XIV/63

THE CODE

OF

CIVIL PROCEDURE

BEING

ACT X OF 1877.

With Notes and Appendix.

BY

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PREFACE.

THIS Code is founded for the most part upon the Code of Civil Procedure of 1859, the provisions of which are repeated, re-enacted, or expanded, and altered and added to in some respects. The changes in the law will be noticed in the comments upon the several sections of this enactment; and some of them are of considerable importance.

In order to facilitate a comparison beeween the old Code and the new, there is, in the index to this Commentary, under the headings "Act VIII of 1859" and "Act XXIII of 1861," a statement showing the sections in the present Code which correspond with those of the old Code, and conversely the sections of the present Code have, in the body of the Code, been referred to those of the old Code for which they have been substituted.

As the new Code is in the main a re-enactment of Act VIII of 1859, the notes to the various sections will be found to consist chiefly of cases which have been decided upon that Act. To select the cases which are wholly applicable, to notice where they must be modified in consequence of the changes which have been made, and to exclude those which are now obsolete, has been the chief object which has here been aimed at.

But there have been also introduced into this Code many new provisions gathered from various sources, such as the English Judicature Act, the Insolvency Act, and some Indian Enactments, which it has been found convenient to repeal and re-enact, so as to make the Code, as far as may be, perfect in itself.

The following statement of new matter will perhaps be a guide of some utility to practitioners who have hitherto been accustomed to regulate their practice by the Act of 1859.

Time must necessarily elapse, and there must be many decisions and constructions of the new Code by the High Courts and by the Judicial Committee of the Privy Council before it will be possible to say how these changes will operate, or how they ought to be construed. This Commentary must, therefore, be taken only as a preliminary note, and merely as a guide to enable legal practitioners to discover for themselves those innovations upon points of practice

which will constantly arise in the course of their professional occupations.

The principal changes in the law and the principal additions to the Code of 1859 may be most conveniently seen by a reference to a statement in a tabular form. They are as follows :—

(*a*) s. 20*	...	Stay of suit pending another suit instituted in another Court.
(*b*) ss. 26 to 33	...	Taken from Order No. 16 under the English Judicature Acts; relates to the parties to suits.
(*c*) ss. 44 to 47	...	Taken from Order No. 17 under the same Acts; relates to the joinder of causes of action.
(*d*) s. 52	...	Verification of plaints.
(*e*) s. 58	...	Copies of the plaint to be furnished.
(*f*) s. 86	...	Mofussil process to be executed by Small Cause Courts in the Presidency-towns.
(*g*) s. 108	...	Makes *ex parte* decrees appealable like other decrees, omitting the words in the old Act of 1859 which barred such appeals.
(*h*) ss. 121 to 136	...	Taken from Order No. 31 under the English Judicature Acts, relating to Interrogatories and to Discovery.
(*i*) s. 180	...	The right to begin and the order in which the parties or their Advocates are to address the Court.
(*j*) s. 192	...	Power to act upon evidence taken before a Judge who has left the Court.
(*k*) ss. 194 to 196	...	Taken from Order No. 37 under the English Judicature Acts; relates to the taking of evidence in the suit by affidavit.
(*l*) s. 206	...	Power to amend the decree, speaking to the minutes of the decree.
(*m*) s. 209	...	Regulation as to interest on decrees.
(*n*) s. 214	...	Pre-emption.
(*o*) ch. XIX	...	Execution.
s. 237	...	Verification of particulars as to lands.

*. Act X of 1877.

s. 266	...	Articles excepted from seizure in execution.
s. 268	...	Limit of the duration of an attachment to six months.
s 269	...	Power to sell property likely to deteriorate.
s. 271	...	Rules to be observed when a dwelling-house or zenana is entered for the purpose of attaching property.
s, 273	...	Rule as to the attachment of decrees.
s. 287	...	Specification as to encumbrances upon land attached, and enquiries into such encumbrances.
s. 291	...	Power to adjourn the sale, and to stop it upon payment of the debt and costs.
s. 292	...	Prohibition against biddings by persons who are conducting the sale.
s. 294	...	Decree-holders not to bid at the sale without leave.
s. 295	...	The proceeds of sales in execution to be divided rateably among the decree-holders, no priority being given to the first attaching creditor as was the case under Act VIII of 1859.
s. 313	...	Setting aside of sales of land in execution when the debtor has no property in what has been sold.
s. 315	...	Return of purchase-money in such a case to the purchaser; such purchase-money to be recovered by process of execution.
ss. 320 to 327	...	Transfer of sale of lands in execution to the Local Government, with power to stay the sale and put the property under a manager.
(p) ss. 338 & 339	...	Power given to the Local Government to fix scales of subsistence-money when a debtor is arrested, and directions that no execution-debtor shall be arrested until subsistence-money has been paid.

(*q*)	s. 342 ...	Imprisonment in execution of a decree not to exceed six months.
(*r*)	ch. xx, ss. 344 to 360 ...	Insolvency.
(*s*)	s. 372 ...	Taken from Order No. 50 under the English Judicature Act; provides for the continuation of the suit by or against the assignee *pendente lite.*
(*t*)	ch. xxii ...	Payment into Court.
(*u*)	s. 382 ...	Security for costs. A person leaving British India so that he will not probably be forthcoming when he may be called upon, to be deemed to be *residing* out of British India.
(*v*)	s. 396 ...	Commissions to make partition of rent-free lands.
(*w*)	s. 424 ...	No suit to be instituted against the Secretary of State for India or against a public officer without previous notice.
(*x*)	ch. xxviii, ss. 430 to 434...	Suits by aliens and by and against foreign and native rulers.
(*y*)	ch. xxxi, ss. 440 to 463...	Adopting the rules of the Calcutta High Court of 10th June, 1874, relating to suits by and against minors and persons of unsound mind.
(*z*)	s. 469 ...	Execution of decrees in cantonments.
(*aa*)	ch. xxxiii, ss. 470 to 476...	Interpleader.
(*bb*)	s. 482. ...	Arrest before judgment; subsistence allowance.
(*cc*)	ch. xxxv ...	Injunctions. The provisions of this Code apply only to temporary injunctions. Perpetual injunctions are dealt with by the Specific Relief Act.
(*dd*)	ss. 498 to 500 ...	Power to order sale of perishable property, the subject of a suit pending the suit; to order the detention, preservation, inspection, the taking of samples, &c., of such property.
(*ee*)	s. 502 ...	Power to order a party to the suit, who lays no claim to money or other thing which can be delivered, to deposit the money in Court or to deliver the property.

(*ff*) ch. xxxix, ss. 532 to 538...	Summary procedure on bills of exchange, placing in this Code the provisions of Act V of 1866, now repealed.
(*gg*) s. 539 ...	Suits relating to public charities.
(*hh*) s. 560 ...	Re-hearing of appeals decided *ex parte*.
(*ii*) s. 575 ...	Course to be followed when the appeal is heard by two or more Judges.
(*jj*) s. 577 ...	Special appeals now confined to appeals from appellate decrees.
(*kk*) s. 588 ...	Appeals from orders: a list of appealable orders is given, and all others are declared to be not subject to appeal.
(*ll*) ch. xlv., ss. 594 to 615 ...	Appeals to the Queen in Council, placing in this Code the provisions of Act VI of 1874, now repealed.
(*mm*) ch. xlviii, ss. 631 to 639	Special rules relating to the Chartered High Courts. The whole Code, except as is provided in this chapter, applies to such High Courts.
(*nn*) s. 642 ...	Exemption of Judicial Officers from arrest while going to, presiding in, and returning from Court; and a like exemption in favor of parties and witnesses going to and returning from Court.
(*oo*) s. 645 ...	Regulates the language to be in use in Courts.
(*pp*) s. 646 ...	Power given to Registrars of Small Cause Courts to state cases for the opinion of their Judges.
(*qq*) s. 647 ...	High Courts to make rules as to the admission of affidavits.
(*rr*) s. 648 ...	General powers to execute process of other Courts. These provisions appear to be inconsistent with the special rules laid down in the earlier sections of chapter XIX.

A quantity of forms is also added to this Code.

Some important questions arose and were decided in the High Courts at Calcutta, Bombay, and Allahabad upon the question how far the new Code applies to pending suits and proceedings. These cases are referred to in the notes to sections 342, 540, and 588. Since, however, the book has been printed, I have received a judg-

ment of the Chief Justice of the North-Western Provinces, in the case of *Musst. Uda Begum* v. *Imam-ud-din*, on the subject of appeals from orders, in which his Lordship takes a different view from the rest of the Bench at Allahabad, as expressed in their judgment in the case of *Thakur Prasad* v. *Ashan Ali* (reported in I. L. R., 1 All., F. B., 668), which is alluded to in the note to s. 588 of the Code. The judgment of the learned Chief Justice will, doubtless, shortly appear in the published Reports. These cases will become of less particular interest as time passes, and cases originated before the Code came into operation become eliminated; but the general principles upon which they proceeded will always be interesting, especially in this country where the laws are so frequently re-cast and re-enacted. Besides these cases there have not been many decisions upon the new Procedure Code since it came into force in October, 1877.

But it is right to notice in this place some points which have been adverted to by the Registrar of the High Court at Calcutta in his report for 1877, which deserve special attention. He observes, with regard to sections 51, 52, and 115, "that the plaint, or written statement, is required to be signed by the suitor and his pleader, and the verification is required to be signed by the suitor or some other person acquainted with the facts *in Court*, or if out of Court in the presence of a witness; and, when signed in the presence of a witness, the Court is required to examine the witness as to the fact of the signature. The difficulty experienced in giving effect to these sections, especially in those cases in which a suitor, or other person acquainted with the facts of the case, resides out of the British territory in India, or at a distance from Calcutta, has been obviated by rules passed by the Court, which enable the verification to be proved by affidavit."

It will be observed that chapter xvi enables the Court to order that any fact may be proved by affidavit.

Section 58 requires as many full copies of the plaint as there are defendants to be furnished by the plaintiff. It also provides that a like number of concise statements may, with the permission of the Court, be substituted for full copies, when the plaint is of unusual length, or there are numerous defendants, or for any sufficient reason.

After noticing the effect of this provision upon the amount of the costs, it is stated that, in order to prevent unnecessary costs from being incurred, a rule has been passed which provides that no costs

for making or presenting any copy or copies of the plaint under this section will be allowed, unless the Court has directed such copy or copies to be presented.

It is pointed out that the provision for substituting concise statements for full copies of the plaint is of no practical value, inasmuch as a concise statement in the form prescribed contains no particulars of the claim beyond those given in the body of the summons to appear and answer.

[The forms of the summons to appear and answer and many others were drawn up in 1868 for the use of the Recorder's Court at Rangoon, and having been found useful were published at the end of the Commentaries on Act VIII of 1859.]

The forms of concise statement are identical with the general endorsement of claim which, by the rules contained in the schedule to the Supreme Court of Judicature Act, 1875 (38 and 39 Vict., c. 77) are required to be made on the writ of summons *ad respondendum.*

The form of summons prescribed by the Judicature Act requires a defendant to "cause an appearance to be entered in an action at the suit of A B." It contains no information as to the nature of the claim, except that stated by the endorsement on the summons.

Concise statements are not adapted to a procedure which requires the particulars of the claim to be set forth in the body of the summons.

It is also pointed out that section 268 provides that "no attachment under this section shall remain in force for more than six months, *at the end of which time,* if the judgment-debtor has not obeyed the decree, the property attached may be sold.

As the property cannot be sold in execution after the attachment has ceased to be in force, it has been held, on an application for the sale of property attached under that section, that that section must be read as if the words "during" was substituted for the words "at the end of."

One of the earliest applications made to the Court under the new Code of Civil Procedure was for execution, within the local limits of its jurisdiction, of a warrant issued by the Court of the Deputy Commissioner of Delhi, for the arrest, before judgment, of the defendant in a suit for the recovery of a sum below Rs. 1,000. The application was made under section 648, which requires that the person arrested shall be sent to the Court by which the warrant was issued. The result of arresting a defendant in Calcutta and sending him in safe custody to a distance of 1,000 miles, and that

too in a suit in which the claim was not only for a small sum, but in which judgment had not yet been obtained, would have been most oppressive. The application was refused.*

The most important additions to the Code are the provisions relating to the taking of evidence by affidavit and to discovery; they are adopted from the practice of the Court of Chancery, and the text-books upon these subjects will, no doubt, be consulted in their application. It has been thought sufficient in this Commentary to illustrate them shortly by one or two of the leading cases.

The most important alterations are those relating to executions of decrees, and particularly of decrees for land. It is now necessary for the judgment-creditor to give to the Court a verified statement of particulars regarding lands which are sought to be sold in execution, and a preliminary enquiry as to encumbrances has to be made before the sale takes place.

The Local Government is empowered to take the proceedings in execution into its own hands, to appoint managers, and to postpone the sale of the land, paying the debt by instalments with such interest as it may think fit, unless a rate of interest has been fixed by the decree. This alteration was the result of much discussion; it was contended on the one hand that to allow sales of land in execution of decrees for money was impolitic, and on the other, that by placing difficulties in the way of realizing decrees, the evils against which the alteration was directed, would be aggravated and not done away with, and the rate of interest upon loans would be very much increased; it was also said that the management of property would be unduly expensive, the properties in the majority of cases being too small to afford the cost of a manager. In what way and how far these anticipations will be realized are questions that can only be accurately answered when some experience of the operation of the new law has been gathered; but it may probably be stated with some confidence, that their effect, coupled with the extremely unsatisfactory state of the law regarding mortgages, and also in view of the peculiarities of the tenure of land in India, will be to render land as a security for advances practically valueless.

The term for which a judgment-debtor may now be imprisoned has been reduced from two years to six months. This also militates

* Report for 1877

against the judgment-creditor whose position is therefore much the worse for the new enactment, so that it may be presumed that lenders of every class, whatever the security the borrower may have to offer, will demand a higher rate of interest than heretofore.

In a Code extending to six hundred and fifty-two sections there must be many points which will arise and which will require elucidation. At the present time there are, however, few materials for comment, other than those which are afforded by the decisions upon the previous law upon which the present is based.

A Bill has lately been introduced into the Legislative Council to amend the Code in the following particulars:—

Sec. 4. It is proposed to amend this section so as to enable the Local Legislatures to deal, in future, with cases between landlord and tenant, the present section having been held applicable only to laws in force when the Code was passed.

Sec. 51 to be amended to remove a doubt whether (notwithstanding the provision of s. 36) the plaint may, in the plaintiff's absence, be subscribed on his behalf by his duly authorized agent.

Sec. 52 to be amended in order to prevent the necessity (if it exists) of examining in Court the witness as to the verification of the plaint.

Sec. 229. It is proposed to substitute the words "Foreign Prince or State" for "Native Prince or State in India," so as to include such Courts as that of the Resident at Mandalay.

Sec. 335. It is proposed to amend this section so as to include the case in which property has been sold in execution of a decree, and in delivering possession, a person claiming a right to the present possession is dispossessed.

Sec. 588 to be amended so as to give an appeal when an application to set aside an *ex parte* decree has been rejected; and it is proposed to omit from clause (*f*) the words "of the same nature with appealable orders made in the course of a suit." The object of this alteration is to restore the first of the two appeals given in effect by Act XXIII of 1861, s. 11, against all orders determining any question relating to the execution of a decree.

Sec. 652 to be amended so as to extend the powers of the "High Courts" as defined by Act I of 1868, other than the Chartered High Courts, to make rules.

Some other alterations of minor importance are also proposed.

I desire to express my obligations to several gentlemen who have assisted me in the preparation of these notes. To Mr. Kennedy

and Mr. Henry Bell, both of the Calcutta Bar, I am indebted for very full annotations upon the last editions of the Commentary I published on Act VIII of 1859.

Mr. Agnew and Mr. Henderson, also of the Calcutta Bar, have assisted me throughout in collecting authorities and passing the book through the press; and have prepared the index, a matter of great importance to a book of reference. My thanks are especially due to these two gentlemen for the trouble they have taken.

L. P D. BROUGHTON.

CALCUTTA, *Novr.*, 1878.

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ERRATA, ADDENDA, AND CORRIGENDA.

Page 11, end of foot-note (*b*), *add* :—
"See the observations of Markby, J., in Mackintosh *v.* Temple, 2 In Jur., N. S., 336."

Page 12, line 8 from top, *after* "duress," *add* :—
"or into Court under protest—Fatima Khatoon Chowdhrain *v.* Mahomed Jan Chowdhry, 12 Moo. I. A, 65 ; S. C., 1 B L. R, P. C., 21."

Page 21, end of foot-note (*b*), *add* :—
"S. C., 5 Bom. H. C. Rep., Apx., 1 ; Narayan Krishna Laud *v.* Norman, *ib*, O. C. J., 1. ; Secretary of State *v.* Bombay Landing and Shipping Co., *ib.*, 23."

Page 25, end of foot-note (*d*), *add* :—
"Also Ramsahaya *v.* Syud Muzhar Ali, 2 B. L. R., Apx., 40 ; and see 1 Suth. W. R., 323, and 6 *ib.*, 75.

Page 58, line 7 from top, *after* "constituted" *insert* :—
"If a Court attempt to execute a decree in a case in which it has no jurisdiction, the plaintiff who applied for execution will be liable to be sued in an action for damages—Doyle *v.* Dwarkanath Chatterjee, 8 Suth. W. R., 88, Peacock, C. J., and Glover, J. ; and see cases cited in the 4th edition of Broughton's Commentary on Act VIII of 1859 by Wilkinson, page 117."

Page 59, end of foot-note (*b*), *add* :—
"Churchill *v.* Siggers, 3 E. and B, 929 ; Rowland *v.* Senior, 8 Q B., 677."

Page 64, line 3 from bottom, *after* "(Mirzapore)," *insert* :—
"XXII of 1869 (Garo Hills)."

Page 64, end of foot-note (*a*), *add* :—
"But see now the decision of the Privy Council, reported in L. R., 3 App. Cas, 889, reversing that of the High Court"

Page 112, foot-note (*g*), *after* "Jackson *v.* Spittal (39 L J, N. S., 324)," *insert* :—
"S. C., L. R., 5 C. P., 542."

Page 122, line 17 from top, *dele* from "(in the case——Courts in Burma)."

Page 132, end of last line, *add* :—
"The drawer and acceptor of a bill of exchange can be joined as co-defendant in a suit brought by the holder—Pestonjee Edaljee Gurdur *v* Mirza Mahomed Ally, I. L. R., 3 Calc, 541, Pontifex J."

Page 135, last line, *for* "Rule 19," *read* "Rule 13."

Page 191, line 7 from bottom, *after* "Act XXIII of 1861, s 2," *insert* :—
"which was substituted for s. 23 of Act VIII of 1859."

Page 257, line 9 from bottom, *for* "s. 126," *read* "ss. 126 and 170."

Page 257, line 2 from bottom, *after* "new," *insert* :—
"See s. 161 of Act VIII of 1859."

ERRATA, ADDENDA, AND CORRIGENDA.

Page 259, line 19 from top, *after* "Act VIII of 1859," *insert* :—
"(and see s. 174)."

Page 267, line 8 from bottom, *for* "successor," *read* "predecessor."

Page 304, foot-note (*a*), *after* "14 B. L. R., F. B., 152," *insert* :—
"S C., 22 Suth. W. R., 512."

Page 304, end of foot-note (*a*) *add* :—
"See Surdharee Lall *v.* Girindur Chunder Ghose, 1 Cal. Rep., 475.

Page 316, line 5 from top, *add* :—
"It has been held that there is no appeal from an order under s. 210 of Act VIII of 1859—Pogose *v.* Bebee Dishkoon Waris Calchuck, 2 Cal. Rep, 278 Ainslie and Macdonell, JJ.

Page 341, end note to s. 250, *add* :—
"See Eshan Chunder Bose *v.* Prannath Nag, 22 Suth. W. R, F. B, 512; and Chunder Coomar Roy *v.* Bhogobutty Prosunno Roy, 1 Cal. Rep., F. B, 23, which seems conflicting: see note to s. 179 of Act XV of 1877, *post*."

Page 363, line 28 from top, *for* "Act III," *read* "Act VIII."

Page 369, line 20 from top, *for* "larger," *read* "longer."

Page 540, line 7 from top, *for* "413," *read* "431."

Page 620, line 14 from top, *for* "had," *read* "having."

Page 624, foot-note (*g*), *for* "s 28," *read* "ss. 12 and 28."

Page 626, line 4 from top, *after* (*a*), *insert* :—
"Where an applicant has not tendered the stamp-duty and penalty on a document which the Courts below have held to be insufficiently stamped, the High Court will not allow him to do so—Ramkrishna Gopal *v.* Vithu Shivaji, 10 Bom H. C., 441.'

Page 697, end of foot-note (*b*), *add* :—
"Reported *nom.* Thakur Prasad *v.* Ahsan Ali, I. L. R, 1 All., F. B, 668. In the case, however, of Musst Uda Begum *v.* Imam-ud-din (not yet reported) the Chief Justice of the N. W. Provinces has since expressed his dissent from this decision of the Full Bench at Allahabad."

BENGAL SECRETARIAT LIBRARY

CIVIL PROCEDURE.

ACT X OF 1877.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor-General on the 30th March*, 1877.)

An Act to consolidate and amend the Laws relating to the Procedure of the Courts of Civil Judicature.

Preamble.

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; It is hereby enacted as follows:—

PRELIMINARY.

Short title.

Commencement.

1. (S.) This Act may be cited as "The Code of Civil Procedure:" and it shall come into force on the first day of October, 1877.

Local extent.

This section and section 3 extend to the whole of British India. The other sections extend to the whole of British India except the Scheduled Districts as defined in Act No. XIV of 1874.

The Scheduled Districts are enumerated in Act XIV of 1874.

By a notification dated the 1st October, 1877, it was declared that Act XIV of 1874 was to be in force in the Province of Sindh; and by another notification of the same date, that this Code was to extend to the Province of Sindh.

Interpretation-clause.

2. (S.) In this Act, unless there be something repugnant in the subject or context—

'chapter.'

'chapter' means a chapter of this Code:

'district' 'District Court'

'district' means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a 'District Court'), and includes the local limits of the ordinary original civil jurisdiction of a High Court: every Court of a grade inferior to that of a District Court and every Court of Small Causes shall, for the purposes of this Code, be deemed to be subordinate to the High Court and the District Court:

'pleader.'

'pleader' means every person entitled to appear and plead for another in Court, and includes an advocate, a vakil, and an attorney of a High Court.

'Government Pleader'

'Government Pleader' includes also any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader.

'Collector.'

'Collector' means every officer performing the duties of a Collector of land-revenue:

'judgment'

'judgment' means the statement given by the Judge as the grounds of the order or decree by which a suit or other judicial proceeding is determined:

'decree'

'decree' means the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied. An order on appeal, remanding a suit for re-trial, is not within this definition:

'Judge.'

'Judge' means the presiding officer of a Court:

'judgment-debtor.' 'judgment-debtor' means any person against whom a decree or order has been made:

'decree-holder.' 'decree-holder' means any person in whose favour a decree or any order capable of execution has been made, and includes any person to whom such decree or order is transferred:

'written.' 'written' includes printed and lithographed, and 'writing' includes print and lithography:

'signed.' 'signed' includes 'marked' when the person making the mark is unable to write his name:

'foreign Court.' 'foreign Court' means a court situate beyond the limits of British India and not having authority in British India, nor established by the Governor-General in Council:

'foreign judgment.' 'foreign judgment' means the judgment of a foreign Court:

'public officer.' 'public officer' means a person falling under any of the following descriptions (namely):—

Every Judge;

Every covenanted servant of Her Majesty;

Every commissioned officer in the military or naval forces of Her Majesty while serving under Government;

Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties;

Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety, or convenience;

Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of Government, or to make any survey, assessment or contract on behalf of Government, or to execute any revenue process, or to investigate, or to report on any matter affecting the pecuniary interests of Government, or to make, authenticate or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty.

'Government.'

And in any part of British India in which this Code operates, 'Government' includes the Government of India as well as the Local Government.

Where this interpretation clause does not supply a meaning, reference must be made to Act I of 1868, which defines certain terms, and enacts that they are to bear (in all Acts made by the Governor General of India in Council) the interpretation there given, unless there be something repugnant in the subject or context.

Enactments repealed.

3. (S.) The enactments specified in the first schedule hereto annexed are hereby repealed to the extent mentioned in the third column of same schedule.

References in previous Acts.

But when in any Act, Regulation or Notification passed or issued prior to the day on which this Code comes into force, reference is made to Act VIII of 1859, Act XXIII of 1861, or the 'Code of Civil Procedure,' or to any other Act hereby repealed, such reference shall, so far as may be practicable, be read as applying to this Code or the corresponding part thereof;

Nothing herein contained shall affect the procedure prior to decree in any suit instituted or appeal presented before this Code comes into force.

Saving of procedure in suits instituted before 1st October, 1877.

4. Save as provided in the second paragraph of section 3, nothing herein contained shall be deemed to affect the following enactments (namely):—

Saving of certain Acts affecting Oudh, Panjáb, Central Provinces and Burma.

The Central Provinces Courts Act, 1865:
The Panjáb Courts Act, 1865:
Act No. XXVII of 1867:*
The Oudh Civil Courts Act, 1871:
The Panjáb Appeals Act, 1873:
The Burma Courts Act, 1875:

or any local law prescribing a special procedure for suits between landlord and tenant,

or any local law providing for the partition of immoveable property.

And where under any of the said Acts concurrent civil jurisdiction is given to the Commissioner and the Deputy Commissioner, the Local Government may declare which of such officers shall, for the purposes of this Code, be deemed to be the District Court.

5. (S.) The chapters and sections of this Code specified in the second schedule hereto annexed extend (so far as they are applicable) to Courts of Small Causes constituted under Act No. XI of 1865. The other chapters and sections of this Code do not extend to such Courts. And nothing herein contained shall be deemed to enlarge the powers which such Courts now possess for the purposes of effecting attachments or executing decrees.

Sections extending to Mufassal Small Cause Courts.

These chapters and sections will be distinguished by a capital S.

* To empower Deputy Commissioners in the Central Provinces, the Panjáb, Oudh, and the Jhansi Division to distribute the business in Subordinate Courts.

Saving of jurisdiction and procedure—

(a) of Military Courts of Request;

(b) of officers appointed to try small suits in Bombay;

(c) of Village Munsifs and Village Panchayats in Madras.

(d) of Recorder of Rangoon sitting as an Insolvent Court.

6. Nothing in this Code affects the jurisdiction or procedure—

(a) of Military Courts of Request;

(b) of a single officer duly appointed in the Presidency of Bombay to try small suits in military bázárs at cantonments and stations occupied by the troops of that Presidency; or

(c) of Village Munsifs or Village Pancháyats under the provisions of the Madras Code;

(d) of the Recorder of Rangoon sitting as an Insolvent Court in Rangoon, Maulmain, Akyab or Bassein,

or shall operate to give any Court jurisdiction over suits of which the amount or value of the subject-matter exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

This follows Act VIII of 1859, s. 383, omitting the 'single officer,' in para. (b) in the *Madras* Presidency.

Para. (d) is new. The Recorder of Rangoon has jurisdiction as a Court of Insolvency under a recent Act (XVII of 1875, s. 66), and the procedure in cases brought before the Recorder in the exercise of such jurisdiction shall be, as far as may be practicable, in accordance with the procedure prescribed by the 11th and 12th Vict., c. 21. This Act of Parliament regulates the Insolvent Courts in the Presidency towns.

Saving of certain Bombay laws.

7. With respect to—

(a) the jurisdiction exercised by certain jágírdárs and other authorities invested with powers under the provisions of Bombay Regulation XIII of 1830 and Act XV of 1840 in the cases therein mentioned; and

(b) cases of the nature defined in the enactments specified in the third schedule hereto annexed,

the procedure in such cases, and in the appeals to the Civil Courts allowed therein, shall be according to the

rules laid down in this Code, except where those rules are inconsistent with any specific provisions contained in the enactments mentioned or referred to in this section.

See Act VIII of 1859, s. 384.

Bombay Reg. XIII of 1830, for vesting certain jagirdars, surnijamídárs, and enamdárs with the power of deciding suits within the boundaries of their respective estates.

Act XV of 1840, for extending Reg. XV of 1827 and XIII of 1830 of the Bombay Code to the agents of foreign sovereigns.

(*b*) includes Bombay Reg. XXIX of 1827, for bringing under the operation of the Regulations the Bombay Territories in the Deccan and Khandesh.

Bombay Reg. VII of 1830, the same in the case of the Southern Mahratta country.

Bombay Reg. I of 1831 and XVI of 1831, for extending the jurisdiction of the Agent of Government in the Deccan and Khandesh and of the Political Agent in the Southern Mahratta country over suits in which certain privileged persons are concerned.

Act XIX of 1835, relating to the jurisdiction and authority of the assistant to the agent for sirdars in the Deccan, and

Act XIII of 1842, to enable the holders of revenue which has been alienated to them by the State to collect that revenue within the Presidency of Bombay.

Presidency Small Cause Courts.

8. Save as provided in sections 3, 25, 86, 223, 225, 386 and Chapter XXXIX, this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras, and Bombay.

But the Local Government may, by notification published in the official Gazette, extend to any such Court this Code or any part thereof, except so far as relates to appeals and reviews of judgment.

This corresponds with Act VIII of 1859, s. 382.

Section 3 relates to repeal of enactments.

Section 25 relates to transfer of suits.

Section 86 relates to service of process within Presidency towns.

Sections 223, 225 relates to execution of decrees.

Chapter XXXIX relates to summary procedure on negotiable instruments.

Section 382 of Act VIII also enacted that the Code should not extend to any suit instituted in any Court of Judicature established by Royal Charter,—that is to say, to any original suit.

By the Charters establishing the High Courts under the provisions of the Act of Parliament 24 and 25 Vict, c. 104, and dated 14th May, 1862, and by the 37th clause, it was ordained that, "save in the second clause otherwise provided, the proceedings "in civil suits of every description between party and party brought "in the said High Court shall be regulated by the Code of Civil "Procedure, &c., subject to such laws or regulations as might be "made by the Governor General in Council"

The Charters of 1865 (which revoked the Charter of 1862) in clause 37, ordained that it should be lawful for the High Court from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before it, &c Provided that the said High Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure and by the provisions of any amending law.

By s. 28 of the Charter of the High Court, North-Western Provinces, 13th June, 1866, that Court was empowered to make rules and orders for the purpose of adapting, as far as possible, the provisions of the Code of Civil Procedure to all proceedings in its testamentary, intestate, and matrimonial jurisdictions, respectively. That Court has no ordinary original civil jurisdiction.

The procedure of the Small Cause Courts in the Presidency towns is at present regulated by Act IX of 1850.

The present Code is applicable generally to the High Courts, subject to the special rules which are contained in Part IX, Chap. XLVIII, *post*.

Division of Code.

9. This Code is divided into ten Parts as follows:—

The first Part:	Suits in General.
The second Part:	Incidental Proceedings.
The third Part:	Suits in particular Cases.
The fourth Part:	Provisional Remedies.
The fifth Part:	Special Proceedings.

The sixth Part:	Appeals.
The seventh Part:	Reference to and Revision by the High Court.
The eighth Part:	Review of Judgment.
The ninth Part:	Special Rules relating to the Chartered High Courts.
The tenth Part:	Certain Miscellaneous Matters.

PART I.

OF SUITS IN GENERAL.

CHAPTER I.

OF THE JURISDICTION OF THE COURTS AND RES JUDICATA.

No person exempt from jurisdiction by reason of descent or place of birth

10 (S.) No person shall, by reason of his descent or place of birth, be in any civil proceeding exempted from the jurisdiction of any of the Courts.

This corresponds with Act VIII of 1859, s. 4.

Courts to try all civil suits unless specially barred.

11. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force.

Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

This section corresponds with Act VIII of 1859, s 1. The Explanation is new

1. This section, like s 1 of Act VIII of 1859, says,—that "the "Courts shall have jurisdiction to try (take cognizance of) all "suits of a civil nature," &c,—"that is, the Civil Court is competent "to investigate the complaint of the suitor, and determine whether "he has a legal right or not Although the Court has cognizance of "the suit, it cannot decree for the plaintiff, unless he has a cause of "action" (*a*) Section 50 renders it necessary for the plaintiff to give in his plaint a plain and concise statement of the cause of action, and

(*a*) Per Peacock, C. J, The Collector of Pubna *v* Romanauth Tagore, B. L. R., F. B, 630

when and where it arose, and (s. 48) it is to be presented to the Court, and (s. 53) the Court may reject it or return it to be amended if it do not disclose a cause of action. This preliminary question whether or not there is a cause of action should, therefore, be considered before any proceedings are taken in the case.

2. This section is declaratory, and lays down what is a maxim of law, "*ubi jus ibi remedium.*" The leading case exemplifying this maxim is *Ashby* v. *White* (*a*). It was held in that case that a man who has a right to vote at an election for members of Parliament could maintain an action against the returning officer for maliciously refusing to admit his vote, though his right was never determined by Parliament, and though the persons for whom he offered to vote were elected. Lord Holt, whose opinion was upheld by the House of Lords, says with regard to this last point,—"every "injury imports a damage, though it does not cost the party one far-"thing, and it is impossible to prove the contrary; for a damage is "not merely pecuniary, but an injury imports a damage when a man "is thereby hindered of his right. As, in an action for slanderous "words, though a man does not lose a penny by reason of the speak-"ing them, yet he shall have an action. So if a man gave another "a cuff on the ear, though it cost him nothing, no not so much as "a little diachylon, yet he shall have his action, for it is a personal "injury." As an example of this nature it has been decided in India that a plaintiff may sue and be entitled to substantial damages for being beaten with a shoe, although it may not have occasioned loss of caste, pecuniary loss, or physical injury to him (*b*).

3. The authors of the note in Smith's Leading Cases, and Mr. Broom in his "Legal Maxims," have been careful to point out the distinction between cases in which a right has been infringed and cases in which the damage was not occasioned by anything which the law esteems an injury. The case of *Pryce* v. *Belcher* (*c*) is cited as an instance of this latter kind. There the action was of the same nature as in *Ashby* v. *White* (*a*); but the plaintiff was disqualified as a voter by an Act of Parliament, which required a residence as a qualification; and as he was not a resident, it was held that no action would lie. Another instance is given, as where A. builds a house on his own land adjoining the

(*a*) 1 Smith's L. C., 216.

(*b*) Bhyrau Pershad *v.* Isharee, 3 H. C., N. W. P., 313, Morgan, C. J., and Pearson, J., Sept. 2, 1871.

(*c*) 3 C. B., 58, and 4 C B., 866.

land of B., and after a time sufficiently long has elapsed to give A. a prescriptive right to the support afforded by B.'s land, B. digs his land away and lets A.'s house fall. A. has his action; but if B., before A. acquires a right to such support, does the same thing, then no action is maintainable, unless it can be shown that the defendant did it negligently. A suit will not lie to recover money paid by the plaintiff voluntarily to the defendant or for him (*a*). But where the payment has been made under duress, it may be recovered by suit (*b*). To dissuade a tenant from paying his rent to his landlord is not an actionable wrong. The landlord can recover his rents by law (*c*). Other instances might be given of injuries for which there is no remedy, as, where one man builds a mill close by the mill of his neighbour, and draws away his custom. Acts done by way of self-defence against a common enemy, such as the erection of banks to prevent the inroads of the sea, fall within the same rule, and damage resulting therefrom is not actionable (*d*).

4. A suit will lie for damages for a disturbance of the plaintiff's right to fish and use fishing stakes and nets in the sea below low-water mark and within three miles of it. The right of the public to fish in the sea, whether it and its subjacent soil be or be not vested in the Crown, is common, and is not the subject of property. It may, in certain portions of the sea, be regulated by local custom, and individuals exercising this common right must do so in a fair and reasonable manner, and not so as to impede others. Conduct which prevents another in the fair exercise of his equal rights is actionable, if the other is damaged thereby (*e*).

5. These cases are put forward as instances of the general proposition, or as showing where it is inapplicable. The reader is further referred to the English authorities already quoted. It is sufficient to say in this place, that the principles laid down there, and the cases cited, must be considered with reference to the municipal law of the country, where a right is to be enforced or a remedy to be sought (*f*). Thus, to take examples of a class of suits, many of which will be found in the reports of cases decided in the various Courts in India, a suit brought

(*a*) Ram Tubul Singh *v.* Biseswar Lal Sahoo, 15 B. L R., 208.

(*b*) Ramguttee *v.* Gholam Ahmed Khoudkar, Suth. F. B. Rep., 85.

(*c*) Dalgeish *v.* Jeebun Mahto, 25 Suth. W. R., 230.

(*d*) Rex *v.* Pagham, 8 B. & C., 355, cited in 1 Smith's L. C., 248.

(*e*) Baban Mayacha *v.* Nagu Shravucha, I. L. R., 2 Bom., 19.

(*f*) Sri Sunkur Bharti Swami *v.* Sidha Lingayah Charanti, 3 Moo. I. A., 198.

by the widow of one of the members for her share of the fees obtained by the joint members of a family of Purohits, has been held in Bengal to be cognizable in the Civil Courts (*a*). The plaintiff in that case sued the defendants, members of their family, for a share in the ministrations on the river bank at Patna under kabalas or agreements, and it was held that the suit would lie. But the obligation to employ a particular priest is a simple matter of conscience, and not an obligation that a Court of law can enforce (*b*). So also a suit does not lie for customary offerings made to a family priest by his employers, but otherwise for offerings collected at shrines or temples from worshippers or pilgrims (*c*). There is a distinction drawn by the Courts between offerings on a festive occasion and offerings at shrines or temples; for the former a suit will not lie, but it will for the latter (*d*). Where a plaintiff sued to establish his exclusive right to receive fees paid to the Purohits by the pilgrims resorting to a temple, and to recover a sum of money received by the defendants as fees, it was held (*e*) that, in the absence of any contract between the parties, or of any such proof of long and uninterrupted usage as, in the absence of a documentary title, would suffice to establish a prescriptive right, the plaintiff's suit must be dismissed (*f*). In a recent case decided in Bombay, the plaintiff, representing the elder branch of the family of Tukaram, sued seventeen other members of the family to establish his exclusive right to perform the ceremony of breaking a curd pot in a temple, and alleged that, in the year 1867, the defendants broke a curd pot there, whereby he was deprived of an offering which would have been, but was not, made to him. It was held that he could recover damages (*g*). A suit is properly cognizable in the Bengal Civil Courts in respect of a claim for a legal due or cess arising out of the

(*a*) Khedroo Ojha *v.* Musst. Deo Ranee Koomar, 5 Suth. W. R., 222; see also Becharam Banerjee *v.* Sreemuttee Thakoormonee Debia, 10 Suth. W. R., 114, Kemp and Jackson, JJ.; see Magju Pandaen *v.* Ramdyal Tewari, 8 B. L. R., 50.

(*b*) Roodurmun Misser *v.* Damoodur Misser, 1 Hay's Rep., 365, cited in a note in 8 B. L. R., 54.

(*c*) Ranee Sadut Koour *v.* Jowalla Pershad, S. D. A. (N. W. P.), 1861, p. 720, where several cases were cited in support of this view.

(*d*) Ussalul-oon-nissa *v.* Ruheem Buksh, S. D. A. (N. W. P.), 30th Sept., 1861.

(*e*) See Ramasamy Aiyan *v.* Venkatachara, 9 Moo. I. A., 344.

(*f*) Krishna Aiyan *v.* Anantarama Aiyan, 2 Mad. H. C. Rep., 330.

(*g*) Narayan Sadanand Bava *v.* Balkrishna Shidheshvar, 9 Bom. H. C., A. C., 413.

privilege of selling *pan* on haut days (*a*). A suit will not lie for a share in the proceeds of the trade of begging (*b*): a definite right must be established.

6. In a case of a public endowment of lands transferred to trustees, managers or superintendents of such lands under Act XX of 1863, any person or persons interested (and the interest need not be a pecuniary one) in the religious establishment, its worship or service, or in its trusts, have a right of suit, after leave obtained from a Civil Court, against such trustees, &c., for misfeasance, breach of trust, &c., neglect of duty, &c. (*c*).

7. A suit will lie between Hindus in Bengal for restoration to caste and for damages (*d*). But it has been decided that a suit will not lie to compel a defendant to ask the plaintiff to his house or to entertainments (*e*). Exclusion from entertainments, to which the other members of the caste are invited, is, however, a very marked way of showing that the person excluded is considered an outcast; and in a Bombay case (*f*), a plaintiff recovered damages for loss of character, owing to the defendant maliciously refusing to invite him to a solemn feast. A suit was brought not long ago, in which the plaintiff claimed to recover from his guests the cost of an entertainment when after accepting his invitation they had refused to come, but it was held by L. S. Jackson and Macdonell, JJ., that such a suit could not be maintained (*g*). In Bombay, questions relating to caste are, however, excluded by Reg. II of 1827, s. 21, from the jurisdiction of the Civil Courts. Thus, in a case (*h*) where the plaintiffs and defendant belonged to the Dhed community, and the plaintiffs sued the defendant to recover from him certain fees which they claimed as due to them as Mehtars or chief men of the Dhed caste on the occasion of any marriage ceremony which took place in a Dhed family, it was held that the suit would not lie. In this case the Court treated the matter as a mere

(*a*) Hurish Chunder Koond *v.* Gopal Barooye, 3 Suth. W. R., Act X Rul., 158, Kemp and Seton-Karr, JJ.

(*b*) S. D. A. (N. W. P.), 1862, p 314.

(*c*) Kuneez Fatima *v* Saheba Jan, 8 Suth. W. R, 313, Kemp and Glover, JJ.

(*d*) Ramkant and others *v.* Rammohun Acharji, S. D. A., 1859, p. 535; Gopaul Gurain *v.* Gurain, 7 Suth W. R., 299, Bayley and Sumbhoonath Pundit, JJ.

(*e*) Joychunder Sirdar *v.* Ramchurn, 6 Suth. W. R., 325, Norman and Seton-Karr, JJ.

(*f*) Nhanee *v* Hureeram Dhoolubh, 1 Borr. Bom. Sud. Reps., 84, cited in 3 Moo. I. A, 208.

(*g*) Kalai Haldar *v.* Shaikh Kyamaddi, 23 Suth. W. R., 417.

(*h*) Murar Daya *v.* Nagria Ganeshia, 6 Bom. H. C. Rep., A. C. J., 17.

question of caste, the payment of the fees being entirely at the option of the members. When the plaintiff has a *right*, the fact of a question of caste being involved would not bar the suit; see the explanation of this section.

8. It was formerly thought that a suit will lie for mere verbal abuse, without any consequential injury (*a*). In another case (*b*) it seems to have been held by Bayley and Sumbhoonath Pundit, JJ., that an action would lie for damages for mere abuse. The report of these cases is, however, very meagre, and the exact words used are not stated. The plaintiff, a mooktear, sued a Deputy Collecter for abusing him, whereby he was injured in character and reputation and in his profession as a mooktear. It does not appear that there was any question of privilege or immunity set up by the Collector. The Court of appeal merely remarked that it did not follow that because a man's professional reputation or gains are not injured by abuse received by him, that his feelings are not injured and outraged (*c*). In a subsequent case, Pontifex, J., thought that the words must be actionable *per se*. He said—"Actions for verbal slander ought not, in my opinion, to be encour-"aged. Unless there are special damages proved, the Court will be "very reluctant to give any damages. It is not necessary that the "Court should give even nominal damages." And he doubted whether such words as "you are a drunkard, thief, cheat; you are the paramour of your sister-in-law Nistarinee; you bastard"—common forms of abuse among the lower orders—were actionable when applied to a Brahmin. The question, however, was not expressly decided in that case. An objection was made to the misjoinder of parties, and it was held that in slander each defendant should be sued separately. In the case of a written libel, several defendants might be jointly sued (*d*). It seems to have been contended that the law of defamation is on a different footing in the mofussil to that on which it stands in the Presidency towns or in England. A slander, which is understood to be unwritten, must, in order to be actionable in England, be an imputation of some temporal

(*a*) Moulvie Gholam Hossein Vakeel *v* Hargobind Dass Tashildar, 1 Suth. W. R., 19, Loch and Seton-Karr, JJ.; Shaikh Tukee *v.* Shaikh Khoshdel Biswas, 6 Suth. W. R., 151, Bayley and E. Jackson, JJ.; Kalikumar Mitter *v.* Ramgati Bhattacharjee, 6 B L R., App., 99.

(*b*) Ooseemooddeen *v.* Futteh Mahomed, 7 B. L. R., 259.

(*c*) Gourchunder Puteetundee *v.* Clay, 8 B. L. R., 256, Kemp and Glover, JJ.

(*d*) Nilmadhub Mookerjee *v.* Dookeeram Kottah, 15 B. L. R., 161, see p. 166, Aug 20, 1874.

offence for which the party might be indicted and punished in the temporal Courts; of an existing contagious disorder, tending to exclude the party from society; of an unfitness or inability to perform an office or employment of profit; words prejudicing a person in his profession or trade; any untrue words causing *actual* damage. See 2 Selwyn's N. P., 1254; and also the judgment of De Grey, C. J., in the case of *Onslow* v. *Horne* (*a*). In this case Mr. Onslow was one of the members for the County of Surrey, concerning whom the defendant used the words—"As to instructing our member to obtain redress, I am totally against that plan, for as to instructing Mr. Onslow, we might as well instruct the winds; and should he even promise his assistance, I should not expect him to give it"—these words were spoken at a public meeting; it was held that they were not actionable. A libel, on the other hand, is a malicious defamation of another expressed by writing, printing, signs, pictures, or representations; and published. Anything of this kind which tends to injure the feelings or the reputation of another, is *primâ facie* actionable without proof of special damage. The reason of this distinction appears to be this: that slander is said once for all, it may be in a moment of heat, while a writing, &c., which is published, has a more permanent tendency (*b*).

9. It was formerly held (*c*) in appeal from a decision of 1865, that a husband who had been repudiated by his wife, on his conversion from Hinduism to Christianity, could not sue for restitution of conjugal rights (but see now Act XXI of 1866). In the same case it was held that he had a right to sue for the custody of his children (see Act XXI of 1850). In a later case (*d*) it was held that a civil suit will lie between Hindus for restitution of conjugal rights by a husband against his wife; but (by Jackson, J., and Macpherson, J.) the decree in such a suit ought to be declaratory only, and to be enforced in case of disobedience by attachment (Seton-Karr, J., doubting, but not dissenting). This case was followed in a similar suit between Mussulmans (*e*). In a case (*f*) before the Judicial Committee of the

(*a*) 3 Wils, 177.

(*b*) 2 Selwyn, N. P., 1252.

(*c*) Muchoo *v.* Arzoon Sahoo, 5 Suth. W. R., 235, May 7th, 1866.

(*d*) Jotun Bibee *v.* Ameer Chand, 1 In. Jur., N. S., 317.

(*e*) Shaikh Koobur Khansamah *v.* Shaik Jan Khansamah, 5 Wyman's Reporter, 12, Loch and Mitter, JJ.

(*f*) Moonshee Buzloor Ruheem *v.* Shumsoonissa Begum, 11 Moo. I. A., 551, see p. 606.

Privy Council, the question was very fully discussed. Reference was made to the case of *Ardaseer Cursetjee* v. *Perozeboye* (*a*), in which it was decided that no suit for restitution of conjugal rights between Parsees and *à fortiori* between Hindus would lie in the Supreme Courts on their Ecclesiastical Side; but from some remarks of Dr. Lushington, who delivered judgment in that case, it would seem that a suit of such a nature was by him considered maintainable in the Civil Courts in India (*b*). In a suit of this nature the criterion of legal cruelty justifying the wife's desertion has been held in Bombay to be the same in this country as in England,—*viz.*, whether there has been actual violence of such a character as to endanger personal health or safety, or whether there is reasonable apprehension of it (*c*). It was doubtful how a decree in such a case could be enforced, but the present Code provides for this difficulty, s. 260 enacting, in accordance with the view taken by the Judicial Committee, that such a decree can be enforced by imprisonment, or attachment of property, or both. On the question whether the suit would lie or not, the Committee had no doubt, on principle and authority, that a Mussulman husband might bring a suit in the Civil Courts in India for a declaration of his right to the possssion of his wife, and for a sentence that she return to cohabitation, and that such a suit between Mahomedans must be determined on the principles of Mahomedan law (*d*). It has recently been held that, among the Hindus, the right to conjugal cohabitation is complete on the marriage, which generally take places when the parties are mere children (*e*). In another case (*f*) however, Phear, J., and Morris, J., declined to decree restitution of conjugal rights where the wife was a child, on the ground of the universal custom that children who are wives must attain maturity before they can be called upon to cohabit with their husbands. A suit for restitution of conjugal rights between Parsees is maintainable under Act XV of 1865, ss. 36, 37;

(*a*) 6 Moo. I. A., 390.

(*b*) See the cases of Maulvi Abdool Wahab *v.* Mussamut Hingu, 5 Ben. Sud. Dew. Ad. Rep., 200; Mussamut Ameena *v.* Kuttoo Khan, 7 *ib.*, 27.

(*c*) Yamunabai *v.* Narayan Moreshvar Pendse, I. L. R., 1 Bom., 164.

(*d*) See also Gatha Ram Mistree *v.* Moohita Kochin Atteah Domoonee, 14 B. L. R, 298, Markby and Mitter, JJ., July, 9, 1875.

(*e*) Kateram Dokanee *v.* Mussamut Gendhenee, 23 Suth. W. R., 178, Markby and Mitter, JJ.; Boolchand Koilta *v.* Janokee, 25 *ib.*, 386, Markby and Morris, JJ.

(*f*) Suntosh Ram Dass *v.* Gera Pattuck, 23 Suth. W. R., 22.

but the Act limits the age of the parties—the husband must be 16 and the wife 14 years of age.

A suit for a declaration that an alleged Hindu marriage is invalid, is a suit of a civil nature, and will lie in the ordinary Civil Courts (*a*). In this case a former decision of the High Court at Calcutta, to the effect that no such suit would lie, was overruled; and several cases in which such suits had been allowed in the Bombay Courts were referred to. A suit will lie for a declaration of the validity of a marriage between Hindus (*b*).

Where a Hindu paid money to another in consideration of a promise of the latter to give him his sister in marriage, and the consideration failed, it was held that a suit would lie to recover the money (*c*). But a suit will not lie for the specific performance of a promise to give a girl in marriage (*d*), nor of a contract to marry (*e*).

10. A suit to enforce a Hindu custom which is contrary to public morality will not be entertained; thus a suit to establish a monopoly in the appointment of public prostitutes at a temple, *deva dassis*, will not lie (*f*). Nor can a landlord sue for rent of lodgings let to a prostitute for the purpose of carrying on her vocation there (*g*).

11. By Act V of 1843, no rights which would have arisen out of the status of slavery, but for the passing of that Act, can be enforced by civil suit, and it has been held that a suit brought by the heir of the master of a slave girl, emancipated by and married to such master in his lifetime, to recover as such heir her property in the hands of her descendants, is barred by s. 2 of that Act (*h*).

12. It has been held in Bengal that a suit will not lie to compel the defendant to close a door which is in his own wall, on the ground of a possibility of his committing a trespass on the land of

(*a*) Aunjona Dasi *v.* Pralhad Chundra Ghose, 6 B. L. R, 243, Norman, Offg. C. J., Ainslie and Loch, JJ., 6th December, 1870.

(*b*) Mussamut Butoolun *v.* Mussamut Koolsoom, 25 Suth. W. R., 444.

(*c*) Jogeswar Chakrabatti *v.* Panch Kauri Chakrabatti, 5 B. L. R., 395, L. S. Jackson and Glover, JJ.

(*d*) Shaikh Bhugun *v.* Shaikh Ruman, 24 Suth. W. R., 380.

(*e*) Act I of 1877, s. 21.

(*f*) Chinna Ummayi *v.* Tegari Chetti, I. L. R., 1 Mad., 168, Innes and Kernan, JJ., 16th October, 1876.

(*g*) Gaurinath Mookerjee *v.* Madhumani Peshakar, 9 B. L. R., App., 37, Couch, C. J., and Ainslie J.; Protima Aurat *v.* Dukhia Sircar, *ib.*, 38.

(*h*) Mir Azimuddin Khan *v.* Zianunnissa Begum, 12 Bom. H. C. Rep., 156, Westropp, C. J., and Kemball, J.

the plaintiff, or of his actually having committed such a trespass (*a*). And it has been held that a suit cannot be maintained to oblige the defendant to close doors recently opened in his house, on the ground that they overlook the zenana of the plaintiff (*b*). In two Bombay decisions (*c*) it was held that, according to the usage of Guzerat, an invasion of a neighbour's privacy by opening windows, and so as to overlook parts of his premises ordinarily secluded, is an actionable wrong. So also in the North-Western Provinces (*d*). But in Madras it has been said that there is "no right of privacy" (*e*).

13. As the Crown is subject to the jurisdiction of none of its Courts, it follows that no suit will lie in any one of them against the sovereign; see 1 Blackstone (Kerr), 242. The subject must proceed by a petition. By 23 and 24 Vict., c. 34, a simple procedure is provided for the trial of such petitions (Petitions of Right) in the Courts at Westminster. No such petitions could be dealt with by any Court of Justice in this country.

14. It is enacted by 21 Geo. III, c. 70, s. 1, that "the "Governor in Council of Bengal shall not be subject jointly or "severally to the jurisdiction of the Supreme Court of Fort William "in Bengal for or by reason of any act or order, or any matter or "thing whatsoever counselled, ordered, or done by them in their "public capacity only acting as Governor General and Council;" and s. 2 exempts persons from suits in that Court in respect of things done by them under the written order of the Governor General in Council. A similar exemption is given to the Governors of Madras and Bombay and their Councils by 37 Geo. III, c. 142, s. 11, and they all extend to the High Courts, which represent the Supreme Courts. In the days when those Acts of Parliament were passed, the Governor General, Governors and Councillors were servants of the East India Company as a trading corporation, and it was necessary to pass special enactments to protect them from suits on account of things done in the exercise of their *quasi*-political functions. Afterwards the Statute 3 and 4 Wm. IV, c. 85, abolished the trading capacity of the Company and rendered the objects and

(*a*) Jibbon *v.* Abdur Rahman Khan, 3 B. L. R., 411.

(*b*) Mahomed Abdur Rahim *v.* Birja Sahu, 5 B. L. R., 676; Ramlal *v.* Mahes Baboo, *ib.*, 676; Sheikh Golamali *v.* Kazi Mahomed Zahur Alum, 6 B. L. R., App., 76.

(*c*) Manishankar Hargovan *v.* Trikam Narsi, 5 Bom. H. C. Rep., A. C., 42; Kuvarji Premchund *v.* Bai Javer, 6 *ib.*, 143.

(*d*) Goor Das *v.* Monohur Dass, 2 Agra H. C. Rep., 269.

(*e*) Komathi *v.* Gurunada Pillai, 3 Mad. H. C. Rep., 141, Holloway and Innes, JJ.

duties of the Company merely political and having reference to the government of the country which they held in trust for the Crown. The Governor General (s. 42) being appointed by the Board of Directors subject to the approval of the Crown, signified in writing by the Sign Manual, and the other Governors in the same manner (s. 58), and now the Government of India being transferred to the Crown (21 and 22 Vict., c. 106), and the appointments being made (s. 29) directly by the Crown, the positions of Governor General and Governors of Presidencies as to their civil liability seem to be independent of the 21 Geo. III, and to rest upon general principles. The governing power cannot be sued in a Municipal Court in respect of anything done in its political capacity. That was decided in the case of the resumption of the raj of Tanjore by the East India Company, on the death of Sevajee, the last raja, leaving no heir in October, 1855 (*a*). And the individual Governor is equally exempt in such a case (*b*). But the liability of a Governor to a civil suit regarding matters done in his private capacity still remains (*c*). Sir George Hill, Governor of Trinidad, was held liable for a debt in a suit (*d*) brought in the Court established in the Island. The debt was incurred in England before he was Governor: the plaintiffs were jewellers in England.

But in India neither the Governor General nor any of his Council, nor the Chief Justice or Judges of the High Court, can be arrested or imprisoned upon any action, suit or proceeding of the said Court: 13 Geo. III, c. 63, s. 17 (Bengal); Madras Supreme Court Charter, cl. 23; Bombay Supreme Court Charter, cl. 30.

An officer of Government cannot be sued in a Court of a Subordinate Judge in Bombay: Act XIV of 1869, s. 32 (Bombay Civil Courts Act); and a Collector placed in charge of a minor's estate under Act XX of 1864, ss. 11 and 15, is an officer of Government within the meaning of this provision (*e*).

(*a*) The Secretary of State, &c., *v.* Kamachee Boye Sahara, 7 Moo. I. A., 476; Sirdar Bhagwan Singh *v.* The Secretary of State, &c, L. R., 2 I. A., 38.

(*b*) See Forsyth's Cases and Opinions, 85, and see Dhackjee Dadajee *v.* E. I. Co., Perry's Notes of Cases, 343; 2 Morley's Dig., 307; Tandy *v.* Lord Westmoreland, 27 How. St. Tr., 1264. Duke of Brunswick *v.* King of Hanover, 6 Beav., 1; S. C. on appeal, 2 H. L. Cases, 1; Nabob of Carnatic *v.* E. I Co., 1 Ves, 371; 2 *ib*, 56; Elphinstone *v.* Bedrechund, 1 Knapp, 316; Wadeer, ex-Rajah of Coorg *v.* E. I. Co, 29 Beav., 300.

(*c*) Forsyth, 84.

(*d*) See Hill *v.* Bigge, 3 Moo. P. C., 465.

(*e*) Narsing Rao Ramchandra *v.* Luxman Rao, I. L R., 1 Bom., 318, Westropp, C. J., and Kemball, J.

15. The East India Company, although for some purposes a sovereign power, was at the same time a trading company, and could be sued in the Courts in India for acts done in their trading capacity. They could be sued upon a contract (*a*). Chief Justice Tindal draws the distinction (*b*). He says—"It is manifest that the East India Company have been invested with "powers of a twofold nature, perfectly distinct from each other; "namely, powers to carry on trade as merchants, and (subject only "to the prerogative of the Crown, to be exercised by the Board "of Commissioners for the affairs of India) power to acquire, and "retain, and govern territory, to raise and maintain armed forces "by sea and land, and to make peace or war with the native powers "of India." When the direct government of the country was transferred from the Company to the Crown, provision was made for the continuance of this class of suits. By 21 and 22 Vict., c. 106, s. 65, it is enacted that "the Secretary of State in Council shall "and may sue and be sued, as well in India as in England, by the "name of the Secretary of State in Council as body corporate; "and all persons and bodies politic shall and may have and take "the same suits, remedies, and proceedings, legal and equitable, "against the Secretary of State in Council of India as they could "have done against the said Company." This is an exceptional enactment making the Secretary of State in Council a corporation for the purpose of suits. Colonial Governments cannot be sued unless they are subject to some such provision (*c*). But this particular enactment enables a suitor to institute a regular suit in certain cases only. A case (*d*) decided by the late Supreme Court at Calcutta shows the distinction between the acts of the Government of India as a sovereign power where no suit would lie, and its acts done in its individual capacity without the exercise of sovereign authority. It is in the latter class of cases alone that suits now lie against the Secretary of State in Council by virtue of the Act of Parliament. In the case last referred to, the plaintiffs claimed damages in respect of an injury done to one of their horses through the negligence of some men employed in one of the Government dockyards, which dockyard was carried on by the Government in the

(*a*) Bank of Bengal *v.* East India Co., 2 Knapp, 245; Moodalay *v.* East India Co., 1 Bro. C. C., 469.

(*b*) In Gisbon *v.* East India Co., 5 Bingh. N. C. 275.

(*c*) Stoman *v.* The Government of New Zealand, L. R., 1 C. P. Div., 563.

(*d*) P. and O. Company *v.* The Secretary of State, Bourke's Rep., Pt. VII, 166.

same way, and for the same purposes, as any private firm or company might have carried on a similar business. It was tried by Mr. Justice Macpherson, who at that time was the First Judge of the Small Cause Court, and the question of the defendant's liability was referred by him to the Supreme Court as a point of law. It was decided by Peacock, C. J., and two other Judges of the Supreme Court, that the Government were responsible to the plaintiffs on the ground that the negligence complained of was an act done by their servants in carrying on the ordinary business of ship-builders (unconnected with the exercise of sovereign powers) and which any firm or individual might have carried on for the same purposes. Again it was held by Mr. Justice Phear (*a*), whose decision was confirmed on appeal by Garth, C. J., and Macpherson, J. (July, 1875), that when an act has been done in the exercise of the duty of Government in collecting the public revenue by the sale of licenses to sell drugs in Calcutta, the case was one in which the Government was acting in the exercise of sovereign authority, and was not the subject of a civil suit. In that case the plaintiff, who was a retail dealer in ganja and sidhi in Calcutta, bought at the annual sale (the sale being the mode adopted by the Collector, acting under the authority of Government, for collecting the revenue) the licenses to sell ganja and sidhi at five shops, and he paid the deposit amounting to Rs. 968. The licenses were not granted, and it was held that the plaintiff could not sue in a Civil Court for damages or for the return of his deposit. This case shows the difference in the positions of the Secretary of State and of the East India Company, for in another case (*b*), a suit of a similar kind was held to be maintainable against the Company. There are special provisions regarding the procedure to be observed in suits by or against the Secretary of State in Council under this Code; they will be found in Chap. XXVII, *post*.

16. The Statute 21 Geo. III, c. 70, s. 24, now superseded by a later enactment (XVIII of 1850) and repealed by Act XIV of 1870, both of the Governor General of India in Council, provided that "no action for wrong or injury should lie in the Supreme Court "against any person whatsoever exercising a judicial office in the

(*a*) In Nobinchunder Dey *v.* The Secretary of State for India, I. L. R., 1 Calc., 11.

(*b*) Moodelay *v.* E. I. Co., 1 Bro. Ch. Ca., 469.

"country Courts for any judgment, decree or order of the said Court, "nor against any person for any act done by, or in virtue of, the order "of the said Court." The effect of this clause was considered by the Judicial Committee in a case (*a*) where an European British subject, over whom the defendant, a Zillah Judge, had no jurisdiction, sued the Judge for damages for his arrest and false imprisonment by the Judge in his character of Judge. The case was decided in favor of the Judge, on the ground that he was not liable in trespass for want of jurisdiction, unless he knew, or ought to have known, of the defect; that it lies on the plaintiff in every such case to prove that fact; and that the plaintiff had not proved it (*b*). 21 Geo. III, c. 70, s. 24 does not take away the jurisdiction of the Court, but says, that no person shall be answerable for an act done in a judicial capacity. Not that the Court is precluded from enquiring whether the act was done in a judicial capacity (*c*). In a note to the report it is observed, "that the decision in the case of *Calder* "v. *Halket* (*d*) affirmed the decision of the Court below in favor "of the Magistrate, but the Privy Council repudiated the doctrine "of Chief Justice Ryan and Mr. Justice Malkin, *viz.*, that the juris-"diction of the Court was ousted by the Statute, however illegal "the act complained of. The Council agreed with the dissentient "Judge, Sir J. P. Grant, in their view of the law, but decided on "the facts that the point of law did not arise, because it did not "appear that the Magistrate had notice or knowledge of the circum-"stances upon which the appellant relied as exempting him from "the jurisdiction" (*e*). The effect of the clause was stated in the beginning of the judgment to be this:—"To put the "Judges of native Courts of Justice on the same footing as those "of English Courts of similar jurisdiction, protecting them from "actions for things done *within their jurisdiction*, though erro-"neously or irregularly done." And this interpretation was followed in a case (*f*) tried in the Supreme Court ten years afterwards, and in which the clause was relied on by the defendant, but ineffectually. The defendant, Captain Phayre, was the Assistant Commissioner of Moulmein in the Province of Tennasserim, now a part of British

(*a*) Calder *v.* Halket, 2 Moo. I. A., 293; S. C., 3 Moo., 28.

(*b*) Following Gwynn *v.* Poole, Lutw. App. 1560; Moravia *v.* Sloper, Willes, 35; Pike *v.* Carter, 3 Bing, 78; Lowther *v* Earl of Radnor, 8 East, 113.

(*c*) *Per* Grant, J., in Young *v.* Jackson, Montriou, 196.

(*d*) Morton, 170.

(*e*) Note by Montriou—M., 200.

(*f*) Fewson *v.* Phayre, Taylor's Rep., 1848, p. 405.

Burma, and at that time a part of the British possessions. The Court over which Captain Phayre presided was supposed to be constituted by a mere order of the Governor General in Council, and not by any legislative enactment. The plaintiff Fewson was a defendant in a civil suit for debt, brought by one Crisp, in the supposed Court over which the defendant presided. The proceedings in the suit were conducted in accordance with a set of rules promulgated by the Governor General in Council, and analagous to the course of procedure then prevailing in British India. In the course of these proceedings, the defendant, at the instance of Crisp, arrested the plaintiff, who, as it was stated, and it seems proved, was about to leave the alleged jurisdiction of the Court; and it was held that the defendant, who was blameless throughout the transaction, was still liable to pay damages to the plaintiff, unless he could establish the legal constitution and jurisdiction of the Court as actually exercised. The above case was, in January, 1850, followed by *In re Foy* (*a*), a case in which the applicant, who was a British subject, had been tried and convicted for an offence against the Salt Acts, and was undergoing imprisonment for the offence. He applied for a writ of *habeas corpus*, but it was refused, the proceedings being on the face of them regular, and because it did not appear that the Magistrate had notice that the defendant claimed or possessed exemption from his jurisdiction; and on the ground that a Court of limited criminal jurisdiction which has sentenced an accused person must necessarily be understood to have decided the question of his liability to its jurisdiction. If it decides on the presumption of his liability to its jurisdiction from the fact of his not contesting it, it is a point not the less involved in its decision. "By Act XVIII of 1850 (protection of Judicial Officers), "s. 1, no Judge, Magistrate, Justice of Peace, Collector, or other "person acting judicially, shall be liable to be sued in any Civil "Court for any act done, or ordered to be done, by him in the dis-"charge of his judicial duty, whether or not within the limits of his "jurisdiction: provided that he at the time, in good faith, believed "himself to have jurisdiction to do or order the act complained of; "and no officer of any Court, or other person bound to execute the "lawful warrant or order of any such Judge, Magistrate, Justice of "the Peace, Collector, or other person acting judicially, shall be

(*a*) Taylor and Bell, 219.

"liable to be sued in any Civil Court for the execution of any "warrant or order which he would be bound to execute if within "the jurisdiction of the same." This Act was passed shortly after the hearing of the case of *Foy* (*a*); and probably, in consequence of it, Peel, C. J., who decided the case, being then a member of the Legislative Council; it goes considerably further than 21 Geo. III, c. 70, s. 24, inasmuch as it protects a Judge where he gives judgment, or makes an order in the *bonâ fide* exercise of his office, and in the belief that he has jurisdiction, although he has none—a protection which the Act of Parliament did not afford (*b*). Soon after the passing of Act XVIII of 1850, *Lang* v. *Gubbins* (*c*) came to be decided by Peel, C. J., who held that the words "in good faith" were merely the English version of the Latin phrase "*bonâ fide*" of such frequent use in the law, both phrases having the same meaning; that the true construction of "good faith" appeared to be "that belief which though erroneous was excusable in the particular instance, or, in other words, that which stood on some reasonable grounds" (*d*). Where the act is done, or ordered to be done, by the Judge, &c., in the discharge of his judicial duty within the limits of his jurisdiction, the question of good faith does not arise (*e*). In a case (*f*) where the plaint alleged that the first defendant, while acting as a Judge, knowingly and maliciously issued an illegal order, which the second defendant, the Nazir, executed, although aware of its illegality, and, moreover, in doing so, exceeded the limit prescribed by it, and deprived the plaintiff of his property, there was no allegation that the Judge acted beyond his jurisdiction, it was, therefore, decided that there was no cause of action against him. If the order had been beyond the jurisdiction, it would have been necessary to aver that there was no reasonable and probable cause for the Judge's supposing, after due enquiry, that he had jurisdiction to issue the order; but whether he had reasonable and probable cause could not be a

(*a*) Taylor and Bell, 219.

(*b*) See the remarks of Parke, B., 2 Moo. I. A., 306-7.

(*c*) Taylor and Bell, 228 n.

(*d*) See also Vinayak Divakar v. Bai Itcha, 3 Bom. H. C. Rep., A. C., 36, Westropp, Tucker, and Warden, JJ., Same v. Armstrong, *ib.*, 47, same Judges.

(*e*) Meghraj v. Zakir Hussain, I. L. R., 1 All., 280, Turner and Spankie, JJ.

(*f*) Prallhad Maharudra v. Watt and others, 10 Bom. H. C. Rep., 346, *Coram*, West, J., Aug. 28, 1873.

material question in the case in point (*a*). In another case (*b*) the plaintiff sued the defendant, a Judge of a Small Cause Court, for damages, arising from his want of good faith in granting his sanction to a third party to prosecute the plaintiff, who was acquitted. There it was clear that the thing was done by the Judge while acting in his judicial capacity, and that therefore he was not liable (*c*). Where the Judge acts without jurisdiction, the question of his good faith is material. Thus where the defendant, who was the Collector of Sea Customs at Madras, professing to act under s. 24 of Act VI of 1863, imposed a fine upon the plaintiff without a trial,—the plaintiff being resident in Ceylon,—and seized his property in Madras for the purpose of realizing the amount, his good faith was enquired into; and it was held that, under the circumstances, he had not a *bonâ fide* belief that he was acting within his jurisdiction, and that he was not protected by Act XVIII of 1850 (*d*). The Act under which he proceeded directed the Collector to *adjudicate*, but contained no rules of procedure. The Collector made some sort of *ex parte* investigation, and then inflicted the fine on the plaintiff who was in Ceylon, gave him notice by telegraph of his having been fined, and seized his property in Madras to realize the amount by its sale. It was held that, notwithstanding the omission of rules of procedure, the direction that the Collector shall *adjudicate*, of itself imports that he shall not proceed to adjudicate without due notice and investigation. It is established that a man cannot incur the loss of property for an offence by a proceeding judicial in its nature as this is, until he has had a fair opportunity of answering the charge against him, unless, indeed, the legislature had expressly or impliedly given authority to act without that necessary preliminary. This is such a very clear and elementary proposition, that to hold an enquiry in the absence of the accused is of itself evidence of *mala fides* (*e*).

(*a*) Scott *v* Stansfield, L. R., 3 Exch., 320; S. C., 37 L. J., N. S., Exch., 155, was also cited.

(*b*) Hari Ravji *v* Janarden Vasudu, cited in a note, 10 Bom H. C. Rep., 350, Melvile and West, JJ.

(*c*) See also Girdharlal *v.* Jagannath, 10 Bom. H. C Rep, 182

(*d*) Collector of Sea Customs, Madras, *v.* Punniar Chithambaram, I. L. R, 1 Mad., 89, Morgan, C. J., Innes and Kernan, JJ.

(*e*) *Ib.*, per Morgan, C. J.; and see also James Bagg's Case, 11 Rep., 99; Dr Bentley's Case, 1 Stra., 557, and numerous other authorities cited in Maxwell's Duties of Magistrates, Indian Edition, p. 30; Collector of Hooghly *v.* Tarak Nath, 7 B L R., 449, a case which was very fully argued, the leading authorities will be found in the report of the case; S. C., in the Court below, 4 B. L. R, A. C., 37.

The case of *The Collector of Sea Customs* was also reported in 10 Mad. Jur., 94, and is referred to by Phear, J., in another case (*a*), where he says:—"The defendant, though an officer of Government, was made personally liable to the plaintiff for conduct in his office, so extravagantly *ultra vires* and tortuous that he could not be presumed to have acted *bonâ fide*." Where the duties of the officer acting in the particular case are in no sense judicial, the Act (XVIII of 1850) cannot be called in aid by the defendant. For instance, the powers and duties of Commissioners of Municipalities under Schedule K of Act VI of 1868 (B. C.) are not judicial. An Assistant Magistrate, therefore, who directed the removal of the steps leading up to the house of the plaintiff under these provisions, was held not to be protected by this enactment, but he is liable as a Commissioner, not personally. A fine inflicted under the same Act of 1868 would be inflicted judicially, and the Magistrate would be protected by Act XVIII of 1850 (*b*). A Magistrate issued an order under s. 308 of Act VIII of 1869, calling upon A. to remove his hut as being an obstruction to a public highway. A. claimed a jury under s. 310, and the majority thought the Magistrate's order reasonable and proper. A. refused to obey, and the hut was removed under s. 311. A. sued the Magistrate for possession of the land and damages. Held, that such a suit would not lie (*c*). Nor will a suit lie to set aside such an order, or to restrain the Magistrate from carrying it into effect (*d*).

17. The protection that is accorded to Judges in the exercise of their duty is also extended to the witnesses, jurors, and parties to the proceedings; thus, words spoken by a witness in the course of a judicial proceeding, although defamatory, are no more actionable in this country than in England. "The grounds of this are, that "it concerns the public and the administration of justice; that wit-"nesses giving their evidence on oath in a Court of Justice should "not have before their eyes the fear of being harassed by suits for "damages; but that the only penalty which they should incur

(*a*) Nobin Chunder Dey *v.* The Secretary of State for India, I. L. R., 1 Calc., 17.

(*b*) *Per* Markby, J.; Chunder Narain Singh *v.* Brijo Bullub Goyee, 16 B. L. R., 254, Couch, C. J., L. S. Jackson and Ainslie, JJ., confirming a decision of Markby, J.

(*c*) Meechoo Chunder Sarcar *v.* Ravenshaw, 11 B. L. R., 9, Couch, C. J., and Kemp, J.

(*d*) Ujalamayi Dasi *v.* Chandra Kumar Neogi, 4 B. L. R., F. B., 24 See Chabildas Lallubhai *v.* The Municipal Commissioners of Bombay, 8 Bom. H. C. Rep., O. C., 94, Sargent, J.

"if they give evidence falsely should be an indictment for per-"jury" (*a*). In a later case (*b*) it was decided that an action of slander against a witness would not lie, although the words were not spoken in good faith as a witness, but were spoken by the defendant as a volunteer for his own purposes and maliciously.

This rule extends to words spoken and writings exhibited by the defendant, a military man, bound to give evidence before a Court Martial (*c*). Thus, an action was brought for libel. The alleged libel was a document handed in by the defendant to a Military Court of Enquiry, containing statements reflecting on the plaintiff's character as an officer, such statements being in substance what the defendant had deposed to as a witness before the same Court. There was also a count in slander for the words spoken. The counsel for the plaintiff proposed to give evidence to show that the defendant, in making and handing in such statements, was acting *malâ fide* and with actual malice; that the statements were respectively made without any reasonable and probable cause, and with a knowledge on the part of the defendant that they were false. Whereupon it was objected by the counsel for the defendant that even if all this were proved, still the action would not lie. The Judge concurred in this view, and so directed the jury, who, in accordance with his direction, returned a verdict for the defendant. The plaintiff's counsel thereupon tendered a Bill of Exceptions. The point was then argued in the Exchequer Chamber; and it was held by all the Judges present on that occasion that the direction of the Judge at *nisi prius* was correct, on the ground that the Court of Enquiry was a duly constituted Court of Justice recognized by law—and consequently that the same principles applied which protected judges, counsel, witnesses, and parties against actions for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law (*d*). In a decision (*e*) of Kent, C. J., in America, the authorities were reviewed and the principle adopted (*f*); and it applies even although the statements

(*a*) See the case of Gunesh Dutt Singh *v.* Mugneeram Chowdhry, 11 B. L. R., 321, decided by the Judicial Committee of the Privy Council.

(*b*) Seaman *v.* Netherclift, L. R., 1 C. P. Div., 540; see also Beauchamp *v.* Croft, Keilwey, 26.

(*c*) See Dawkins *v.* Lord Rokeby, reported in L. R., 8 Q. B., 255

(*d*) See Floyd *v.* Barker, 12 Co. Rep., 23.

(*e*) In Yates *v.* Lausing, 5 Johs., 282; 9 *ib.*, 395.

(*f*) See also Revis *v.* Smith, 18 C. B., 126; S. C, 25 L. J (C. P.), 195.

are false to the knowledge of the deponent (*a*). Where the Judge of a County Court in the course of a trial (*b*) told the plaintiff that he was a harpy preying on the vitals of the poor, and in answer to the action pleaded (by Statute 15 and 16 Vict., c. 54, s. 6, and 9 and 10 Vict., c. 95, s. 138) that the words were used by him when sitting as a Judge, &c., it was held by all the Judges that, on general principles as ancient as the law itself, the action was not maintainable. The same principle was maintained in this country in a case (*c*) in which the defendant was the Civil and Sessions Judge of Behar, and the matter complained of was contained in a report sent in the course of his duty to the Nizamut Adawlut. The Judges of the Exchequer Chamber also held in the case (*d*) already alluded to that the words spoken at a Military Court of Enquiry were part of the minutes of the Court, and when reported and delivered to the Commander-in-Chief, were received and held by him on behalf of the sovereign, and as such ought not, except by Her Majesty's command or permission, to be produced, and were therefore wholly inadmissible in evidence. In this respect they dissented from Lord Campbell's ruling at *nisi prius* in *Dickson* v. *Lord Wilton* (*e*), where he had directed such evidence to be produced. (As to this see Act I of 1872, s. 124.) The case of *Dawkins* v. *Lord Rokeby* (*f*) was afterwards taken to the House of Lords, and the question was referred to the Judges in attendance, who all agreed that a "long series of "decisions has settled that no action will lie against a witness "for what he says or writes in giving evidence before a Court "of Justice. This does not proceed on the ground that the occa-"sion rebuts the *primâ facie* presumption that words disparaging "to another are maliciously spoken or written. If this were all, "evidence of express malice would remove this ground. But "the principle is that public policy requires that witnesses "should give their testimony free from any fear of being harassed "by an action, on an allegation, whether true or false, that they "acted from malice. The authorities as regards witnesses in the "ordinary Courts of Justice are numerous and uniform. In the "present case it appears in the Bill of Exceptions that the words

(*a*) Henderson *v.* Broomhead, 4 H. & N., 569; S. C., 28 L. J., N. S., Exch., 360.

(*b*) Scott *v.* Stansfield, L. R., 3 Exch, 220; S. C., 37 L. J., N. S., Exch., 155.

(*c*) Moulavie Ally Kurreem *v.* Sandys, Boulnois' Rep., 1.

(*d*) Dawkins *v.* Lord Rokeby.

(*e*) 1 F. & F., 419.

(*f*) L. R., 7 E. & T. Appeals, 744.

"and writings complained of were published by the defendant, a "military man, bound to appear and give testimony before a "Court of Enquiry. All he said and wrote had reference to that "enquiry, and we can see no reason why public policy should not "equally prevent an action being brought against such a witness "as against one giving evidence in an ordinary Court of Justice." And these conclusions were adopted unanimously by the House of Lords. In an action (*a*) for a libel, the defendant pleaded that the alleged libel was written by him in an official report to the Adjutant-General, and it was held that even if it were shown that the defendant was actuated by malice and in the absence of reasonable and probable cause, yet, as it was a matter for the military tribunal, the defendant was protected. In another suit (*b*) between the same plaintiff, tried by Mr. Justice Willes, July 21st, 1866, at *nisi prius*, in the C. P. at Westminster, the declaration was (1st count) for arresting and imprisoning the plaintiff; (2nd) for maliciously, and without reasonable or probable cause, detaining the plaintiff under arrest for more than eight days, without bringing him to a Court Martial; (3rd) for conspiring with others, and procuring the Commander-in-Chief to dismiss the plaintiff from the army on half-pay. The plaintiff was a captain in the Coldstream Guards. In consequence of certain quarrels and altercations, a Court of Enquiry was ordered by the Commander-in-Chief to assemble for the purpose of inquiring into certain matters brought forward by the plaintiff, and this Court of Enquiry was desired to take evidence and give its opinion on two points: 1st, whether the plaintiff was justified or otherwise in the complaints raised by him; 2nd, of the fitness of the plaintiff to command a battalion of guards. The defendant gave evidence before this Court of Enquiry of a nature unfavorable to the plaintiff, and the Court, while finding that the plaintiff was justified in his complaints, and declining to say that he was shown by the evidence to be unfitted for command, added that they were of opinion that he had shown infirmity of temper, and disrespect in the tone he had assumed towards his superior officer. A subsequent Court of Enquiry was held to investigate certain other charges made by the

(*a*) Dawkins *v.* Lord William Paulet, 39 L J, N. S, Q B, 53, Mellor, Hayes, and Lush, JJ., dissenting.

(*b*) Dawkins *v.* Lord Rokeby, 4 F. & F., 806.

plaintiff against several officers, and this Court stated that it was their opinion that if the plaintiff were ever placed in command of a battalion of guards, it would be to the detriment of Her Majesty's service. The Commander-in-Chief afterwards placed the plaintiff on half-pay. In the course of the affair, the defendant had put and detained the plaintiff in arrest for more than eight days, without bringing him to a Court Martial, and this was contrary to the 19th Article of War. Mr. Justice Willes directed a nonsuit. He said:—"Military men have laws applying to themselves for military "purposes, and civilians have the law of the land by which they are "guided. It is well that each should keep distinct where their res-"pective laws are applicable. I go so far as to say that if Lord "Rokeby maliciously gave evidence and so procured the plaintiff's "removal from the army, he would have no redress in this Court; "his remedy is given him by the Articles of War. I am further "of opinion that Lord Rokeby did not act maliciously: and the "same observation applies to all the gentlemen who had to do with "the two Courts of Enquiry. In addition to this, there is the "most overwhelming reason for holding that he is not liable "for what he stated as a witness, and if witnesses were not "protected, they would give evidence in fear of proceedings being "taken against them. I give no opinion as to whether Lord "Rokeby was right in coming to the conclusion that Colonel Daw-"kins' temper was incompatible with the due execution of his duty "as an officer, but I must remark upon the great impropriety of "making this Court inquire into matters which a military tribunal "is more conversant with, and to which such Court is applicable. "Lord Rokeby did not cause the first Court to be held, and it was "entirely at the instigation of the plaintiff that the second Court "took place. Even if in point of law this action were maintain-"able, I should be clearly of opinion that there was no case—no "malice—no conspiracy; and whatever was done was moved by "Colonel Dawkins himself. I am satisfied that there is no cause of "action in a Civil Court. I think it most wise that military men "should settle their own disputes in their own Courts, and civilians "in theirs; and I can conceive nothing more subversive of order "than that a soldier should endeavour to review the decisions of "his own tribunals in this or any other Civil Court."

A man by becoming a soldier, and receiving the Queen's pay, agrees and consents that he shall be subject to military discipline, and he cannot appeal to the Civil Courts to rescue him from his

own compact. Therefore the Court would not interfere to prevent the execution of the sentence of a Court Martial (*a*) if not in excess of its jurisdiction (*b*). Military matters, properly brought within the true limits of military jurisdiction, are not to be called in question by Civil Courts. In an action (*c*) brought by the captain of a man-of-war against his admiral for falsely and maliciously, and without any reasonable and probable cause, charging and accusing the plaintiff with having disobeyed his orders and signals, with not cutting his cables to put to sea after the enemy, with dropping astern, and not keeping up in line of battle, and for falsely, maliciously, wrongfully, and injuriously causing the plaintiff to be put in arrest and keeping him there and bringing him before a Court Martial, at which Court Martial the plaintiff was honorably acquitted of the whole charge,—the jury gave the plaintiff a verdict with £6,000 damages, and a motion in arrest of judgment was refused by the Court of Exchequer. But this decision was reversed in error in the Exchequer Chamber by Lord Thurlow, on the reports of Lords Mansfield and Loughborough, before whom the case in error was argued. The judgment of the Court below was reversed on the ground that the facts showed the existence of reasonable and probable cause (*d*), but they strongly inclined to the opinion that no such action would lie. In *Dawkins* v. *Lord W. Paulet*, the Chief Justice (Sir A. Cockburn) dissented from the judgment of the rest of the Court on the ground that *Sutton* v. *Johnstone* was not a direct decision on the point, and that he could not agree with Lord Mansfield's arguments. So far as regards witnesses, the matter is settled by the decision of the House of Lords (*e*), and there is no doubt but that the President and Members of the Court Martial would be protected against the consequence of any act done by them within the limits of the jurisdiction. But parties to proceedings, whether of a civil or criminal nature, who set the Court in motion, or who obtain the arrest of other persons, are not protected unless they take such proceedings without malice and with reasonable and probable cause (*f*).

(*a*) Grant *v.* Gould, 2 H. Blackstone, 69.

(*b*) *Per* Lord Longhborough, Grant *v.* Gould, 2 H. Blackstone, 100.

(*c*) Johnstone *v.* Sutton, 1 Term. Rep., 493.

(*d*) See *per* Cockburn, C. J., 39 L. J., N. S., Q. B., at p. 64.

(*e*) In Dawkins *v.* Lord Rokeby.

(*f*) See the note to Ashby *v.* White, 1 Smith's L. C, 216, and the cases there cited.

18. There are certain Acts of the Legislature and Charters which excluded the jurisdiction of the late Supreme Courts in matters affecting the revenue. The original Act which barred such suits was 21 Geo. III, c. 70, s. 8. Sir E. Perry says of this Act that "it was introduced to prevent the Supreme Court at Fort "William from bringing within its jurisdiction the whole of the "Civil Service and their employés for acts done in the collection "of the revenue throughout Bengal, Behar, and Orissa, and thus "engrossing to itself the chief functions of an Asiatic Govern-"ment" (*a*). It enacted that "the Supreme Court shall not have "or exercise any jurisdiction in any matter concerning the revenue, "or concerning any act or acts ordered to be done in the collection "thereof, according to the usage and practice of the country or "the Regulations of the Governor General in Council" (*b*). S. 11 of 37 Geo. III, c. 142, and the Charters of the other Supreme Courts (Madras, cl. 23, and Bombay, cl. 30), are to the same effect "either "within or without the limits of the said towns, forts, or factories." The position of the Government and of the Presidency Courts is now, however, so completely changed, that it has been doubted whether the special restrictions which would be applied to these particular Courts are still in force, except perhaps as regards the collection of the land revenue. In a case (*c*) decided by Macpherson, J., the learned Judge considered that the Act of Geo. III was still operative, and that it related to all matters connected with the revenue, not exclusively to the land revenue. A different opinion was, however, entertained in a late case (*d*) decided in Madras, where the majority of the Court thought that the High Court at Madras had jurisdiction to try original suits against revenue officers for acts *ultra vires* done in their official capacity; that the provision of the Letters Patent of the Supreme Court, whereby such suits were exempted from the jurisdiction of the Supreme Court, had not been continued by the Letters Patent of the High Court so as to except such suits from the original jurisdiction of the High Court, but had been impliedly repealed by those Letters Patent; and Mr. Justice

(*a*) Ramchund *v.* Glass, Perry's Oriental Cases, 363

(*b*) See also a note by Mr. Millet on the Revenue of Calcutta, *Doe d.* Dassmoney Dassee *v.* Bissonath Mookerjee, Bignell, 1; and see *ib*, 77.

(*c*) *In re* Audhur Chandra Shaw, 11 B L R, 250

(*d*) The Collector of Sea Customs, Madras, *v.* Punniar Chitthambram, I. L. R., 1 Mad, 89.

Kernan was of opinion that they had been repealed by 53 Geo. III, c. 155, ss. 99 and 100, except as to land revenue. The 99th section, after giving to the Governor General in Council power to make laws and regulations relating to taxes, which laws and regulations were to be judicially noticed by the Supreme Court, enacted that it should be "lawful for all persons "whomsoever to prefer, prosecute, and maintain in the same Supreme "Courts all manner of indictments, informations, and suits whatso-"ever for enforcing such laws and regulations, or for any other "matter or thing whatsoever arising out of the same, any Act, "Charter, usage, or thing to the contrary notwithstanding." The 100th section enables the Advocate-General to exhibit informations in the Supreme Courts in matters relating to the revenue. The decision in the case last quoted was on an appeal from a judgment of Kindersley, J., who took the same view as the majority of the Court. A Madras Regulation, IX of 1803 (see also Act XII of 1851, ss. 16 and 17), had made the Collector of Customs at Madras amenable in such matters to the Zillah Court at Chingleput, but that Regulation was repealed by Act XII of 1876 of the Governor General in Council. When the Act which transferred India from the East India Company to the Crown, 21 and 22 Vict, c. 106, was passed, "the reason for the exceptions from the "jurisdiction of the Supreme Court of revenue matters and actions "in relation thereto ceased, *cessante ratione cessat et ipsa lex*."—*Per* Kernan, J. (*a*). Morgan, C. J., holding that the Court had no jurisdiction, did not agree with the majority of the Court in this case.

An Act of the Governor of Madras in Council (VI of 1867), for the ascertainment and collection of the land revenue in the Town of Madras, gives jurisdiction to the Civil Courts in suits brought by persons deeming themselves aggrieved by any proceedings under that Act, except as thereinbefore provided. But the Civil Courts are not to take cognizance of any suit instituted by such parties for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose.

Act XXIII of 1850 declared suits concerning the land revenue in the Town of Calcutta barred in the Supreme Court, and gave jurisdiction to the Company's Court in the 24-Pergunnahs.

(*a*) I. L. R., 1 Mad., 125.

The above are particular provisions limiting the jurisdiction of particular Courts in these matters, but no suit will of course lie in any Court to reduce the amount of a tax, where the tax had been levied and the plaintiff had unsuccessfully appealed against it under the provisions of the Act imposing it; even if the proceedings in the appeal have been informal, the decision of the Municipal Commissioners on appeal under the Act being final, although suits may be brought against them for a great variety of acts which they may do under colour of their statutory powers and under a mistaken view of their duties (*a*).

19. With respect to suits regarding the assessment and collection of the land revenue in the mofussil, there are several recent enactments which limit the jurisdiction of the ordinary civil tribunals and leave such matters to be dealt with by the Revenue Authorities. These cases, moreover, seem to come within the principle of the case in I. L. R., 1 Calc., 11; and, on the grounds already stated, would apparently not fall within the cognizance of the Civil Courts; see p. 22, *ante*, except where the Act itself allows that remedy.

In Act XI of 1859, which relates to the collection of land revenue in Lower Bengal, the partition for fiscal purposes of estates paying Government revenue, and the sale of the tenures themselves for default of payment of revenue, it is provided, s. 33, that "no "sale for arrears of revenue or other demands realizable in the same "manner as arrears of revenue are realizable, made after the passing "of this Act, shall be annulled by a Court of Justice, except upon "the ground of its having been made contrary to the provisions of this "Act, and then only on proof that the plaintiff has sustained substan-"tial injury by reason of the irregularity complained of; and no such "sale shall be annulled upon such ground, unless such ground shall "have been declared and specified in an appeal made to the Com-"missioner under s. 25 of this Act; and no suit to annul a sale "made under this Act shall be received by any Court of Justice "unless it shall be instituted within one year from the date of the "sale becoming final and conclusive under s. 27 of this Act; and "no person shall be entitled to contest the legality of the sale, "after having received any portion of the purchase-money. Pro-"vided, however, that nothing in this Act shall be construed to

(*a*) Manessur Das *v.* The Collector of Chupra, I. L. R., 1 Calc., 409, Garth, C. J., and Mitter, J., 28th June, 1876.

"debar any person considering himself wronged by any act or "omission connected with a sale under this Act, from his remedy in "a personal action for damages against the person by whose act or "omission he considers himself to have been wronged." Section 34 also puts limits upon the execution of decrees annulling sales. Section 36 bars a suit to oust a certified purchaser on the ground that he purchased at a sale for arrears of revenue on behalf of another.

See also as regards—

Bengal (North-Western Provinces), Act XIX of 1873, s. 241;

Bombay, Act X of 1876, s. 4;

Madras, Act XI of 1864, which by s. 58 bars civil suits on questions relating to the rate of revenue assessed, but s. 59 permits suits by persons considering themselves aggrieved by proceedings under the Act, except as therein provided, if instituted within six months from the time when the cause of action arose;

Oudh, Act XVII of 1876, s. 219;

Punjab, Act XXXIII of 1871, s. 65;

British Burmah, Act II of 1876, s. 55;

Bhutan Doars, Act XVI of 1869, which excludes suits connected with immovable property, revenue, and rent, s. 2.

The general restrictions of jurisdiction contained in these Acts, except where their operation has been specially stated, relate to cases arising in connexion with the settlement of the land revenue, to set aside sales, and to oust certified purchasers, some claims to hold land wholly or partly free from the payment of land revenue, &c. A sale by the authority of a Revenue Court can always be set aside on the ground of fraud by a suit brought in the Civil Court (*a*). This is not on the ground that the Civil Court has power to set aside the decree of the Revenue Court, but on the ground that the fraud gives a right of action to the party injured by it against the party who commits it (*b*).

In the case of *Nawab Sidhee Nazir Ali Khan* v. *Ojoodhya Ram Khan* (*c*), the sale was under Act XI of 1859, s. 33. A suit for a declaration that the plaintiff was entitled to share in land and to set aside the Collector's award declining to recognize him in

(*a*) Nilmonee Bunnick *v.* Poddo Lochun Chuckerbutty, 1 Wym., 144; S. C., 5 Suth. W. R., Act X Rul., 20, F. B.; B. L. R., Sp. No., 379.

(*b*) *Per* Peacock, C. J.; and see also Ramsunder Poramanic *v.* Prasanna Kumar Bose, B. L R., Sp. No., 382, F. B.; Gunga Doss Dutt *v.* Ramnarain Ghose, *ib.*, 625, F. B.

(*c*) 5 Suth. W. R., 83, Privy Council.

proceedings for a separate assessment, under Act XI of 1859, of the revenue, brought by A. and B., who were recorded as proprietors of the same land, was held to lie in a Civil Court (*a*). See now Act VIII of 1876 (Bengal), as to what suits are disallowed and allowed under that Act (*to make better provision for the partition of estates.*)

The Revenue Courts in Bengal had jurisdiction under the Butwara Law, Reg. XIX of 1814 (repealed; see now Act VIII of 1876, Bengal), to assess a certain jumma on certain shares, but they have none to determine a disputed question of title. Therefore the provisions of s. 20 of that Regulation, which declares that the decisions of the Revenue Authorities in the former proceedings shall be final, are no bar to a suit in the Civil Courts to try the question of right (*b*).

20. By Act XXIII of 1871 (to consolidate and amend the law relating to pensions and grants by Government of money or land revenue), s. 4, it is enacted that, except as thereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted. Such claims are (s. 5) to be made to the Collector or other person authorized by Government to receive them. And (s. 6) the Civil Court may try the case on the certificate of the Collector or other officer that the case may be tried; but is not empowered to make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected either directly or indirectly. These provisions do not (s. 7) affect any Inam of the class referred to in the first section of Madras Act IV of 1862, or to pensions heretofore granted by Government in the territories respectively subject to the Lieutenant-Governors of Bengal and the North-Western Provinces, either wholly or in part as an indemnity for loss sustained by the resumption by a native Government of lands held under sanads purporting to confer a

(*a*) Hargobind Das *v.* Baroda Prasad Das, 6 B. L. R., 614.

(*b*) Spencer *v.* Puhul Chowdry, 6 B. L. R., 658. Also Mosun Ali *v.* Nusun Ali, 6 Suth. W. R., 15; Shaikh Mahomed Ghose *v.* Ezub-oolnissa Begum, S. D. A., N. W. P., 1868, p. 68.

right in perpetuity. The object of the Act was to keep the distribution of State bounty in the hands of the Executive, but its effect is to oust the jurisdiction in regard to other allowances. It would seem to apply to *Toda giras haks* (*a*). As to the nature of which species of payment, see *Maharana Fatesangji Jesvantsangji* v. *Desai Kallianrayaji Hukamatraiji* (*b*) and *Sumbhoolall Girdhurlall* v. *Collector of Surat* (*c*). Lands free of assessment held under a grant from the Government which bestows the lands themselves, and not merely the profit arising from them, do not fall within the provisions of the above Act (*d*). Civil Courts have jurisdiction to enquire into the title to lands enfranchised by the Inam Commissioner (*e*). The Civil Court cannot interfere to reinstate a ghatwal, who has been dismissed by the Police authorities, in the land which he formerly held as ghatwal. The right to possess the land depends on the tenure of the office (*f*). As ghatwalee lands are remuneration for service, when the service ceases the tenure ceases also (*g*).

21. A principal class of cases in which the Legislature has barred the action in a Civil Court is that relating to the Law of Landlord and Tenant in Bengal. Act X of 1859 (Bengal, recovery of rents) contains in ss. 23 and 24 provisions barring civil suits in the first instance in certain specified cases. Act X was repealed, so far as it was applicable to Lower Bengal, by Act VIII of 1869, s 33, of the Bengal Council, which re-established the jurisdiction of the Civil Courts in such cases in the Lower Provinces, and abolished the jurisdiction of the Revenue Courts; and it was wholly repealed by Act XVIII of 1873 (rent, North-Western Provinces), but by this latter enactment the exclusive jurisdiction of the Collectors' Courts in matters relating to landlord and tenant in the North-Western Provinces of the Bengal Presidency was maintained. The provisions of Act XVIII of 1873, ss. 93 and 95, combine with some alterations

(*a*) See Parbhudas Ravaji v. Motiram Kalyandas, I L. R, 1 Bom., 203, Melvill and Kemball, JJ, March 27th, 1876.

(*b*) 10 Bom H C. Rep. 281 (P. C)

(*c*) 8 Moore's I A., 1.

(*d*) Babaji Hari v Rajaram Ballal, I. L. R., 1 Bom, 75, West, J., Dec. 20th, 1875.

(*e*) Cherukuri Vancama v Mantravatti Lakshmi Narayana Sastruti, 2 Mad. H. C Rep., 327; Vissappa v. Ramajogi, *ib*, 341.

(*f*) Debee Narain Sing v Sree Kishen Sem, 1 Suth. W. R., 321, Bayley and Macpherson, JJ.

(*g*) See also Tekayet Jugo Mohun Singh's case, S D. A., 1857, p 1812; Baboo Kooldeep Narain Singh v. Mohadeo Singh, B L R, F B, 559; and see now Act XXIII of 1871 (Pensions, &c, Act).

and additions those of Act X of 1859, ss. 23 and 24, and of Act XIV of 1863, s. 1, amending Act X so far as related to the North-Western Provinces, and both repealed by Act XVIII of 1873, which consolidates the law on that subject applicable to those Provinces.

The following remarks apply, therefore, to the state of things in the North-Western Provinces of Bengal only:—

The Acts in question relate to certain disputes between landlord and tenant, &c., and it has been held repeatedly that they must be strictly construed, and do not oust the jurisdiction of the ordinary tribunals, except where they expressly declare that intention (*a*). Thus a Revenue Court has no jurisdiction to try whether A. and B., in whose name C. has purchased a leasehold estate, and for whom C. is in the position of a trustee, are liable in equity to pay the rent. "When the Legislature took away from the regular civil "tribunals of this country the right of determining questions with "regard to rent, they intended to take away from them, and to vest "in the Collector's jurisdiction those cases only in which the ques-"tion might arise between a landlord and his tenant. Two persons "may be joint tenants, and as such may be jointly liable for rent. "A., and not B., may be the tenant of certain lands. There may be "cases in which B. may be equitably liable to pay the rent legally "due from A. But the liability of B. does not arise from the legal "relationship of landlord and tenant An Act by which the jurisdic-"tion of the ordinary Court of Judicature is taken away, must be "construed strictly" (*b*). So a suit in which A. claims as vendee of B. against C., who claims under a pottah from B., lies in the Civil Court (*c*). A suit for specific performance of an agreement to sign and deliver a pottah to a party not being a ryot in possession, lies in the Civil Court (*d*). So also of a suit for possession under a pottah, where the plaintiff has never been in possession (*e*). A suit by a ryot asserting a right of occupancy lies in the Civil Court, where

(*a*) Prosunno Coomar Paul Chowdry *v.* Koylash Chunder Paul Chowdry, B. L. R., F. B., 759, see p. 773; S. C., 5 Wym. (Rent Suits), 2; and 8 Suth W. R., 428. Mudun Mohan Roy *v.* Gourmonee Goopto, B. L. R., Sp. No., 31.

(*b*) Peacock, C. J., in Prosunno Coomar Paul Chowdry *v.* Koylash Chunder Paul Chowdry and others, *supra*.

(*c*) Ufsuroodeen *v.* Akbur Ali Howaldar, 2 Suth. W. R., Act X Rul., 77, Kemp and Glover, JJ.

(*d*) Bharrut Chunder Sein *v.* Acheemooddeen, 2 Wyman's Rep., 207, Trevor and Bayley, JJ.

(*e*) Jodonath Ghose *v.* Ranee Sookhmoyee Dassee, 1 Suth. W R., 202, Morgan and Sumbhoonath Pundit, JJ.

he has never been in possession and ousted; but if he has been so in possession and ousted, the suit lies in the Revenue Court (*a*). A ryot and zemindar were sued by a party who held a pottah under the zemindar. The ryot-defendant alone appealed. It was held, that although it was competent to the zemindar to object to the jurisdiction of the Civil Court, it was not competent to the ryot to do so (*b*). Again, where the zemindar had retired from the contest, and the case involves a question of title between two ryots, it is matter to be tried by the Civil Courts (*c*). An admission by a defendant that he is in possession under an agreement with the plaintiff and other shareholders that they would grant a mourosee pottah, which was never granted, and under which no rent has ever been paid, is not an admission of a tenancy on which to found a suit under the Rent Act (*d*). Where the plaintiff sues for one moiety of the rent of certain land in the possession of his *co-sharer*, the suit should be brought in the Civil Court, and not in that of the Collector (*e*). Where the dispossession *of one ryot by another* is not the direct act of the zemindar, the case is cognizable by the Civil Court (*f*). A suit for possession brought in reality by one lessee against the other lessees as *coparceners* in collusion with the zemindar, and not against the zemindar as landlord, is rightly brought in the Civil Court, and not before the Collector (*g*). A suit by a ryot dispossessed, against his lessor and other ryots claiming adversely to him, lies in the Civil Court (*h*). A suit for the recovery from

(*a*) Sheodan Singh *v.* Seetul Singh, S. D. A., N. W. P., 1865, p. 282; see also *ib.*, 1864, p. 127; *ib.*, 1864, p. 162.

(*b*) Bhuggobutty Churn Mookerjee *v.* Hurromohun Mookerjee, 2 Suth. W. R, Act X Rul., 55, Steer and E. Jackson, JJ.

(*c*) Obhoy Churn Newgee *v.* Sristidur Bagdee and others, 1 Suth. W. R. 101, Loch and Seton-Karr, JJ.

(*d*) Doorga Debia *v.* Beckwith, 2 Suth. W. R., Act X Rul., 45, Sumbhoonath Pundit and Macpherson, JJ.

(*e*) Mittunlall Sahoo *v.* Shaikh Nadur, 1 Suth. W. R., 53, Norman and Sumbhoonath Pundit, JJ.

(*f*) Teeluck Chand Oswal *v.* Gour Chunder Shaha, 2 Suth. W. R., Act X Rul., 100, Trevor and Campbell, JJ.; Obhoy Churn Newgee *v* Sristidhur Bagdee, 1 Suth. W. R., 101, Loch and Seton-Karr, JJ.; Amjed Ali Khan *v.* Gholam Hyder Khan, 1 Suth. W. R., 313, Kemp and Glover, JJ.

(*g*) Shumbhoonath Shaha *v.* Ram Sunder Sircar, 2 Suth. W. R, Act X Rul., 105, Bayley and Phear, JJ.; Kinaram Kuleetah *v.* Hana Kuleetah, 6 Suth. W. R., 293, Trevor and Seton-Karr, JJ.

(*h*) Mugnee Roy *v.* Lallah Khoonee Lall, 6 Suth. W. R., Act X Rul., 19, Peacock, C. J., and Jackson, J.

the *coparceners* of a joint estate proportional shares of the expenses of its division, under cl. 3, s. 4, Reg. XIX of 1814, by reversal of an order passed in the Revenue Department, is cognizable in the Civil Courts (*a*). The Civil Court has jurisdiction in a suit which involves the right to collect rents as a sharer, or representative of, or deriving from, a sharer, and the decision of which depends on proof of a certain alleged partition defining particular shares (*b*). A suit brought against the zemindar to obtain possession of a 12-anna share of 62 beegahs, the jote of his vendor, alleging that he purchased from the tenant, but was prevented taking possession by the zemindar, is cognizable by the Civil Court, and not by the Collector, the plaintiff never having been in possession (*c*). In a suit for possession by an ejected tenant against a person whose alleged title as adverse holder accrued before the institution of the suit, the Civil Courts have jurisdiction (*d*). So also in a suit for possession and mesne profits (*e*); even where the suit includes the setting aside of a pottah, the Civil Court has jurisdiction (*f*). A suit by a zemindar to eject a ryot who holds over after the period of his lease is cognizable by the Civil Court (*g*).

A suit against a tenant for rent due by him, heard and determined in the Collector's Court, is no bar to suit against the tenant's surety on his bond, even although the surety was made a party to the rent suit, and it is doubtful whether a suit lies in the Collector's Court against the surety (*h*). Where (*i*) the plaintiff sued

(*a*) Dan Sha *v.* Bhageeruth, S. D A., N. W. P., 1865, p. 6.

(*b*) Hurro Chunder Roy *v.* Obhoy Churn Sircar, 2 Suth. W. R., Act X Rul., 72.

(*c*) Kanaye Mollah v. Debnath Roy, 3 Suth. W. R., Act X Rul., 161, Loch and Glover, JJ.

(*d*) Ruttun Monee Dabea *v.* Dhurmomoyee Dassee, 2 Suth. W. R., Act X Rul., 9, Norman and Sumbhoonath Pundit, JJ.

(*e*) Sumbessur Dey *v.* Fukeer Mahomed Sircar, 7 Suth. W. R., 243, Kemp and L. S. Jackson, JJ.; Tara Chand Zurgur *v.* Lokenath Dutt, *ib.*,414, Norman and Seton-Karr, JJ.; Puddo Monee Dossia *v.* Jholla Pally and others, 7 Suth. W. R, 283, Loch and Macpherson, JJ.; Ramchand *v.* Chundee Churn Doss, 1 *ib.*, 161, Trevor and Campbell, JJ.; Makoojoo Noshya *v.* Dohur Mahomed, 2 *ib.*, 52, Kemp and Glover, JJ.; Ram Lochun Doss *v* Mungul Sheikh, No. 757 of 1863, cited

(*f*) Bidhobudun Mookerjee *v.* Doorga Monee Debia, 2 Suth. W. R., 157, Bayley and Macpherson, JJ.

(*g*) Sadat Ali *v.* S. M. Jadattunnissa 3 B. L. R., App., 101.

(*h*) Ramtanu Achaiji *v.* Komal Lochun Roy, 3 B. L. R., App., 37.

(*i*) Bepin Behari Chowdhry *v.* Ram Chandra Roy, 5 B. L. R, 234.

several defendants for arrears of rent under a pottah, a third person was the nominal holder of the pottah, but the defendants were the real tenants; and it was a *benami* transaction, it was held by Peacock, C J, that the suit would not lie in the Collector's Court, as the decision rested on matters extraneous to the lease. Mitter, J., held that the Collector had jurisdiction. On appeal under cl. 15 of the Letters Patent, two Judges, Kemp and L. S. Jackson, JJ., agreed with Mitter, J., and one, Norman, J., with Peacock, C. J.

Rent suits, cognizable in the Collector's Court only, are confined to suits for the rent of land and such other things as are mentioned. Thus a suit for the rent of land let for a factory, including the dwelling-house of the proprietor of the factory, lies in the Collector's Court, and not in the Civil Court, it being immaterial for what purpose the lands were devised, when the rent issues out of. and was reserved in respect of, the land alone (*a*). But, in another case (*b*), it was held, that a suit for arrears of rent due on account of an indigo factory would not lie in the Collector's Court. In that case, however, the rent was reserved not for the *land*, but for the *factory*, and the business and benefit of the contracts connected therewith. A similar decision was made by L. S. Jackson, J., in a case (*c*) where the rent was reserved for land *and buildings;* so also (*d*) where the rent was for arhats, ghats, and bazars. If a house and two parcels of ground are held and enjoyed together, forming, as it were, one compound or set of premises, the suit as to the whole is cognizable by the Civil Court. If one of the parcels of land lies at a distance, or is wholly separate and distinct from the other, the suit as to the former is not cognizable by the Civil Court (*e*). A suit to recover arrears of rent for an iron mine lies in the Civil Court, and is properly brought in the Court within whose jurisdiction the defendant dwells (*f*). Where the claim is not for rent, but for profits of certain properties which have been appropriated by a wrong-

(*a*) Tareeny Persaud Ghose *v.* Bengal Indigo Company, 2 Suth. W. R, Act X Rul., 9, Norman and Sumbhoonath Pundit, JJ.

(*b*) Oddit Chunder Paul *v.* Comolakanto Paul, Marshall, 401, Peacock, C. J, & L S Jackson, J.

(*c*) Maharajah Dhiraj Mahatab Chand Bahadoor *v.* Makund Ballab Bose, 9 B L. R., App., 13.

(*d*) Hari Mohun Sircar *v* Moncrieff, 9 B L. R, 14.

(*e*) Bipro Doss Dey *v.* Wollen, 1 Suth. W. R, 223, Bayley & Macpherson, JJ.

(*f*) Khalut Chunder Ghose *v.* Minto, 1 In. Jur., N. S., 426.

doer, the suit is cognizable by the Civil Court (*a*). A suit for enhancement of rent of a dwelling-house in a village is cognizable by the Collector. Bayley and Hobhouse, JJ., drew a distinction between this case (*b*) and another (*c*), where the Civil Court was held to have jurisdiction; the house was part of a range of buildings in the centre of a town. See Act XVIII of 1873, s. 95, cl. (l), for the application of these two cases.

It has been already said that the Rent Act does not prevent Civil Courts trying questions of title, but refers only to *possessory* actions against persons entitled to receive the rent (*d*). Where the question is one of *title, and not one between a landlord and tenant,* such a suit is properly brought in the Civil Court (*e*). And now, in Lower Bengal, where the Civil Court tries the rent suit, it can of course determine a question of title arising in the case (*f*). Questions of title, however, do not necessarily arise in rent suits (*g*); and where the Collector does go into a question of title, an appeal lies (*h*). A suit for the relinquishment of a lease on the ground of fraud, is cognizable only in the Civil Court (*i*). A suit was brought by a zemindar to try the validity of a pottah which has been put forward by a tenant in a suit for damages against the plaintiff's *ijaradar* (farmer of public revenue), and which the plaintiff declared to be a forgery. Held, that this

(*a*) Teknet Roop Mungul Singh *v.* Anund Roy, 3 Suth. W. R., 111, Kemp and Seton-Karr, JJ.

(*b*) Abdul Hamid *v.* Dongaram Dey, 3 B. L. R., App., 133.

(*c*) Kali Mohan Chatterjee *v.* Kali Krishna Roy Chowdhry, 2 B. L. R., App, 39.

(*d*) Gooroodass Roy *v.* Ramnarain Mitter, 2 In. Jur., N. S., 113, Full Bench; S. C., B. L. R., F. B, 628, explained by Peacock, C. J., in Jonardun Acharjee *v.* Haradun Acharjee, B. L. R., F. B., 1021-2, who says that in this case it was merely held that a suit for a declaration of title might be brought in the ordinary Civil Court.

(*e*) Brojo Soondur Mitter *v.* Ram Chunder Roy, 2 Suth. W. R., Act X Rul., 40, Steer and E. Jackson, JJ.; Ram Chunder Gooptoo *v.* Bhuggobutty Dabea, 2 Suth. W. R., Act X Rul., 85, Morgan and Sumbhoonath Pundit, JJ.; Kalee Doss Nundee *v.* Ramguttee Dutt Sein, 6 Suth W. R., Act X Rul., 10, Peacock, C. J., and Loch, J.

(*f*) Ram Doss Nushkur *v.* Rash Monee Dossee, 25 Suth. W. R., 189.

(*g*) Soorjee Kanto Roy *v.* Forlong, 1 In. Jur., N. S., 382, Bayley and Campbell, JJ.

(*h*) Moha Moya Chowdhrain *v.* Ramnath Chowdry, 6 Suth. W. R., Act X Rul., 1, Seton-Karr and Macpherson, JJ.

(*i*) Bholanath Khan and others *v.* Ram Chunder Sircar, 7 Suth. W. R., 62, Bayley and Sumbhoonath Pundit, JJ.

suit was cognizable in the Civil Courts (*a*). A suit to recover a sum of money deposited with the defendant to be applied in payment of rents (the deposit having been unsuccessfully pleaded in a suit before the Revenue authorities for rent) lies in the Civil Courts, and not before the Collector (*b*). A suit by a purchaser at a sale in execution for avoidance of a fraudulent transfer of his seer land by the judgment-debtor, whilst the property was under attachment in execution of the decree to realize which it was sold, is cognizable by the Civil Courts, the defendants being the lessor, the lessee and the lumbardar, a party to the fraud (*c*).

Act XVIII of 1873, s. 93, enacts that, except in the way of appeal as hereinafter provided, no Courts in the North-Western Provinces other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought, and such suits shall be heard and determined in the said Courts of Revenue in the manner provided in this Act, and not otherwise. Clause (a) relates to "suits for arrears of rent on "account of land or on account of any rights of pasturage, forest "rights, fisheries or the like." This clause corresponds to Act X of 1859, s. 23, cl. 4, omitting after the word "land" the words "either kherajee or lakheraj." And a suit for rent is cognizable only by the Collector, whether it be based upon a kubooleut or agreement, or neither (*d*). A suit for profits, *i. e.*, rent under a "theeka" or farming lease, is cognizable by the Revenue Courts (*e*). It was held by a Full Bench of the High Court at Allahabad, that a suit for the money equivalent of arrears of rent payable in kind is a suit for arrears of rent (*f*). As to fisheries, see *Koylash Chunder Dey* v. *Joynarain Jaloolah* (*g*); and enhancement of rent of fisheries, *Puran Sautra* v. *Sheikh Tájooddeen* (*h*).

Clause (b) relates to "suits to eject a tenant for any act or omis-"sion detrimental to the land in his occupation, or inconsistent with "the purpose for which the land was let;" and cl. (c), to "suits to

(*a*) Kobirooddeen *v.* Kishen Dhun Chuckerbutty, 3 Suth. W. R., 209, Seton-Karr and E Jackson, JJ.

(*b*) Debee Golam Singh *v.* Chunder Kant Mookerjee, 3 Suth. W. R., 109, Bayley and E. Jackson, JJ.

(*c*) Lahoo Ram Narain Dass *v.* Bhugwant Singh, S D. A, N. W. P., 1865, p. 257.

(*d*) Dhunput Singh *v.* Mills, 7 Suth. W. R., 473, Kemp and Glover, JJ.

(*e*) Muthra Pershad *v.* Kunnoujee Lall, S. D A., N. W. P., 1861, p. 791.

(*f*) Tajooddeen Khan *v.* Rampersad Bhagat, F. L. R., 1 All., 217, F. B., Pearson, J., dissenting, April 26, 1876.

(*g*) 7 Suth. W. R., 93.

(*h*) 5 Suth. W. R., Act X Rul., 20.

"cancel a lease for the breach of any condition binding on the "tenant, and which, by law, custom, or special agreement, involves "the forfeiture of the lease." These clauses combined represent Act X of 1859, s. 23, cl. 5: "All suits to eject a ryot or to cancel any lease "on account of nonpayment of arrears of rent, or on account of any "breach of the conditions of any contract by which a ryot may be "liable to ejectment, or a lease may be liable to be cancelled." But the suits must be between landlord and tenant. Thus the Civil Court has jurisdiction in a suit in ejectment in which the plaintiff expressly denies the existence of the relation of landlord and tenant, and treats the defendant as a trespasser (*a*).

A suit against a ryot who sets up a title as tenant to a hostile zemindar, against both of whom (as defendants) the plaintiff established his title to the land, of which he sued to recover possession, is cognizable in the Civil Courts (*b*). A lease empowered the landlord, on default of payment of any kists by the tenants, to appoint a kuruk sezawal. A default having occurred, and a kuruk sezawal appointed, the landlord sued to recover the loss sustained by him. Held, that such a suit lies in the Civil, and not in the Revenue, Court (*c*). The Civil Court has no jurisdiction to try a suit by a putneedar to recover khas possession of land against a tenant who has sold his rights and interests to a third party (*d*); nor has it jurisdiction to entertain a suit to cancel a dur-putnee lease on account of a breach of the conditions thereof. Such suit must be brought before the Revenue Court (*e*). An ejectment of a ryot by his landlord, although carried out and enforced by the orders of the Magistrate, is still an ejectment at the suit of the landlord, and is illegal if the tenant be entitled to retain possession, and whether the ejectment is from the whole tenure or only a portion of it, the suit is only cognizable by the Revenue Court (*f*).

Clause (d) relates to "suits for the recovery of any overpay-"ment of rent, or for compensation under s. 48 or 49." Section 48

(*a*) Ram Chunder Mitter *v.* Ramzanee Bebee, 2 Suth W. R., Act X Rul., 4, Bayley and Macpherson, JJ.

(*b*) Fakeer Rohoman *v.* Bhobosoondery Dabea, 1 Suth. W. R., 232, Norman and Campbell, JJ.

(*c*) Anund Moyee Dabea *v.* Khirodhur Holdar, 2 Suth. W. R. Act X Rul., 46, Kemp and Glover, JJ.

(*d*) Kedar Monee Dassee *v.* Chunder Coomar Roy, 2 Suth. W. R., Act X Rul, 75, Kemp and Glover, JJ.

(*e*) Ram Chunder Dutt *v.* Din Dyal Paramanick, 2 Suth. W. R., Act X Rul, 16, Steer and Campbell, JJ.

(*f*) Bhugeeruth Chunder Doss *v* Kashee Prsah, 1 Suth. W. R., 269, Steer and E. Jackson, JJ.

enacts that "every tenant from whom any sum is exacted in excess "of the rent specified in his lease or payable under the provisions "of this Act, and every tenant from whom a receipt is withheld "for any sum of money paid by him as rent, shall be entitled to "recover from the landholder compensation not exceeding double the "amount so exacted or paid. Receipts for rent shall specify the "period or crop on account of which the rent is acknowledged to "have been paid; and any refusal to make such specification shall "be held to be a withholding of a receipt."

Section 49 enacts that, "if payment of rent, whether the same "be legally due or not, is extorted from any tenant by illegal confine-"ment or duress, he shall be entitled to recover from the person "guilty of such extortion such further compensation, not exceeding "the sum of Rs. 200, as the Collector of the District or Assistant "Collector thinks reasonable. An award of compensation under "this section shall not bar or affect any penalty or punishment to "which the person guilty of such extortion may be subject under "the Indian Penal Code."

This clause (d) and clause (e) of s. 93 of Act XVIII of 1873, relating to "suits for compensation for withholding receipts for rent paid," therefore correspond with Act X of 1859, s. 23, cl. 2, which prohibited the Civil Courts from entertaining original suits "for damages on account of the illegal exaction of rent, or of any "unauthorized cess or impost, or on account of the refusal of receipts "for rent paid, or on account of the extortion of rent by confine-"ment or other duress." A suit for refund of rent of land in excess of the holding under the pottah is cognizable in the Civil Court (*a*). A suit for rent of land in excess of the land mentioned in the pottah is cognizable in the Revenue Courts (*b*).

Clause (f) relates to "suits for contesting the exercise of the "powers of distress conferred on landowners and others by this Act, "or anything purporting to be done in the exercise of the said power, "or for compensation for wrongful acts or omissions of a distrainer." This corresponds with Act X of 1859, s. 23, cl. 7,—that is to say, all suits which are specially provided by the Rent Act, and which arise out of the exercise of the power of distraint, or out of any acts done

(*a*) Prosunnomoyee Dassee *v.* Soondui Coomaree Debia, 2 Suth. W. R., Act X Rul., 30, Kemp and Glover, JJ., referring to a decision of a Full Bench on Dec. 18th, 1864.

(*b*) Raj Mohun Bose *v.* Issur Chunder Shaha, 6 Suth. W. R., Act X Rul., 19, Bayley and E. Jackson, JJ. (see s. 17 of Act X.)

under colour of the exercise of the said power, must be brought in the Revenue Courts (*a*).

Clause (g) relates to "suits by lumbardars for arrears of Government revenue" payable through them by the co-sharers whom they represent, which corresponds with Act XIV of 1863 (repealed with Act XXII of 1872 by Act XVIII of 1873), s. 1, cl. 1, with the addition "and for village expenses and other dues for which the co-sharers may be responsible to the lumbardar," which was held to be the effect of the clause without the addition (*b*).

Clause (h) corresponds with Act XIV of 1863, s. 1, cl. 2, and relates to "suits by co-sharers for their share of the profits of a "mehal, or any part thereof, after payment of the Government "revenue and village expenses, or for a settlement of accounts."

A suit by a mortgagee for mesne profits against a lumbardar and co-sharer, or a suit to obtain a share of profits by a co-sharer of a mortgagee against another co-mortgagee recorded as responsible malgoozar in the Collector's books, must be brought in the first instance before the Collector of land revenue (*c*).

Clause (i) corresponds with Act XIV of 1863, s. 1, cl. 3—"suits by muafidars or assignees of the Government revenue for "arrears of revenue due to them as such."

Clause (j) corresponds with Act XIV of 1863, s. 1, cl. 4—"suits by talukdars and other superior proprietors for arrears of "revenue due to them as such," but omitting the words "or otherwise not being rent claimable under s. 23 of the said Act X of 1859."

Under Act XVIII of 1873, s. 95, certain applications must be made to the Revenue Courts and not to the Civil Courts, and no Courts other than Courts of Revenue shall take cognizance of any dispute or matter on which any application of the nature mentioned in this section might be made. These are—

(a.) Applications to determine the nature and class of a tenant's tenure under s. 10, under which the Collector or his Assistant is to decide whether the tenant is to hold as (1) a tenant at fixed rates, or (2) as an ex-proprietary tenant, or (3) as an occupancy tenant, or (4) without a right of occupancy, as defined in the Act.

(*a*) Joyloll Sheikh *v.* B. Paul Chowdry, 9 Suth. W. R., 162, Peacock, C. J., and Hobhouse, J.; Ram Chunder Chowdry *v.* Subal Patro, 3 B. L. R., App., 74.

(*b*) Pirthoo Singh *v.* Mahomed Jaffer Ali, S. D. A., N. W. P., 1865, p. 125.

(*c*) Omrao Sing *v.* Dhoon Singh, S. D. A., N. W. P., 1865, p. 185; Baboo Zokul Dass *v.* Baboo Balmokund, S. D. A., N. W. P., 1864, p. 592.

(b.) Application by a landholder or his agent to compel a patwari to produce his accounts relating to land.

(c.) Application to resume rent-free grants under s. 30 (which gives power to the proprietor to resume rent-free grants), and to assess land previously held rent-free.

(d.) Application from a landholder to eject a tenant under ss. 35 or 36 (that is to say, a tenant against whom a decree for arrears has been passed, and remains unsatisfied).

(e.) Applications made by a tenant under s. 39 (*i.e.*, contesting his liability to be ejected).

(f.) Application from a landholder under s. 40 for assistance to eject a tenant.

(g.) Application from a tenant or landholder to determine the value of any standing crop, or ungathered products of the earth, belonging to the tenant, and being on the land at the time of his ejectment under s. 42 (which gives a tenant ejected in accordance with the Act a right to growing crops, &c., on payment of a rent, &c.).

(h.) Application by a landholder to determine rent payable for land used by a tenant for the purpose of tending and gathering the growing crop, under s. 42.

(i.) Application by a landholder or tenant for assistance in the division or appraisement of a standing crop under s. 43.

(j.) Application by a landholder or tenant to determine compensation for improvements of land.

(k.) Application by a tenant for leave to deposit rent.

(l.) Application for enhancement of rent.

(m.) Application for compensation for wrongful dispossession.

(n.) Application for the recovery of the occupancy of land of which a tenant has been wrongfully dispossessed.

Act X of 1859, s. 23, cl. 6, barred civil suits of this nature. Under that clause it was held that all suits in the nature of ejectment between landlord and tenant in possession only should be brought in the Revenue Court (*a*).

(o.) Application for abatement of rent.

See Act X of 1859, s. 23, cl. 3. It was held under that clause

(*a*) Muthooranauth Koond *v.* Sameeruddee Mollah, 1 Suth. W. R., 42, Campbell and Glover, JJ.; Jodoonauth Ghose *v.* Ranee Sookhmoyee Dossee, 1 Suth. W. R., 202; Rajah Anundnauth Roy *v.* Jummeejoy Biswas, 8 Suth. W. R., 240, Seton-Karr and Macpherson, JJ.; Kanaye Mollah *v.* Debnauth Roy, 3 Suth. W. R, Act X Rul., 161.

that a Civil Court has not jurisdiction to try a suit for abatement of rent by a *putneedar*. Such a suit must be brought in the Revenue Court (*a*); and where a suit is partly for an abatement of rent and partly for damages, the latter part only is cognizable in the Civil Court (*b*).

(p.) Application for leases or counterparts, and for the determination of the rates of rent at which such leases or counterparts are to be delivered.

Clause 1 of Act X of 1859, s. 23, barred suits of this nature in the Civil Courts. It was held under that clause that a suit for the ascertainment and demarcation of a shikmee talook is cognizable by the Civil Court, notwithstanding that it includes a claim for the assessment of rent therefrom (*c*).

The Act relating to rent in the Madras Presidency is Act VIII of 1865 (M), and equally with all prior enactments abstains from authorizing the cognizance by the Revenue authorities of suits for arrears of rent (*d*).

By Act XVI of 1869—the Bhootan Dooars Act—the Civil Courts have no jurisdiction regarding land-revenue and rent.

In Oudh, suits under the Rent Act, XIX of 1868, are cognizable only by the Revenue Courts (s. 83).

22. No suit will lie for damages as between joint owners on undivided estates in consequence of the sale of the whole estate through default of one or more such owners in paying their shares of Government revenue (*e*), because the plaintiff could have registered his own rights in the collectorate, and thus have saved his estate from sale, or he could have paid the whole revenue. Where one co-sharer pays the whole Government revenue to save the estate from sale, he can sue the others for contribution, but not

(*a*) Man Gurobinee Dassea *v.* Khetter Chunder Ghose, 2 Suth. W. R., Act X Rul., 47, Norman and Sumbhoonauth Pundit, JJ.; Prosunomoyee Dossee *v.* Soonder Coomaree Debia, *ib.*, 30. Kemp and Glover, JJ.

(*b*) Maharajah Nilmonee Singh Deo *v.* Eshur Chunder Ghosal, 5 Wym. Rep., 51, Bayley and Phear, JJ.; S. C., 9 Suth. W. R., 92.

(*c*) Jugut Tara Chowdhrain *v.* Rajah Protab Chunder Singh, 3 Suth. W. R., 154, Loch and Glover, JJ.

(*d*) See, for a description and history of these provisions, the case of Gauri Anantha Parathesi *v.* Kaliappa Setti, 3 Mad. H. C. Rep., 213.

(*e*) Lallah Ramessur Doyal Singh *v.* Lallah Bissen Doyal, I. L. R., 1 Calc., 406, Kemp and Pontifex, JJ., Feb. 22, 1876, following Odoit Roy *v.* Radha Pandey, 7 Suth W. R., 72; and Gungapersaud Sahee *v.* Madhopersaud Sahee, 13 S. D. A., 1244.

in a Small Cause Court (*a*). As to the general doctrine of contribution, see the judgments of Peacock, C. J., in the following cases (*b*). The mere existence of a claim on a decree against one of several joint debtors, does not afford ground for a suit by him for contribution against the other debtors (*c*).

There are special provisions for the trial of cases relating to the partition of estates paying revenue to Government in the N. W. P., and suits in Civil Courts are barred by Act XIX of 1863, s. 11.

23. Special tribunals for adjudicating questions regarding the taking of land for works of public utility are created by Act XXII of 1863.

By Act X of 1870—Land Acquisition—s. 58, no suit can be brought to set aside an award under that Act.

By Act VIII of 1873—Northern India Canal and Drainage—s. 67, no Civil Court can pass an order as to the supply of canal water to any crop sown or growing at the time of such order.

By Act XIII of 1863, claims to waste lands are to be adjudicated on by Revenue officers.

24. In some cases proceedings may be taken concurrently in the Civil and in the Criminal Courts. Thus it was observed (*d*) that a party assaulted has a choice of many remedies, civil as well as criminal. So also, in the cases of libels and slanders, tending to provoke a breach of the peace, adultery, &c. It has been held that the rule of English law, that an action cannot be brought for a tort amounting to a felony before the defendant has been prosecuted for the crime (*e*) does not apply in India. The Court has only to see whether the suit is barred by any legislative enactment (*f*). Phear, J., however, expressed some doubt as to whether the ruling of the Chief Justice was intended to apply equally to the Original Side of the High Court. By the 213th

(*a*) Rambux Chittangeo *v.* Modoosoodun Paul Chowdhry, B. L.R., F. B., 675. See also Enayet Hossain *v.* Dhumroo Meah, 14 B L. R., 155; Ram Dyal *v.* Gulab Singh, I. L. R., 1 All., 26, Turner, offg. C. J., Pearson, and Oldfield, JJ., *dissentiente*, Spankie, J., Aug. 17, 1 875.

(*b*) Rambux Chittangeo *v.* Modoosoodun Paul Chowdhry, B. L. R., F. B., 675; Sreeputty Roy *v.* Loharam Roy, *ib*, 687; and Shaboo Majee *v.* Noorai Mollah, *ib*, 691.

(*c*) Rampershaud Singh *v.* Neerbhoy Singh, 11 B. L. R., 76.

(*d*) R. *v.* Deny, 2 L. M. & P., 230.

(*e*) Crosby *v.* Long, 12 East, 409; Wells *v.* Abrahams, L. R., 7 Q. B., 554; Osborn *v.* Gillett, L. R., 8 Ex., 88.

(*f*) Shama Churn Bose *v.* Bholanath Dutt, 6 Suth. W. R., Civ. Ref., 9, Peacock, C. J., and L. S. Jackson, J., July, 1866; Coonamull *v.* Surno Rawr, 2 In. Jur., N. S., 187.

and 214th sections of the Indian Penal Code, the taking or offering of gifts, &c., to screen offenders is made penal; but the exception at the end of the latter section provides that this shall not extend to any case in which the offence consists only of an act irrespective of the intention of the offender, and for which act the person injured may bring a civil action. Thus, where plaintiff and defendant had entered into a contract, by which the plaintiff was to withdraw a charge of wrongful restraint, and the defendant was to pay him money in consideration of his doing so, it was held that the plaintiff could sue upon the contract (*a*).

The imprisonment of a defendant by order of the Magistrate, under Act XIII of 1859 (Masters and Workmen, Presidency Towns), does not bar a civil suit for recovery of money advanced to the defendant for the performance of the work (*b*). The second section of the Act expressly leaves the civil remedy untouched (*c*).

The Code of Criminal Procedure (Act X of 1872), s. 536, which enables the Magistrate to make an order directing a husband to maintain his wife, does not prevent her suing him for maintenance in a civil suit (*d*).

25. No suit will lie in a Civil Court to set aside the order, duly made, of a Magistrate, regarding a nuisance under the Criminal Procedure Code, to restrain him from carrying such order into effect (*e*). In that case, which overruled the case of *Ram Shodoy Ghose* v. *Jettadharee Haldar* (*f*), the suit is described as having been instituted to set aside the Magistrate's order for the removal of the plaintiff's wall The report does not show who the defendant was, whether he was the Magistrate or a stranger. The judgment of Peacock, C. J., shows the principle which governs such cases. After reviewing the clauses of the Code of Criminal Procedure then in force relating to the matter—similar clauses to those

(*a*) Mothoornath Bhoomick *v.* Kenaram Kurmokar and another, 7 Suth. W. R, 33, Peacock, C. J., and L. S. Jackson, J.

(*b*) Vernede *v.* Abdul Giri Chinna Swami, 2 Mad. H. C. Rep., 427.

(*c*) See also the cases of Ram Suroop Mun Tewaree *v* Meer Nubee Buksh, S. D. A. (N. W. P.), 1861, p. 690; and Soorkit Oopadhya *v.* Byj Nath Oopadhya, *ib.*, 1862, p. 518.

(*d*) Lallah Gopeenauth *v.* Musst. Jeetun Kooer, 6 Suth. W. R., 57, Peacock C. J., and Loch J., Ranee Ketramoyee *v.* Rajah Opoorva Krishna Bahadoor, MS., Calcutta, April 26th, 1865.

(*e*) Ujalamayi Dasi *v.* Chandra Kumar Neogi, 4 B. L. R., F. B., 24.

(*f*) 7 Suth. W. R., 95.

contained in the new Code, Act X of 1872, chap. xxxix—he observed, that these summary powers are given to the Magistrate for the purpose of enabling him speedily to remove nuisances. If, when a Magistrate has entered into the question and has determined that a nuisance does exist, he is to be restrained by a Court of civil judicature from carrying his order into execution, it might be two or three years before the nuisance could be removed, by which time all the injury may have been actually sustained. Nor will a suit lie for the recovery of the land or for damages, where the order is for the removal of an obstruction, such as a hut or building standing on the highway (*a*), or for the filling up of a tank (*b*). It appears, however, that this view of the law is not taken by the High Court at Bombay, and that such suits are there allowed (*c*).

A Civil Court cannot entertain a suit to set aside an order of the Magistrate declaring a road a public road (*d*); that is a matter for the Criminal Courts to deal with (see Act X of 1872, Code of Criminal Procedure, chap. xxxix); where no trespass by the defendant to the plaintiff's property is alleged (*e*), and see *ante*, page 41. In a late case a suit was allowed, the object of which was to remove an obstruction in a public highway, no damage being alleged (*f*). But this is opposed to several cases (*g*). Peacock, C. J., and Mitter, J., thought it clear that the suit would not lie (*h*), but the damage need not in all cases have been actually incurred when the suit is brought; for instance, a plaintiff may sue for the removal of a bund without showing special damage (*i*), because when the rain falls his field will be flooded.

(*a*) Meechoo Chunder Sircar *v.* Ravenshaw, 11 Suth. W. R., 9.

(*b*) Sohun Patuck *v.* Omoola Koowur, Marshall, 7.

(*c*) Lalji Ukheda *v.* Jowba Dowba and the Collector of Khandesh, 8 Bom. H. C. Rep., A. C., 94.

(*d*) Rooke *v.* Pyari Lal, 3 B. L. R., App., 43; Pyari Lal *v.* Rooke, *ib.*, A. C., 305.

(*e*) Hirachand Banerjee *v.* Shama Charan Chatterjee, 3 B. L. R., A. C., 351.

(*f*) Trilochun Doss *v.* Gugun Chunder Dey, 24 Suth. W. R., 413;

(*g*) Parbaticharan Mookhopadhya *v.* Kalinath Mookhopadhya, 6 B. L. R., App., 73; Ramtarak Karati *v.* Dinanath Mandal, 7 *ib.*, 184; Buroda Pershad Moostafee *v.* Gorachand Moostafee, 3 *ib.*, A. C., 295; 12 Suth. W. R. 160, Peacock, C. J.

(*h*) See also Pearee Lall *v.* Rooke, 12 Suth. W. R., 199; and Heerachand Banerjee *v.* Shamachurn Chatterjee, *ib.*, 275.

(*i*) Ram Chand Chuckerbutty *v.* Nuddiar Chand Ghose, 23 Suth. W. R., 230.

In *Karim Buksh* v. *Budha* (*a*), the foregoing cases on this point were cited and approved of in the judgment of the Court; and the case of *Jina Runchod* v. *Jodha Ghella* (*b*) was stated to be contrary to the weight of authority. The case does not appear in the second edition of the first volume of the Bombay Reports, and it seems from the report in the first edition that the plaintiff alleged damage, contending on appeal that he had a right to sue "provided he was injured" (*c*).

The Civil Court will not interfere to restrain a criminal offence unless the plaintiff show some interference with his property (*d*). It has no jurisdiction to prevent the commission of crimes (*e*).

The Criminal Procedure Code (Act X of 1872) provides (see s. 530) for certain proceedings before a Magistrate in cases of disputed possession of property, where the dispute is likely to induce a breach of the peace. Again, Act XIV of 1859, s. 15, provided for certain suits for possession, merely where there had been an illegal dispossession. In both cases the ordinary civil remedy remains, and a suit can afterwards be brought to try the question of title. Act XIV of 1859 is now repealed, and s. 9 of the Specific Relief Act, I of 1877, takes it place (*f*).

26. "Where the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damages result from the use of such a thing independently of negligence, the party using it is not responsible" (*g*).

The Legislature may be presumed not to have conferred special powers on persons or companies without being satisfied that the exercise of them would be for the benefit of the public

(*a*) I. L. R., 1 All., 249, Turner and Oldfield, JJ., June 9, 1876.

(*b*) 1 Bom. H. C. Rep. 1, 1st ed.

(*c*) Parbati Charan Mukhopadhya *v.* Kali Nath Mukhopadhya, 6 B. L. R., App., 73.

(*d*) Southey *v.* Sherwood, 2 Mer., 435; Walcot *v.* Walker, 7 Ves., 1.

(*e*) Gee *v.* Pritchard, 2 Swanst., 402, Lord Eldon.

(*j*) See also Act V of 1864 (Bom.) and the case of Nagova Kow Jakan Punda, 3 Bom. H. C. Rep., A. C., 108, Couch, C.J; and Greesh Chunder Shaha *v.* Ali Meah, 8 Suth. W. R., 490, Kemp and Glover, JJ.

(*g*) R. *v.* Pease, 4 B. & Ac., 30; S. C., 2 L. J., N. S., M. C., 26; and *per* Cockburn, C. J., in Vaughan *v.* The Taff Vale Railway Co, 5 H. & N., 679; S.C., 29 L. J., N. S., Exch., 247.

as well as the grantees. On this principle it was decided that a waterworks company laying down pipes in the exercise of a statutory power, was not liable for damages occasioned by water escaping in consequence of a fire plug being forced out of its place by a frost of unusual severity (*a*). The same rule was applied by the Judicial Committee in a case (*b*) in which a zemindar was held absolved from the consequence of the bursting of a tank on his property, in consequence of which damages were sustained by a railway company. The ground of this decision was, that the zemindar was bound to maintain the tank by reason of his tenure. And the case was thus distinguishable from *Rylands* v. *Fletcher* (*c*), where the defendants had erected a reservoir for their own purposes, and were held liable for its overflow into a neighbouring mine. In that case Lord Cranworth stated the principle that "if a person brings, or accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage."

A railway company having statutory powers to run trains with locomotive engines were held not liable for a fire ignited by a spark from an engine, which destroyed the plaintiff's bungalow (*d*). In that case the engine was properly constructed for the burning of *coal*. Whether a company that consumed *wood* in a dry season would be equally exempt has never been expressly held and reported, but it would appear necessary for such a company to adopt at any rate extraordinary precautions against fire. It is clear that where the Legislature gives to a company limited powers, and it exceeds those limits, and damage ensues, it will be liable. Thus it was held in a case (*e*) that a railway company which had not express statutable power to use locomotive engines, was liable for damage done by fire proceeding from

(*a*) Blyth *v.* The Birmingham Waterworks Company, 25 L. J., Ex., 212.

(*b*) The Madras Railway Co. *v.* Zemindar of Carvetingaram, 14 B. L. R., 209, see p. 216.

(*c*) L. R., 8 H. L., 330.

(*d*) Halford *v.* The East Indian Railway Co., 14 B. L. R., 1.

(*e*) Jones *v.* The Festiniog Railway Company, L. R., 3 Q. B., 733; S. C., 37 L. J., N. S., Q. B., 214.

them, though negligence on the part of the company was negatived (*a*).

27. Where a liability already exists, and a Statute or Act declares the liability and gives a special remedy, the remedy may be sought either by suit, unless the words of the enactment excludes a suit, or in the way pointed out by the Statute or Act. If a new liability be created, and no special remedy be pointed out, the remedy is to be sought by suit. But if a new liability is created, and a particular form of remedy is pointed out, that remedy alone can be pursued (*b*). Where the Legislature creates an obligation to be enforced in a specific manner; as a general rule performance cannot be enforced in any other way (*c*). The English cases in which these principles were laid down were treated by Peacock, C. J., as authorities in India in a recent case (*d*) where it was held that a private ferry having been declared public under Reg. VI of 1819, s. 3, an individual, claiming compensation for the loss alleged to have been caused to him by the extension of the authority of Government cannot sustain an action in the Civil Courts to enforce his claim. By Reg. XIX of 1816 it was expressly provided that the Courts of Judicature should not take cognizance of any claims to deduction or compensation on account of the tolls levied at any ferry. These words are not found in Reg. VI of 1819, and it was contended that the Civil Courts must, therefore, have jurisdiction. But it was held that the plaintiff had *no cause of action* of which the Courts could take cognizance (*e*). It was held in another case (*f*) that a suit would not lie to enforce registration of a document under Act XX of 1866 (now repealed and

(*a*) See further on these points, Filliter *v.* Phippard, 11 Q. B., 347; Tubervil *v.* Stamp, 1 Salk, 13; Ruck *v.* Williams, 27 L. J., Ex., 357; S. C., 3 H. & N., 308; Smith *v.* The London and South Western Railway Co., L. R, 5 C. P., 98; S. C. in Exch., Ch. L. R., 6 C. P, 14; The Hammersmith Railway Co. *v.* Brand, L. R., 4 H. L, 171; R *v.* Pease, 4 B. & Ad., 30; Biscoe *v.* The Great Eastern Ry. Co, L. R, 16 Eq., 636; Fremantle *v.* The London and North-Western Ry. Co., 10 C. B., N. S., 89; Parker *v.* The Great Western Ry. Co., 7 M. & G., 253; Scales *v.* Pickering, 4 Bing., 448; Clowes *v.* Staffordshire Potteries, L R., 8 Ch., 125; Rajmohun Bose *v.* The East Indian Ry. Co, 10 B. L. R, 241.

(*b*) Wolveshampton Waterworks Co. *v.* Hawkesford, 28 L. J., N. S., C P., 242; see p. 244.

(*c*) Stevens *v.* Jeacocke, 11 Q. B, 731; *Doe* d Bishop of Rochester *v.* Bridges, 1 B. & Ad., 847.

(*d*) Collector of Pubna *v.* Romanath Tagore, B. L. R., F. B., 630.

(*e*) See also Berkeley *v.* Elderkin, 1 E. & B., 805.

(*f*) Tulsi Sahu *v.* Madheo Das, 2 B. L. R., A. C., 105.

re-enacted, Act III of 1877); that the plaintiff should have proceeded under s. 83 of that Act which provided a remedy. The defendants in that case denied the execution of the deed, and the Registrar had consequently refused to register the document. The case of *Sheikh Rahmatulla* v. *Sheikh Sariutulla Kagchi* (a) was referred to as an authority that such a suit could not be instituted. But that was a suit to establish the title of the plaintiff as purchaser of the land, and to set aside his fraudulent objections to the deed, which was not registered, which required to be registered, and which the plaintiff offered to put in evidence for the purpose of this suit notwithstanding that the Act declared it should not be received in evidence. The defendant had not denied the execution of the document, but, when he was before the Registrar, had stated that it was not intended to operate as a bill of sale, which it purported to be, and the Registrar thereupon refused to register it, which he ought not to have done. The question whether a suit could be brought to compel registration against a defendant, who having executed a deed refused to go before the Registrar and complete the document, did not arise for decision in this case; but some of the Judges did state their opinion that such a suit would be maintainable; see the remarks of Macpherson, J., at the top of page 86, and of Bayley, J., p. 91. Mitter, J., who dissented on the question before the Court from the rest of the Judges, thought that the plaintiff had this remedy, and the other two Judges, Peacock, C. J., and L. S. Jackson, J., did not touch the point. No doubt, a suit could not be brought against the Registrar himself, because a special remedy is provided when he refuses to register. In the case of *Rajah Kishen Kishore Chund* v. *Mahomed Zuhab-oll-lah* the point directly arose. That was a suit brought when Act XVI of 1864 was in force. S. 15 of that Act provides for a civil suit when the Registrar refuses to register and so far the procedure differs; but the Court held that a suit would lie where one of the *parties to the deed* refused to register it, as well as when the deed was brought to the Registrar and he refused. The procedure in the latter case is now altered, but no change has been made in the law with respect to the former.

28. Lord Campbell's Act, 9 and 10 Vict., c. 93, was extended to India by XIII of 1855, under which Act a suit was brought by a

(a) 1 B. L. R., F. B., 58.

widow to recover damages for loss of her husband, a clerk in the railway office, by explosion of detonating powder packed in a box not marked "dangerous," or otherwise notified to the Company as required by s. 15 of Act XVIII of 1854. The case was decreed in favor of the plaintiff, although the defendant was not proved, in the opinion of the Court, to have been cognizant of the fact that the thing was dangerous. Damages were accorded on the basis of the husband's salary and the presumed value of his life (*a*). Pearson, J., dissenting, thought that no civil liability attached. [The defendant was a chemist, and had prepared the powder.]

29. In order to support a suit for malicious prosecution, it has been held by the Judicial Committee of the Privy Council, that the plaintiff must allege and prove that the defendants were the prosecutors against him; that they were actuated by malice and the absence of reasonable and probable cause (*b*). The malice may sometimes be inferred from the absence of reasonable and probable cause, but malice itself is not sufficient if there was reasonable and probable cause for the prosecution (*c*). In a suit for maliciously arresting the plaintiff in a suit in which he was defendant, and the defendant plaintiff, or attaching his property, it is also necessary to show malice in law and want of reasonable and probable cause. "A creditor is not entitled, merely because he has a just demand against his debtor, to resort to the extraordinary process of arrest or attachment or mesne process. Those processes are intended to secure to the creditor his rights, when there is reason to believe that his debtor is about to depart from the jurisdiction of the Court or to make away with his property. If a creditor without reasonable or probable cause procures his debtor to be arrested, or his property to be attached on mesne process, he inflicts an injury for which he must make compensation" (*d*). But the Courts differ in opinion as to whether a suit will lie for maliciously instituting a civil suit without reasonable and probable cause. In Bombay it has been held that no such

(*a*) Lyell *v.* Ganga Pal, I. L. R., 1 All., 60 (a Full Bench), 1st June, 1875.

(*b*) Baboo Gunesh Dutt Singh *v.* Mugneeram Chowdhry, 11 B. L. R., 329.

(*c*) Annundloll Doss *v.* Jointee Chunder Sen, 1 In. Jur., N. S., 23; Svami Nayudu *v.* Subramania Mudali, 2 Mad. H. C. Rep., 158; Vengama Naikar *v.* Raghava Chary, *ib.*, 291; Dunne *v.* Legge, 1 H. C. Rep., N. W. P., 1866, p. 38; Kedarnath *v.* Rughonath, 6 *ib.*, 104; Weatherall *v.* Dillon, *ib.*, 200.

(*d*) Goutiere *v.* Robert and Charriol, 1 H. C., N. W. P., 1869, p. 32.

action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause; nor will it lie to recover the costs awarded by a Civil Court, though it may lie for costs which have been incurred through the default of the defendant; in consequence of which the plaintiff took civil proceedings in a Court which had no power to award costs under the Act by which it was constituted (*a*).

In Madras on the other hand a suit (*b*) was held to be maintainable to recover costs incurred in proceedings taken in compelling the registration of a deed under Act XX of 1866, which Act did provide for the adjudication of costs. In Bengal (*c*) a suit was instituted for the purpose of recovering damages against a person for maliciously and without reasonable or probable cause procuring a suit to be instituted: the plaintiffs in that suit were people of no means; they sued to recover land in the district of Hooghly; their suit was dismissed; they then appealed, and the decree was reversed by the High Court, whose decree was again reversed by the order of the Judicial Committee. The plaintiffs, defendants in the suit, were let into possession, and security for costs was given, and they took proceedings for the recovery of mesne profits, which were ultimately unsuccessful. The plaintiffs alleged that these proceedings had cost them Rs. 25,000. Macpherson, J., gave judgment for them, and although his judgment was reversed by Couch, C. J., and Pontifex, J., on appeal, the Chief Justice remarked:—

"The action may be brought against the defendant although he was not a party to the suit, because an action would be maintainable against the plaintiffs in the suit if they instituted it without reasonable and probable cause. Practically, such actions are seldom or never brought, because if the suit has been brought without reasonable and probable cause, the judgment will be in favor of the defendant, and he will get his costs by the judgment in the suit. Consequently, actions for instituting proceedings without reasonable and probable cause are mostly where the proceedings were

(*a*) Pranshankar Shivshankar *v.* Govindhlal Parbhudas, I. L. R, 1 Bom, 467; Melvill and Nanabhai Haridas, J.J, citing Addison on Torts, 3rd ed, 599.

(*b*) Chengulva Raya Mudali *v.* Thangatchi Ammal, 6 Mad. H. C. Rep., 192.

(*c*) Chanderkant Mookerjee *v.* Ramcoomar Koondu, 13 B. L. R., 530. See also Beauchamp *v.* Croft, Keilwey, 26; Savile *v.* Roberts, 1 Lord Raym., 374; and the remarks of Lord Holt, p. 379.

of a criminal nature, as an action for a malicious prosecution; or where the action is one in which the defendant has been arrested, and then where the action is for the malicious arrest. But in order to maintain an action of this kind, there must be malice, and the suit must have been brought without reasonable or probable cause." In this last case it was urged that the defendant had unduly maintained the action, and that the transaction was champertous in character, but it was held that the English law as to maintenance and champerty are not applicable in India (*a*.)

30. The various Acts which constitute Municipal bodies provide for the most part that they may sue and be sued in the name of their President. The members of the Municipality are not individually and personally liable on any contract made or for any expense incurred by or on behalf of the Committee, but the funds from time to time in the hands of the Committee are liable for and chargeable with all contracts, &c. Notice of the suit must be given, such notice must be proved, and the suit must be brought within a specified period after the right to sue accrues, and the defendant may tender amends (*b*).

Other provisions of this nature are to be found in Acts relating to Customs, Excises, Salt Revenue, Police, Arms and Forests Acts, Acts relating to Volunteer Corps, &c.

These provisions apply when the proceedings have been taken by the public officer *bonâ fide* in the belief that he is exercising a power conferred by the Act, not if they are not justified and are only colorably done under cover of the Act (*c*). The objection to want of notice must be taken in the lower Court, and if not so taken, cannot be raised on appeal (*d*).

31. A suit against an Administrator-General in his representative capacity may be brought against him in his name of office, and does not abate on his death, resignation or removal from office Act II of 1874, s. 34.

If any suit be brought by a creditor against him in his

(*a*) See also Chedambara Chetty *v.* Renga Krishna Muthu Vira Puchaiya Naickar, L. R, 1 T. A., 124.

(*b*) See Act V of 1876 (B C.) Bengal, Act IV of 1876 (B.C.) Cal; XV of 1873, N. W. Provinces and Oudh; IV of 1873, Punjab; XI of 1873, Cen. Provinces; VII of 1874, British Burmah; XVIII of 1864, Lucknow, &c.

(*c*) Gopeekishen Gossain *v.* Ryland, 9 Suth. W. R., 279, Bayley & Phear, JJ

(*d*) Narain Deen Tewaree *v.* Rajah Ramdass, 8 Suth. W. R, 425, Seton-Karr and Macpherson, JJ.

representative capacity the plaintiff shall be liable to pay the costs of the suit down to and including decree unless upon proof by affidavit or otherwise that not less than one month previous to the institution of the suit he had applied in writing to the Administrator-General, stating the amount and other particulars of the claim, and supporting the same by such evidence as, under the circumstances of the case, the Administrator-General was reasonably entitled to require, and that the Administrator-General has refused or neglected to register the claim according to the practice of his office.

If in any such suit judgment is pronounced in favor of the plaintiff, he shall, nevertheless, be only entitled to payment out of the assets of the deceased equally with the other creditors, s. 35.

32. There are certain persons whom the Legislature has thought fit to exempt from civil suits, in consequence of their property being put under the administration of officers selected by the Government or for other reasons. The effect of this is, of course, to deprive them of the credit which attaches to property and to place them, so to speak, in leading strings. Thus, by Act XVIII of 1848, for the administration of the estate of the Nawab of Surat, and to continue the privileges of his family, it was enacted (s. 1) that no writ or process should be sued forth against the person, goods, or property of the several persons named in the schedule to the Act without the consent of the Governor of Bombay in Council, and that all such writs, &c, sued out without such consent should be null and void. In like manner, the ex-King of Oudh was exempted from civil process without the consent of the Governor-General in Council (Act VIII of 1862, s. 4). This section is repealed, but re-enacted by s. 2 of Act XIII of 1868, which, by s. 3, renders his ex-Majesty incapable of contracting.

By Act XXIV of 1870, s. 4, suits against talukdars in Oudh are barred, and they are protected from arrest in respect of their liabilities when the appointment of a manager has been notified under s. 3.

By Act XV of 1871, s. 4, Thakars of Broach cannot be sued or arrested for their debts or liabilities after publication of appointment of a manager of their property under s. 3.

Act XVII of 1873 (Nawab Nazim's debts) s. 11, bars civil suits and process against the person or property, unless with the consent of the Governor-General in Council.

The Prince of Arcot cannot be sued without the sanction of the Governor of Madras (Act XX of 1873, s. 2).

The Chutia Nagpur Encumbered Estates Act, VI of 1876, s. 3, bars civil suits and process in respect of liabilities of persons whose property is, by proclamation under s. 2 of the same Act, vested in a manager.

By Act XIV of 1876 (Sindh Incumbered Estates), s. 8, suits respecting debts and liabilities mentioned in s. 7 of that Act are, on publication of the order of management, suspended, and so long as the management continues, barred in all Civil Courts.

33. As the Civil Courts have jurisdiction to try all suits of a civil nature except suits of which their cognizance is barred by any enactment for the time being in force, it follows that nothing that can be done by the parties to a dispute of a civil nature can bar the jurisdiction of the Civil Court, unless it be done in pursuance or in accordance with some enactment which has that effect. The question how far private individuals may agree to shut out the jurisdiction of the civil tribunals, and to bar their cognizance of any particular matter, has been the subject of discussion in many cases; the result of these cases has been embodied in a late enactment in this country—the Indian Contract Act (IX of 1872), s. 28—which enacts that "every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

"*Exception* 1.—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred."

This section is based upon a judgment of Chief Baron Kelly (*a*).

A contract was made in India, under which the plaintiffs sold to the defendants some castor oil at 5*d.* per lb. English, cost and

(*a*) In Elliott *v.* The Royal Exchange Assurance Co., 36 L. J., N. S., Exch., 129; see also Scott *v.* Avery, 25 *ib.*, 309; Braunstein *v.* The Accidental Death Co., 31 *ib.*, Q. B., 17; Coper *v.* Lendon, 28 *ib.*, 280; Horton *v.* Sayer, 29 *ib.*, Exch., 28; Tredwell *v.* Holman, 31 *ib.*, 398; Luckie *v.* Bushby, 22 *ib.*, C. P., 220; Arnould on Marine Insurance (Maclachlan), 997-8; Willesford *v.* Watson, 42 L. J., N. S., Ch., 447.

freight per sailing vessel to London; and it was agreed that, "in case of any dispute, the same to be decided by two competent London brokers, one to be appointed by the buyers', the other by the sellers' agents; such brokers' decision to be final." There was no provision for making the submission to arbitration a rule of Court. A dispute arose, and the defendants refused to appoint an arbitrator. An award was made by the arbitrators appointed by the plaintiffs. Previous to the making of the award, the plaintiffs, under the provisions of the Common Law Procedure Act, 1854, had the submission made a rule of the Court of Common Pleas. In a suit in Calcutta for damages upon the award, it was contended that, as in fact there had been no reference, there was no award, and it was so decided. Nor could a suit be maintained for specific performance of the agreement to refer. Under the 28th section of the Indian Contract Act (IX of 1872), it does not appear that the Court could decree specific performance in such a case (*a*).

It would seem that the Legislature, in enacting excep. 1 to s. 28, intended to make contracts similar in character to those in *Scott* v. *Avery* (*b*) and in *Tredwen* v. *Holman* (*c*) lawful contracts (*d*).

The question as to how far the Government of India, in its executive or in its legislative capacity, can take away the jurisdiction once conferred upon a Court in British Indian territory, was argued at considerable length on two occasions before the Judicial Committee of the Privy Council (*e*). There the point was raised whether the Crown, without the concurrence of the Imperial Parliament, has the power to cede territory within the jurisdiction of any of the British Courts of Justice, in time of peace, to a foreign power; and it was considered by the High Court at Bombay that it had no such power. This question was argued at the bar before the Judicial Committee, and the Committee, without deciding the case upon that point, which they considered unnecessary, expressed grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the High Court. The place in question was the village

(*a*) Koegler *v.* The Coringa Co., I. L. R., 1 Calc., 42, Phear, J., May 27, 1875.

(*b*) 5 H L. C., 811.

(*c*) 1 H. & C., 72.

(*d*) Koegler *v.* The Coringa Co., I. L R., 1 Calc., 42, Phear, J., May 27, 1875.

(*e*) Damodar Gowhan *v.* Deoram Kanji, I. L R., 1 Bom., 367 (P. C.), 1875-6.

of Gangli, in the pergunnah of Gogo, in the district of Ahmedabad; and the suit was a suit for land, the supposed cession had taken place pending the litigation. The Judicial Committee found however, on a review of the treaties and engagements, that there had in fact been no such cession, unless it could be deemed to have been made by a certain notification which merely declared that the place in question were, from and after a certain date, removed "from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay Presidency, and transferred to the Political Agency at Kattywad, on the same condition, as to jurisdiction, as the villages of the talooka of the Thakors of Bhaunagar heretofore in that Province." The Committee agreed in the reasons given by the Judges of the High Court of Bombay for holding this notification insufficient for the purposes intended. "What was attempted was," in the judgment of the Committee, "nothing more or less than a re-arrangement of "jurisdictions within the British territory, by the exclusion of a "certain district from the Regulations and Codes in force in the Bom-"bay Presidency and from the jurisdiction of all the High Courts, "with a view to the establishment therein of a native jurisdiction, "under British supervision and control. But this could not be done "without a Legislative Act, which, in this case, was never passed. "By the Imperial Statute 3rd and 4th William IV, c. 85, s. 43, "a general power of legislation (with certain exceptions not material "for this purpose) was given to the Governor-General in Council "as to" (among other things) "all Courts of Justice, whether "established by Her Majesty's Charters or otherwise, and the juris-"diction thereof." This power is in substance continued by 24 and 25 Vict., c. 67, s. 22, though the particular clause of the former Statute is thereby repealed. By the 24th and 25th Vict., c. 104, s. 9, "the High Courts of the several Presidencies were "established with such jurisdiction as Her Majesty should, by "her Letters Patent, confer upon them; and under the same "Statute, each of those Courts was also to have and to exercise, "save as by Her Majesty's Letters Patent might be otherwise "directed, and subject to the legislative powers, in relation to "the matters aforesaid, of the Governor-General in Council, all "jurisdiction, power, and authority previously vested in any of "the East India Company's Courts within the same Presidency "which were abolished by that Act. It is unnecessary to refer "to later enactments, which only modified these provisions in "a way not affecting the present case. The jurisdiction, there-

"fore, of the Courts of the Bombay Presidency over Gangli, "rested, in 1866, upon British Statutes, and could not be taken "away or altered (as long as Gangli remained British territory) "so as to substitute for it any native or other extraordinary "jurisdiction, except by legislation in the manner contemplated "by those Statutes. Upon two subordinate points in this case, "their Lordships think it right to add that they agree with "the view taken by the High Court of Bombay. Nothing "in their judgment turns in this case upon the Indian Evi-"dence Act of 1872, s. 113. The Governor-General in Council "being precluded by the Act, 24 and 25 Vict, c 67, s. 22, from "legislating directly as to the sovereignty or dominion of the "Crown over any part of its territories in India, or as to the alle-"giance of British subjects, could not, by any legislative Act, pur-"porting to make a notification in a *Government Gazette* conclu-"sive evidence of a cession of territory, exclude inquiry as to the "nature and lawfulness of that cession. And with respect to the "competency of the Courts of the Bombay Presidency to proceed "with the suits between these parties, if Gangli had, by any valid "cession, ceased to be British territory, their Lordships agree with "the High Court that the foundation of the jurisdiction of those "Courts over the subject-matter of this suit, and the parties thereto, "was territorial, and that it could no longer be exercised (whatever "might be the stage or condition of the litigation at the time) after "such a valid cession had been made" (*a*).

In consequence of this expression of opinion of the Judicial Committee, an Act was passed (The Bhaunaggar Act), No XX of 1876 (with retrospective effect to the 1st of February, 1866), by which certain villages were excluded from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay Presidency, and the validity of all executive acts after that date affirmed, and suits in respect of such acts were barred.

Legislative enactments of this nature had been passed before from time to time. See for instance, Acts XXIV of 1839 (Ganjam), XIV of 1861 (Rohilcund), I of 1864 (Banda), XIX of 1864 (Mirzapore), and III of 1870 (Agror Valley). Wherever it is sought to oust the jurisdiction of a Civil Court under such authority, it must be shown that such authority exists. This

(*a*) See also the case of The Cossyah & Jynteeah Hills: The Queen *v.* Burah & Book Singh, I. L. R., 3 Calc., 63.

Code extends to the whole of British India, and wherever a Civil Court is established in that territory, will *primâ facie* apply.

The plea of want of jurisdiction may be taken at any time (*a*); and it may happen that although there was *primâ facie* jurisdiction, some circumstance has occurred to take it away.

The above observations upon this section will, it is hoped, be of use and some guide in the institution of suits, but particular attention must also be given to the forms of plaints set forth in Sched. iv to this Act (Nos. 1 to 113, inclusive), which, subject to the limitation of s. 644, *post*, can be used in all Courts in suits instituted under this Code.

Pending suits.

12. (S.) Except where a suit has been stayed under section 20, the Court shall not try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties, or between parties under whom they or any of them claim, pending in the same or any other Court, whether superior or inferior, in British India having jurisdiction to grant such relief, or in any Court beyond the limits of British India established by the Governor General in Council and having like jurisdiction, or before Her Majesty in Council.

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action:—

See the note to the next section as to what is a suit directly and substantially in issue between the same parties or between parties under whom they or any of them claim.

In this section the words "for the same relief" are inserted, and the words "litigating under the same title" are omitted.

Res judicata.

13. (S.) No Court shall try any suit or issue, in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit

(*a*) Nobeen Kishen Mookerjee *v.* Shib Pershad Pattack, 7 Suth. W. R., 490.

between the same parties, or between parties under whom they or any of them claim, litigating under the same title.

Explanation I.—The matter above referred to must, in the former suit, have been alleged by one party and either denied or confessed, expressly or impliedly, by the other.

Explanation II.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation III.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

Explanation IV. — A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

Explanation V.—Where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

This explanation should be read with s. 30, *post*, otherwise a person might be bound by a decision in a suit of which he has had no notice.

Explanation VI.—Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction.

This section corresponds with s. 2 of Act VIII of 1859.

1. The principle upon which it is based is thus stated by De Grey, C. J.:—"From the variety of cases relative to judgments "being given in evidence in civil suits, these two deductions "seem to follow as generally true: *first*, that the judgment "of a Court of concurrent jurisdiction directly upon the point, "is, as a plea, a bar, or, as evidence, conclusive, between the "same parties, upon the same matter directly in question in "another Court; *secondly*, that the judgment of a Court of exclu-"sive jurisdiction, directly upon the point, is, in like manner, "conclusive upon the same matter between the same parties com-"ing incidentally in question in another Court for a different "purpose. But neither the judgment of a concurrent or exclusive "jurisdiction is evidence of any matter which came collaterally "in question, though within their jurisdiction, nor of any matter "incidentally cognizable, nor of any matter to be inferred by argu-"ment from the judgment" (*a*).

In a case (*b*) decided by the Judicial Committee on the corresponding clause of Act VIII of 1859 (s. 2), it was said, that this enunciation of the principle is of such authority that it is the established general guide, equally applicable to suits in India, and not peculiar to the law of England.

2. As a general and almost universal rule, a judgment in a suit between two persons does not, in any way, affect others. There are some few cases, however, in which this is not the case, and in which the judgment and the decree are said to be *in rem*, a phrase borrowed from the commentators on the Roman law, which law gave that name to certain actions. The fact that judgments and decrees which could be classed in this category concluded third parties, gave rise in this country to many arguments insisting upon its application to cases in which it was alleged that judgments and decrees determining the *status* of a particular person in a suit was binding on strangers to the suit. This contention was negatived in a case (*c*), where it was held that a decree in a suit by A. against B., A. claiming as widow to succeed to her husband's estate in preference to B., his nephew,

(*a*) Duchess of Kingston's case, 2 Smith's L. C., 680, 6th ed.

(*b*) Khugowlee Sing *v.* Hossein Bux Khan, 7 B. L. R., 673; see p. 678.

(*c*) Katama Natchiar *v.* The Rajah of Shivagunga, 9 Moo. I. A., 539; see p. 601.

on the ground of the family being a divided Hindu family, did not operate as *res judicata*, and could not be pleaded in bar to a suit by C., a daughter claiming to succeed to her father's estate on A.'s death, on the ground that the property was self-acquired by her father. The judgment and decree in such a case determined only an issue raised concerning a particular person, and was not *in rem*, but simply *inter partes* (*a*). This section is in fact declaratory and founded on the principle "*nemo debet bis vexari pro eâdem causâ.*" A decision of a competent Court in a proper suit, as to the status of one of the parties in relation to the other, concludes the matter, and it cannot be again tried in another suit *between them.* Thus, where the question of adoption is set up by the defendant in one suit and directly determined against him, he cannot, by making himself plaintiff in another suit, re-open the same question (*b*). This overrules the case of *Kriparam* v. *Bhagwan Dass* (*c*), where it had been held that where, in a suit between A. and B. for land (A.'s title depending upon his adoption), it had been decided that A. was not adopted, A. might sue B. again for other land, and might again set up his alleged adoption. A decree establishing the fact of legitimacy in a question of succession between A. and B., was sought to be set up as a matter *in rem* in a subsequent suit between C. and the son of B. But it was held, that this was not so; and a strong doubt was expressed by the Judicial Committee as to whether there was in India (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like, and which in the case of war might be exercised in matters of prize), any ordinary Court capable of giving a judgment *in rem.*

It does not appear to have been noticed in the Privy Council case (*d*), decided in 1871, that Act X of 1865, the Indian Succession Act, had conferred upon the District Courts in India jurisdiction in matters of probate, &c. In another case (*e*) decided in 1867, it had

(*a*) See also Yarakatamma *v.* Anakala Naramma, 2 Mad H. C. Rep, 176; Chinniya Mudali *v.* Venkatchella Pillai, 3 *ib.*, 320.

(*b*) Krishna Behari Roy *v.* Bunwari Lall Roy, L. R., 2 I. A., 283; S. C., I. L. R., 1 Calc., 144 (P. C.), November 17, 1875.

(*c*) 1 B. L. R., A. C., 68.

(*d*) Jogendro Deb Roycut *v.* Funindro Deb Roycut, 11 B. L. R., P. C., 247.

(*e*) Kanhaya Lall *v.* Radachurn, 7 Suth. W. R., F. B, 338; S. C., 2 In. Jur, N. S., 229, and B. L. R. F. B., 662.

been held by a Full Bench of the High Court at Calcutta, that a judgment determining a question of adoption in a former suit could not be given in evidence in another suit in which the parties were not identical. Peacock, C. J., who delivered the judgment, had expressed the same opinion that no Mofussil Court could pronounce a judgment which could be called *in rem*, or be so binding (*a*). So again it was held that a judgment declaring a deed void as against A. is not a judgment *in rem* but *inter partes*, and is not a bar to another suit brought by the plaintiff relying on the same deed, but against B. (*b*).

It is stated (*c*), that the Select Committee on the Indian Evidence Bill, which subsequently became Act I of 1872, for the sake of convenience, and in order to avoid the difficulty of defining or enumerating judgments *in rem*, adopted the statement of the law by Sir Barnes Peacock in *Kanhya Lall* v. *Radha Churn*. The clause in question is s. 41, which, as amended by Act XVIII of 1872, s. 3, runs as follows :—

"A final judgment, order, or decree, of a competent Court, in "the exercise of probate, matrimonial, admiralty, or insolvency "jurisdiction, which confers upon or takes away from any person "any legal character, or which declares any person to be entitled to "any such character, or to be entitled to any specific thing, not as "against any specified person, but absolutely, is relevant when the "existence of any such legal character, or the title of any such person to any such thing, is relevant.

"Such judgment, order, or decree is conclusive proof, that any "legal character, which it confers, accrued at the time when such "judgment, order, or decree came into operation; that any legal "character to which it declares any such person to be entitled, "accrued to that person at the time when such judgment, order, or "decree declares it to have accrued to that person; that any legal "character which it takes away from any such person ceased at the "time from which such judgment, order, or decree declared that it "had ceased or should cease; that any thing to which it declares "any person to be so entitled was the property of that person at "the time from which any such judgment, order, or decree declares "that it had been or should be his property."

(*a*) See also Gungadhur Roy *v.* Wooma Soonderee Dassee, 7 Suth. W. R., F. B, 347; S C., 2 In. Jur., N. S., 120, and B. L. R., F. B., 672.

(*b*) Dagdu *v.* Shekh Saheb, 2 Bom. H. C. Rep., 348; Balaji *v.* Dharma, *ib*, 363.

(*c*) See B. L. R., F. B., 671.

Jurisdiction in matters of probate is conferred by Act X of 1865, and in the case of Hindu wills, by Act XXI of 1870. In matters matrimonial, by Act IV of 1869, which applies only to British subjects; see also the Charters of the High Court, 1865 and 1866; and in matters matrimonial among Parsees, by Act XV of 1865. Admiralty jurisdiction is conferred on the High Courts at the Presidency Towns (see Charters, 1865), by virtue of which they now exercise also jurisdiction in insolvency; which is also given to the Recorders' Courts in British Burmah by Act XVII of 1875, s. 66, and to a limited extent to Courts in the Punjab, by Act IV of 1872, ss. 22 to 33 inclusive, and to all District Courts, by the 20th chapter of this Code.

3. In order that a suit may be barred by a previous decision, it is necessary in the first place that *the matters directly and substantially in issue in both suits should be the same.* It is not necessary, however, that in point of form the suits should be identical. The "cause of action" means the cause of action in substance, not merely in form, thus, to quote the words of the Judicial Committee of the Privy Council:—"If both parties invoke the opinion "of the Court upon a question, if it is raised by the pleadings and "argued, their Lordships are unable to come to the conclusion that, "merely because an issue was not framed which, strictly construed, "embraced the whole of it, therefore the judgment upon it was "*ultra vires.* To so hold would appear scarcely consistent with "the case of *Musst. Mitna* v. *Syud Fuzl Rub* (*a*), wherein it "was held that, in a case where there had been no issues at all, "but where, nevertheless, it plainly appeared what the question "was which was raised by the parties in their pleadings, and "was actually submitted by them to the Court, the judgment upon "it was valid" (*b*). "The term 'cause of action' is to be construed "with reference rather to the substance than to the form of the "action. But even if this interpretation were not correct, their "Lordships are of opinion, that this clause in the Code of Procedure "would by no means prevent the operation of the general law relat-"ing to *res judicata* founded on the principle *nemo debet bis vexari* "*pro eâdem causâ.* This law has been laid down by a series of cases "in this country with which the profession is familiar. It has pro-"bably never been better laid down than in a case which was

(*a*) 13 Moore's I. A., 573.

(*b*) Soorjomonee Dayee *v.* Suddanund Mohapatter, 12 B. L. R., 304 (P. C.), July, 1873.

"referred to (*a*), in which Lord Hardwicke held, that when a ques-
"tion was necessarily decided in effect, though not in express terms,
"between parties to the suit, they could not raise the same question
"as between themselves in any other suit in any other form: and
"that decision has been followed by a long course of decisions, the
"greater part of which will be found noticed in the very able notes
"of Mr. Smith to the case of the *Duchess of Kingston*" (*b*).

If a suit is brought for land, and decided against the plaintiff, another suit will not lie at the instance of the same plaintiff against the same defendant, for rent or mesne profits in respect of the occupation of the same land (*c*). So where a suit was brought to recover possession of lands, from which the plaintiff alleged he had been dispossessed in the month of Jeyt, 1253, and the plaint asked for wasilut as it might be determined, but it did not specify the amount or give a separate valuation, the plaintiff obtained a decree for possession, and wasilut from the date of the plaint up to the date of recovery of possession. A subsequent suit between the same parties for wasilut between 1253 and 1264 (the date of the plaint) was held to be barred (*d*). A suit for mesne profits alleged to be due between the institution of the suit and the execution of the decree, where mesne profits were claimed in the original suit, cannot be maintained (*e*).

In a foreclosure suit, A. was plaintiff, and B., C., and D., defendants. It was held that A. was estopped by a previous decision in a suit for ejectment relating to the same property in which C. and D. were plaintiffs and A. defendant (*f*). A suit which treats a man as a trespasser on land, and a suit which treats him as a tenant, and in which rent is claimed from him, are not of the same cause of action (*g*); and a landlord who fails in a suit for rent, can sue for possession (*h*). Where a suit for ejectment, on the ground that the defendant had entered the plaintiff's land wrongfully and forcibly, had been dismissed by the Court, which found that

(*a*) Gregory *v.* Molesworth, 3 Atkyns, 626.

(*b*) 2 Smith's L. C., 6th ed., p. 679; see 12 B. L. R., 315.

(*c*) Khurga *v.* Mahomed Abdoor Sookur, S. D. A., N. W. P., 1863, p. 17.

(*d*) Luteefoonissa Bebee *v.* Luckeemace Dassee, Hay, 161.

(*e*) Narayana Aiyan *v.* Srinivasa Aiyan, 2 Mad. H. C. Rep., 435.

(*f*) Mohinddin *v.* Muhammad Ibrahim, 1 Mad. H. C. Rep., 245, Scotland, C. J., and Bittleston, J.

(*g*) Kadir Buksh *v.* Golam Ali Gomastah, 9 Suth. W. R., 90, Peacock, C.J., and Mitter, J.

(*h*) Kasheenath Bose *v.* Saroda Soonduree Chowdhrain, 19 Suth. W. R., 97.

the defendant was not a trespasser but a tenant, and the plaintiff sued again on the allegation that the defendant was then a trespasser, though lately a tenant, it was held, that the suit was not prohibited. That particular suit was, however, dismissed, as the plaintiff had not terminated the tenancy by giving reasonable notice to quit (*a*). Failure in a suit of simple ejectment does not bar a subsequent suit for redemption, notwithstanding that the defendant had asserted the existence of his mortgage in the former suit (*b*). A decree in a suit brought by a person claiming as heir or co-parcener, is no bar to a second suit to try his right as donee or devisee of the same property; for the question of right would be different unless the latter right appeared to have been in question in the first suit (*c*).

L. and R., who were patnidars of a talook, granted a darpatni to S., who sold his darpatni to L. M. There was no registration of the transfer by way of mutation of names, and no recognition by L. and R. of L. M. as their tenant. The rent of the darpatni was paid in the name of S. In 1864 L. and R. made default in payment of this patni rent, and the zemindar put up the talook for sale for their default. Whereupon L. M., to save his own interest from sale, deposited the amount of the patni rent in Court. At the same time L. M. was in arrears with his darpatni rent, and applied to L. and R. to set off the amount so deposited against this. L. and R. refused to do this, and sued S. for the darpatni rent. L. M. intervened in this suit, and contended for the set-off, which was disallowed. L M. then sued S. for the amount they had deposited. It was held that this suit was not barred as *res judicata* (*d*).

The defendants contracted to supply to the plaintiffs, livery stable-keepers, as much straw as they required during a specified time. The plaintiffs, on March 12th, sued the defendants for Rs. 198, damages for breach of the contract, and obtained a decree; their cause of action was general, for "damages sustained by the plain-" tiffs by reason of your failing to supply straw as agreed between

(*a*) Heera Rawut *v.* Racha Rawut, 22 Suth. W. R, 115, Phear and Morris, JJ.

(*b*) Shridhar Viná Yak *v.* Náráyánvalad Babaji, 11 Bom. H. C. Rep., 224, West and Larpent, JJ.

(*c*) Udaiyar Tevar *v* Katama Natchiar, 2 Mad. H. C. Rep., 131, affirmed on appeal to the Privy Council; Chinniya Mudali *v.* Venkatachella Pillai, 3 *ib.*, 320.

(*d*) Luckhinarain Mitter *v.* Khettro Pal Singh Roy, 13 B L. R., 146, P. C.

"you and them." On the 21st April, they again sued "for damages sustained by the plaintiffs by reason of your failing to supply straw as agreed between you and them from the 20th February to the 17th April." This suit was dismissed by the Judge below (of the Small Cause Court, Calcutta) on the ground that the matter was *res judicata;* but a new trial was obtained, and he ultimately gave a decree for "so much of the damages claimed as had been sustained since the 25th of March." In another action brought by the plaintiffs against the defendant on the same contract for damages sustained between the 17th April and 16th June, it was held by the High Court that the finding of the Judge in the action brought on the 12th March was conclusive as to the contract, and that the defendant's plea of *res judicata* was bad (*a*). Certain property was mortgaged to the defendants by a zur-i-peshgee lease. The plaintiffs brought a suit to recover possession of the property, and obtained a decree, subject to the payment of a certain sum still due by them; they did not avail themselves of the decree, and four years afterwards brought a fresh suit to recover possession, on the allegation that the principal with interest due under the zur-i-peshgee lease had been discharged by usufruct of the property. It was held that the substantial cause of action in the present suit was the state of accounts since the decree in the first suit; that this was an entirely fresh cause of action, and that the second suit was not barred (*b*). A plaintiff having in a former suit obtained a declaration that certain land was his mâl land, and not defendant's lakheraj, served the defendant with a notice to quit, and on his noncompliance with that demand, brought the present suit for ejectment and *khas* possession. It was held, that the suit was not barred, the causes of action in the two suits not being the same (*c*). A former suit brought by the daughter of one of four brothers of a joint Hindu family against her uncles for a declaration of her right to a share in certain bond-debts due to the joint estate (in which suit she obtained a decree), is not identical with a subsequent suit brought by the same plaintiff against the same defendants for a distinct share in certain moneys, which the defendants have since realized upon the bond-debts and have appro-

(*a*) Cook and others *v.* Jadab Chandra Nandi, 2 B. L. R., O. J., 48; see also Baban Mayacha *v.* Nagu Shravucha and others, I. L. R., 2 Bom., 19.

(*b*) Roy Dinkur Doyal *v.* Sheo Golam Singh, 22 Suth. W. R., 172, Phear and Morris, JJ.

(*c*) Ishen Chunder Ghose *v.* Hurish Chunder Banerjee, 18 Suth. W. R., 19, Kemp and Glover, JJ.

priated to themselves, a fresh cause of action accruing to the plaintiff from the time of such appropriation (*a*).

A., a Hindu, died, leaving a sister B., and C., the son of a deceased sister. On A.'s death B. took possession of the property left by A. In a suit by C. against B. for recovery of possession thereof, as heir to his maternal uncle, the Court of first instance held that B. should retain possession of the property during her lifetime without power to waste, and that, on her death, C. should be entitled to the possession thereof. This decision was reversed by the High Court on appeal, which held that "the decree should have been simply a decree of dismissal" of the plaintiff's suit. B. died, leaving an adopted son D. C. sued D. for recovery of possession of the property, the subject-matter of the former suit, on the ground that D. was not the adopted son of B., and that C., "who came within the class of *bandhus*, was entitled to succeed to "the property left by A. and B., there being no nearer heir in "existence." It was held that the suit was not barred (*b*).

Although the words "for the same relief," inserted in s. 12, are omitted in s. 13, it is advisable, in determining whether a fresh suit is or is not barred by the operation of this section, by reason of its being a re-opening of a case already decided on the same cause of action, to consider what redress the plaintiff might have obtained in the former suit; and if the same redress might have been obtained, it will generally be found that the second suit is barred. Prospective damages may, for instance, be recoverable in some cases even where the action is upon contract; and the prospective as well as present injury sustained at the time the action was commenced may be regarded in assessing the damages (*c*). Again, where the action is for a wrong, prospective damages may be recovered in certain cases, but not where the wrong is one of a continuing nature, such as a nuisance, because a fresh cause of action arises day by day; but when the cause of action is not of a continuing nature, but has accrued once for all, the prospective as well as present injury may be considered. The injury in respect of which the prospective

(*a*) Buroda Soonduree Dossee *v.* Raj Bullub Sen, 18 Suth. W. R., 202, Kemp and Glover, JJ.

(*b*) Baboo Mohan Lall Bhya Gyal *v.* Lachman Lal, 5 B. L. R., 663, Bayley and Markby, JJ.

(*c*) See Comyn's Digest, title "Damages" D.; Fetter *v.* Beal, 1 Lord Raymond, 339-692.

damages are to be given must be the necessary result of the wrong done; the damage must not be remote nor uncertain. But where it must to a certainty follow, or perhaps almost certainly so as to leave no room for doubt, it may be included in the claim. In the words of Best, C. J.:—" When the cause of action is complete, " when the whole thing has but one neck, and that neck has been " cut off by one act of the defendant, it would be mischievous " to say—it would be increasing litigation to say—you shall not " have all you are entitled to in your first action, but you shall be " driven to bring a second, a third, or a fourth action for the reco- " very of your damages " (*a*).

Mr. Broom sums up his remarks on the conclusiveness of a judgment of a Court of competent authority, *quoad* the subject-matter in respect whereof such judgment is relied on as a bar to future litigation, in the following words of Vice-Chancellor Knight Bruce:—" It is, I think, to be collected that the rule " against re-agitating matter adjudicated is subject generally to " this restriction—that, however essential the establishment of " particular facts may be to the soundness of a judicial decision, " however it may proceed on them as established, and however " binding and conclusive the decision may, as to its immediate " and direct object, be, those facts are not at all necessarily estab- " lished conclusively between the parties, and that either may " again litigate them for any other purpose as to which they may " come in question, provided the immediate subject of the decision " be not attempted to be withdrawn from its operation so as to " defeat its direct object. This limitation of the rule appears to me, " generally speaking, to be consistent with reason and convenience, " and not opposed to authority " (*b*). In this case on appeal (*c*), Lord Lyndhurst held the sentence of an Ecclesiastical Court, in a suit for administration, turning upon the question whether the party was next-of-kin to the intestate, to be conclusive upon that question in a suit between the same parties for distribution.

4. Secondly, the case must have been heard and finally decided by a Court of competent jurisdiction, and this includes a foreign Court, unless the judgment comes within the exception of s. 14. Where a suit has already been tried in a Civil Court of an independent sovereign, a second suit in a British Court is barred

(*a*) Richardson *v.* Mellish, 2 Bing., 240.

(*b*) Barrs *v.* Jackson, 1 You. and Coll., 597.

(*c*) 1 Phil., 582.

under this section (*a*). A foreign judgment (*e. g.*, that of the French Court at Chandernagore) is conclusive as between the parties, when it cannot be questioned on the ground of fraud or want of jurisdiction, or that it was unduly obtained (*b*). It has been held that the Court of the Rajah of independent Tipperah is not a competent Court within the meaning of the corresponding section of Act VIII of 1859 (*c*).

If the Courts are of concurrent jurisdiction, the estoppel arises, the point being the same, because each Court is competent to decide it; but where the Court is not a Court of concurrent or of competent jurisdiction, there is no estoppel. It was considered when Act X of 1859 was in force in Lower Bengal, and the ruling would still apply to the case of the North-Western Provinces, where rent suits are cognizable by the Revenue authorities under Act XVIII of 1873, that "suits for the recovery of the occupancy or possession of land" under Act X of 1859, s. 23, cl. 6, refer only to *possessory* actions against the person entitled to receive the rent, and not to suits in which the plaintiff sets out his title, and seeks to have his right declared and possession given to him (*d*). In *Prosonno Coomar Pal Chowdry* v. *Kylas Chunder Roy Chowdry* (*e*), Peacock, C. J. said:—"I am of opinion that when the Legislature "took away from the regular tribunals in this country the right "of determining questions with regard to rent, they intended to "take away from them, and to vest in the Collectors, jurisdic-"tion in those cases only in which the question might arise be-"tween a landlord and his tenant Two persons may be joint "tenants, and as such may be jointly liable for rent. A., and not B. "may be the tenant of certain lands. There may be circumstances "under which B. may be equitably liable to pay the rent "legally due from A. But the liability of B. does not arise from "the legal relationship of landlord and tenant. I apprehend "it was never the intention of the Legislature to empower the

(*a*) S. M. Modhoo Bebee *v.* Ram Manicko Dey, 3 Wym Rep., 1; S. C., 6 Suth. W. R., Civil Ref., 31, Peacock, C. J., and L. S. Jackson, J.

(*b*) Boloram Gooy *v.* Kameenee Dossee, 4 Suth. W. R., 108, Morgan and Sumbhoonath Pundit, JJ.

(*c*) Mahd. Ahmed *v.* Alibur Gazee, 10 Suth. W. R, 337, Bayley and Mitter, JJ.

(*d*) Gooroodoss Roy *v.* Ramnarain Mitter, B. L. R., F. B., 628; S.C., 2 In. Jur., N.S., 113, F B.; Ram Chunder Gooptoo *v.* Bhuggobutty Dabea, 2 Suth. W. R., Act X Rul., 85, Morgan and Sumbhoonath Pundit, JJ.; Tarachand Mytee *v.* Nilambur Mundul, 3 Suth. W. R., 227, Steer and E. Jackson, JJ.

(*e*) B. L. R., F. B., 759; S. C., 5 Wym. (Rent Suits), 2; and 8 Suth. W. R., 428.

"Collector to try questions relating to rent, depending upon "equitable rights and liabilities arising from circumstances other "than those of the relationship of landlord and tenant" (*a*).

Where, however, a rent suit was brought in a Civil Court, and decided before the original Bengal Rent Act (X of 1859) came into operation, and an issue of title was raised and determined, it was held, that a second suit for possession was barred (*b*); and where the Revenue Court had direct jurisdiction upon the very point, a second suit to agitate the same question is barred: thus where a Revenue Court having jurisdiction rejected a suit for abatement of rent, the same plaintiff cannot sue the same defendant in a Civil Court to recover as damages alleged payment in excess made under the decree in the Revenue Court (*c*). A decree in a suit for rent in a Collector's Court under Act X of 1859 was conclusive only on the question of rent, and did not operate as an estoppel in a suit in a Civil Court upon a bond, the validity of which was declared by the Collector in pronouncing his decision in the rent suit (*d*).

(*a*) See also Khugowlee Sing *v.* Hossein Bux Khan, 7 B. L. R., 673; Ram Chunder Gooptoo *v.* Bhuggobutty Dabea, 2 Suth. W. R., Act X Rul, 85, Morgan and Sumbhoonath Pundit, JJ; Tarchand Mytee *v.* Nilambur Mundul, 3 *ib.*, 227, Steer and E. Jackson, JJ.; Dhurondeb Mozoomdar *v.* Bissambhur Mookerjee, 2 *ib.*, 103, Bayley and Phear, JJ.; Baser Mahomed *v.* Sudder Ghazee, 7 *ib*, 97, Kemp and L. S. Jackson, JJ.; Woomachurn Dutt *v.* Beckwith, 1 Wym., 59, Morgan and Sumbhoonath Pundit, JJ.; Mondel *v.* Steel, 8 M & W., 858; Carter *v.* James, 13 *ib.*, 137; Rigge *v.* Burbidge, 15 *ib.*, 598; see also Muddun Lall Baboo *v.* Mohesh Chunder Mitter, 1 Wym., 151, F. B.; Soorjee Kanto Roy *v.* Forlong, 1 In. Jur., N. S., 382, Bayley and Campbell, JJ.; Amanat Ali Chowdhry *v.* Mussen Ali, 2 B. L. R., App., 36.

(*b*) Chowdhry Teeluck Pershad Singh *v.* Deb Narain Singh, 10 Suth. W. R., 75, L. S. Jackson and Glover, JJ.

(*c*) Chumon Lall *v.* Gooroodoyal Tewarry, 1 Wym, 32, Morgan and Sumbhoonath Pundit, JJ.; Hossein Alee *v.* Budderroodden, 1 Suth. W. R., 141, Bayley and E. Jackson, JJ.; Mahomed Fazul *v.* Oomakant Sein, 1 Suth. W. R., 159, Trevor and Campbell, JJ.

(*d*) Musst. Edun *v.* Musst. Bechun, 8 Suth. W. R, 175, Peacock, C. J., Campbell and Phear, JJ; S. C., 2 In. Jur., N. S., 265; see also Aradhun Dey *v.* Golam Hossein, 8 Suth. W. R, 487, Loch and Mitter, JJ.; Mohima Chunder Chuckerbutty *v.* Raj Coomar Chuckerbutty, 10 *ib.*, 22, Peacock, C. J., and Mitter, J.; Chunder Coomar Mundul *v.* Nundee Khanum, 11 B. L R, 434, F. B., L. S. Jackson, J., dissenting; see particularly the judgment of Mitter, J, 441 *et seq.* citing Prosonocoomar Paul Chowdhry *v.* Koylash Chunder Roy Chowdhry, as case No. 236 of 1866, 23rd September, 1867, which is reported in B. L. R., F. B., 759; 5 Wym. (Rent Suits), 2; and 8 Suth. W. R., 428; see also similar instances in the cases of Phillip *v.* Moitro, F. B, High Court, Calcutta, 1, July 1863; Chandra Narayan Ghose *v.* Kasi Nath Roy Chowdhry, 4 B. L. R., F. B., 43; Bissumbhur Misser *v.* Gunput Misser, F. B., Calcutta, 18th March, 1863.

Where (*a*) the plaintiff had obtained a lease of land from the defendant, and had been evicted from part of the land, and in a suit against her for arrears of rent for one year, she had claimed an abatement on the ground of this eviction, and asked that the amount might be deducted, the Court allowed her a deduction of Rs. 42. She afterwards sued for the purpose of obtaining a permanent abatement of Rs. 155, claiming the deduction on the same ground as she had claimed it in the other suit. It was held by Garth, C. J., and Birch, J., September 2, 1875, that the suit was barred on the authority of *Mohima Chunder Mozoomdar* v. *Ashrada Dassia* (*b*) and *Rakhal Doss Singh* v. *S. M. Heera Motee Dossee* (*c*). The former case is reported in a note to a decision of a Full Bench in another case (*d*). This suit was brought under Bengal Act VIII of 1869, to recover rent at an enhanced rate after notice. The Act in question says (s. 33), that the jurisdiction of the Collectorate in these suits is to cease, and that the suits are to be cognizable by the Civil Courts according to their several jurisdictions. It appeared that a similar suit had previously been brought between the same parties in the Collector's Court whilst Act X of 1859 was in force, and the right of the plaintiff to assess rent on this portion of the land was then expressly declared, the declaration being affirmed on special appeal by the High Court; the rent, however, was not assessed, the High Court thinking that there were not sufficient materials for assessing it. The Munsif considered this declaration as binding in the second suit, but the District Judge, on appeal, reversed his decision. The case came up on special appeal before Markby and Mitter, JJ., the former of whom supported the opinion of the District Judge, relying upon the decisions of the Judicial Committee (*e*) and of a Full Bench of the High Court at

(*a*) Nobo Doorga Dossee *v.* Foyzbux Chowdhry, I. L. R, 1 Calc., 203.

(*b*) 15 B. L. R., 251, note.

(*c*) 22 W. R, 282.

(*d*) Hurri Sunkur Mookerjee *v.* Muktaram Patro, 15 B. L. R, 238; see also Nilmonee Singh Deo *v.* Issur Chunder Ghosal, 5 Wym., 66; S. C, 9 Suth. W. R., 92, Bayley and Phear, JJ.; Mahomed Azim *v.* Ramkant Chowdry, 6 *ib.*, Act X Rul., 101, L. S. Jackson and Sumbhoonath Pundit, JJ.; Gocool Chunder *v.* Ali Mahomed, 10 *ib.*, 6, Peacock, C. J., and Mitter, J.; Chumon Lall *v.* Gooroodayal Tewarry, 1 Wym., 32, Morgan and Sumbhoonath Pundit, JJ.; Hassan Ali *v.* Budderrooddeen, 1 Suth. W. R., 141, Bayley and E. Jackson, JJ.; Mahomed Fazul *v.* Oomakant Sein, *ib.*, 159, Trevor and Campbell, JJ.; Kristo Pershad Mookerjee *v.* Heeralall Audhicarry, 2 *ib.*, Act X Rul., 42, Kemp and Glover, JJ.; Radha Bullub Sing *v.* Maharajah of Burdwan, 2 *ib.*, Mis., 51, Loch and Seton-Karr, JJ.

(*e*) Khugowlee Singh *v.* Hossein Bux Khan, 7 B. L R., 673.

Calcutta (*a*); the principle decided in these cases being that a Revenue Court has not jurisdiction to try a question of title. Mitter, J., was of a contrary opinion, considering that the decision of the Judicial Committee went no further than to apply the above principle to the cases before them, and that there were cases in which the question of title might arise in the Revenue Courts, which Courts had then jurisdiction to decide them finally, subject only to appeals in regular course (*b*). The Full Bench (Jackson, J., dissenting) concurred with Markby, J., and held that a judgment by a Collector in a suit under Act X of 1859, declaring the plaintiff entitled to assess rent upon land alleged by the defendant to be lakhiraj, is not conclusive in a subsequent suit between the same parties for arrears of rent under Bengal Act VIII of 1869. Jackson, J., held the decision to be binding in the second suit, which but for the passing of Act VIII of 1869 (B.C.) would have been brought in the Revenue Court.

Where a suit is dismissed for want of jurisdiction, a second suit can be brought arising out of the same matter where the question is one which the Court in the second suit has jurisdiction to try. Thus, where A. sued B. to eject B. from a fishing ground three miles out at sea, and the Court of original jurisdiction and the Courts of Appeal all decided that the suit could not be brought, as the fishing ground was not within the jurisdiction of the Court, it was held that a subsequent suit would lie to recover damages from B. for maliciously and wrongfully obstructing A. in the use of the same fishery (*c*). In the above case, moreover, the cause of action was not identical: the first suit was for ejectment from the fishing ground in 1862, and the second for damages to the fishery in 1872. A declaration by a Court in execution proceedings that a person not a party to the suit applying for execution is legitimate, cannot, since it is made without jurisdiction, be pleaded as a bar to a regular suit in which it is sought to establish the illegitimacy of the applicant (*d*).

(*a*) Chunder Coomar Mundul *v.* Nunnee Khanum, 11 B. L. R., 434; see also Meer Babur Ali *v.* Shaikh Dowlut Ali, 15 B. L. R., 242 note.

(*b*) See also Nuffer Chunder Paul Chowdhry *v.* Poulson, 12 B. L. R., 53; Mohesh Chunder Bundopadhya *v.* Joykissen Mookerjee, 15 B. L. R., 248 note; and Mohima Chunder Mozoomdar *v.* Ashrada Dassia, *ib.*, 251 note, which was a suit under the Bengal Rent Act VIII of 1869.

(*c*) Baban Mayacha *v.* Nagu Shravucha and others, I. L. R., 2 Bom., 19.

(*d*) Abidunnissa Khatoon *v.* Amirunnissa Khatoon, I. L. R., 2 Calc., 327, P. C.

The judgment is final only for its own proper purpose and object (*a*). It is necessary, in order to support the plea of *res judicata*, to show that there was a decision in the former suit finally granting or withholding the relief sought for (*b*). The Court must have directly, not collaterally, decided the point which is in issue in the second suit (*c*), or the relief must have been claimed in the plaint and not granted; see Explanation 3, *ante*, p 66. This explanation does not seem to extend to matter of defence or a cross-claim. A decree obtained by arrangement between the parties, the Court giving no judicial opinion, and bestowing no judicial examination on the merits, can never be *res judicata* (*d*); nor would a suit on the same cause of action as another, which was summarily dismissed without trial, be barred by this section, even though the parties be the same (*e*). Where a suit was struck off by reason of the defendant being in jail on a criminal charge, it was held that this could not be set up as a *res judicata* (*f*). A plaintiff (*g*) brought a suit in 1855 to recover possession of land, and in that suit he asked for mesne profits from the time of dispossession until the time of the decree. His suit was dismissed by the Zillah Court in 1859. The plaintiff appealed to the High Court, and in 1863 that Court reversed the decision of the Zillah Court and decreed possession, but nothing was said about mesne profits. It was held that the plaintiff could bring a new suit for mesne profits from the time the Zillah Court decided the suit in 1859 to the time he obtained possession under the decree,—*i. e.*, for the mesne profits which accrued for the period of six years (the period fixed by the Limitation Act) before he brought his second suit. It may be doubtful whether a fresh suit could be brought for the mesne profits accruing before the date of the decree of the Appellate Court in such a case having regard to Explanation 3; but a suit for subsequent mesne profits would lie. A., a Hindu widow, brought a suit

(*a*) Outram *v.* Morewood, 3 East, 357; Ramnath Roy Chowdhry *v* Bhagbut Mohapatur, 3 Suth. W R., Act X Rul, 140; but see Nuthoo Lall Chowdhry *v.* Shonkee Lall, 10 B L. R, 200

(*b*) Shaikappa Chetti *v* Rani Kulanda Puri Nachiyar, 3 Mad. H. C. Rep, 84, Innes and Collett, JJ.

(*c*) Modhoo Ram Dey *v* Boydonath Doss, 9 Suth. W R, 592, L S. Jackson and Mitter, JJ.

(*d*) Jenkins *v.* Robertson, 1 Law Rep, Scotch Appeals, 117.

(*e*) Shokee Bewah *v* Mehdee Mundul, 9 Suth. W. R., 327, Seton-Kair and Mitter, JJ.

(*f*) Luckhee Ram Doss and others Joy Sunker Gooho, 7 Suth. W. R., 236, Kemp and L S Jackson, JJ.

(*g*) Pratab Chandra Burua *v.* Rani Swarnamayi, 4 B. L R., F.B., 113.

to recover possession of her husband's share of certain joint property. After partially examining some of her witnesses, she cited the defendant as a witness, and on his failure to attend, her suit was dismissed. After the death of the widow her daughter sued the same defendant, on behalf of her two minor sons as being entitled in reversion to their grandfather's share, to recover the share which was the subject of the former suit. It was held that the suit was not barred as being *res judicata* until it was shown that the former decree had been obtained after a fair trial of the right, so as to bind not only the widow but the reversioners (*a*). In this case, owing to the default of the defendant, the widow had not had a fair trial. But when an issue is raised and decided against a plaintiff on his own default in the production of evidence, he cannot sue again (*b*). A. purchased the shares of K. and others in certain property. Afterwards the plaintiff purchased the same shares and others in the same property. After that, again the sale to A. was set aside at the instance of K., but this decision was reversed in pursuance of a compromise between A. and K. Subsequently the plaintiff sued to recover the whole of the property he had purchased, wholly ignoring the sale by K. to A. As to so much of the property as was in excess of K.'s share, the plaintiff succeeded, but failed as to the rest, because the Judge thought that as the sale by K. to A. was not shown to be reversed, the plaintiff could not recover as to K.'s share until this could be shown. The plaintiff was allowed to sue again to establish that the sale from K. to A. had been reversed; the point had been expressly left open in the first suit (*c*). Again, a suit on a bond is not barred although a previous suit had been brought on the demand, and decided on the terms of a solenamah (deed of compromise), that decision having been subsequently set aside by reason of the invalidity of the solenamah, and the question of the validity of the bond never decided (*d*). A suit between two brothers, A. and B., respecting ancestral property, was compromised, and the particulars of the compromise embodied in a

(*a*) Brommoye Dassee *v.* Kristo Mohun Mookerjee, I. L. R., 2 Calc., 222.

(*b*) Mofizooddeen *v.* Shaikh Ammooddeen, 23 Suth. W. R., 59; Rama Rao *v.* Suriya Rao, I. L. R., 1 Mad., 84, Morgan, C.J., and Innes, J.

(*c*) Channu Lal Sahu *v.* Manu Lal, 5 B. L. R., 220.

(*d*) Motee Pandy *v.* Isree. Roy, S. D. A., N. W. P., 1863, p. 539.

razinama presented in Court by both parties. A. having died, his widow and B. presented in Court another *razinama*, embodying the particulars of an arrangement respecting the property in which she had become interested as widow, and which was comprised in the former *razinama;* and of this second *razinama* they subsequently put in an amended copy. It was held that a claim arising out of such an arrangement could not be considered to have been a cause of action heard and determined in the former suit (*a*). Again, where a suit against several defendants for a joint jumma is dismissed, on the ground that the jumma is several, and not joint, the plaintiff is not precluded from afterwards suing each of them severally for the separate jumma (*b*). The fact of the consideration for an agreement upon which a suit is brought being the consent of the plaintiff to the compromise of a suit, and to the decree being passed against him, is no bar to his maintaining a suit to compel the defendants to perform the agreement upon the basis of which the decree was obtained (*c*). Where a suit had been determined before 1857, and all records of it destroyed in the Mutiny, the Court allowed the plaintiff to bring another suit, overruling the plea of *res judicata* (*d*), in which peculiar case the former judgment could not of course be given in evidence. A suit struck off for default under s. 114, *post,* is a bar to a second suit under that section; and a former judgment by a Court of competent jurisdiction upon the same cause of action is conclusive between the same parties in a subsequent suit brought in another Court, notwithstanding the pendency of an appeal against it; but the Judge passing the decree in the subsequent suit may, on application made to him and security being given, stay the execution of it until the appeal in the former suit is decided, and may, if the former decree is reversed, entertain an application for review of his own decision in the subsequent suit (*e*).

(*a*) Lakshmi Ammal *v.* Tiharam Tovaji, 1 Mad H C. Rep., 240, Scotland, C. J., and Strange, J.

(*b*) Baboo Telokdharee Sahoo *v.* Baboo Bissendro Narain Sahee, Marsh., 418, Norman and Kemp, JJ.

(*c*) Kallynauth Shaw *v.* Rajeeblochun Mozoomdar, 2 In. Jur., N. S, 343, Peacock, C J., and Macpherson, J.

(*d*) Sheikh Fyzalee *v.* Torab Alee, S. D. A., N. W. P., 1861, p. 290.

(*e*) Bulkiram Nathuram *v.* The Guzerat Mercantile Association, Limited, 4 Bom. H. C. Rep, 81, Appeals, Couch, C.J., Newton and Warden, JJ.

It seems to have been decided, that a defendant having waived his plea of *res judicata* in the Court below may revive the plea in the Court of appeal on the appeal of the plaintiff. When, however, the plea is waived, and the Court, with the consent of both parties, goes on with the suit, its decision will be binding as between the parties (*a*); when the plea has not only been put forward, but has been established by proof, the Court would have no jurisdiction to proceed with the case; and it is difficult to see how the Court, having, as it has, power to call for evidence, can allow such a plea to be waived when it has once been put forward. All that this case directly decides is, that the objection may be insisted upon before a Court of appeal.

A civil suit brought in 1856 was dismissed for want of evidence, the Court making a reservation that the plaintiff should not be precluded from bringing a fresh suit. It was held, that this order was a nullity, and a fresh suit was barred as *res adjudicata*. The Courts had no power, before the Code of Civil Procedure was passed in 1859, to allow a suit to be dismissed, or the plaintiff to be nonsuited with power to sue again (*b*). So, under that Code and under this, the suit should be withdrawn with leave to sue again, not dismissed, if a second suit is to be allowed.

5. Thirdly, the former suit must have been between the same parties, or between parties under whom they or any of them claim, litigating in the same title. A decree until set aside is, as between the parties to it, conclusive as to the rights of those parties and the character in which they sue (*c*). By *parties* must be understood all who are individually named on the record. But when an infant sues by his next friend, the infant is the party and not the next friend; and the Court would look to the real parties in a *benamee* transaction, and if they were the same, the action would be barred under this section. A party introduced in the record by fraud, and without his knowledge, would not be concluded. And it has been held that where a party was made a defendant against his will, and thinking the time had not come, and the proofs not sufficient to support his claim which was common to that of the plaintiff, refused to have anything to do with

(*a*) Mugno Moe Debya *v.* Hur Chunder Raoot, 3 Suth. W. R., Act X Rul., 146, Steer and Phear, JJ.

(*b*) Watson *v.* Collector of Rajshahye, 13 Moo. I. A., 160.

(*c*) Bhawabal Sing *v.* Maharaja Rajendra Pratap Sahoy Bahadur, 5 B. L. R., 330, Markby, J.

the suit, he is not prevented from afterwards suing. Thus, where S. left two sons, G. and N., and a third person, M., claimed the estate of S. under a supposed will. G. sued M., and as N. would not join as plaintiff, made him a defendant; but N. declined to appear or move in the matter. The suit was brought to set aside the alleged will, and to obtain possession of the plaintiff's share in the property. G. failed The decision in G.'s case was held to be no bar to a similar suit brought by N. afterwards for his share (*a*).

A. sued I., who was in possession of the property of her deceased brother S. A. claimed as son of another sister of S., and alleged that I., a childless widow, had no title. A.'s suit was dismissed. I. afterwards adopted a son, and died, leaving the adopted son in possession. The former suit is not a bar to a suit by A. against the adopted son to recover possession of the same property (*b*). The reason of this is, that the son adopted by I. is adopted *to* I.'s deceased husband, and claims therefore as *his son*, not in the same right as I., whose claim was as *his widow*. She was a mere means of doing the act of adopting, and of herself could give no title. The survivor of several Hindu sisters is not bound by decrees obtained against her sisters during their lives, whose interest was only a life-interest in their father's property, which, on their death, passed to the survivor as heir of her father (*c*).

But a Hindu widow in whom the whole estate vests, absolutely for some purposes, though in some respects for a qualified interest, represents the estate in so far that a decree fairly and properly obtained against her binds those coming after her. Until her death it cannot be said who will be entitled to succeed (*d*).

Thus where a plaintiff, in the lifetime of a widow, who held a life estate in certain property, sought, as reversioner, to restrain her from doing certain acts of waste to the estate, and after the decision of that suit against him and the subsequent death of the widow he sued to recover the property, it was held that the second suit was barred (*e*).

(*a*) Nabin Chandra Mazumdar *v.* Mukta Sundari Debi, 7 B. L. R., App., 38; Woomeschunder Roy *v.* Biressur Mookerjee, Hay, 160.

(*b*) Baboo Mohan Lal Bhaya Gyal *v.* Lachman Lal, 5 B. L. R., 663.

(*c*) Joygobind Sohoy *v.* Mahtab Koonwar, 7 Suth. W. R., 1, Peacock, C.J., and L. S. Jackson, J.

(*d*) Katama Natchiar *v.* Raja of Shivagunga, 9 Moo. I. A., 539, see p. 604, followed by Nandkumar *v.* Radha Kuari, I. L. R., 1 All., 282, Stuart, C. J., and Oldfield, J., and see other cases cited in the judgment.

(*e*) Rama Rao *v* Suriya Rao, I. L. R., 1 Mad., 84, Morgan, C. J., and Innes, J.

But where the plaintiff was apparently entitled subject to the life-interest of a Hindu widow, and had brought a suit to set aside the assignment of the widow's life-interest only, in which he failed, it was held that he was not barred by this section from bringing a suit for the assertion of his own rights as reversioner (*a*).

A decree obtained *bonâ fide* against the shebait of an idol is binding on his successor (*b*).

A judgment against one or more of several joint wrong-doers or joint contractors, even without execution, will be a bar to a suit against another or others of them. See the remarks of Parke, B., delivering the judgment of the Court of Exchequer in *King* v. *Hoare* (*c*):—"If there be a breach of contract or wrong done, or any other "cause of action, by one against the other, and judgment be reco-"vered in a Court of record, the judgment is a bar to the original "cause of action, because it is thereby reduced to a certainty, and "the object of the suit attained so far as it can be at that stage, and "it would be useless and vexatious to subject the defendant to "another suit for the purpose of obtaining the same result. Hence "the legal maxim *transit in rem judicatam.* The cause of action "is changed into matter of record, which is of a higher nature, and "the inferior remedy is merged in the higher. And this appears to "be equally true where there is but one cause of action, whether "it be against a single person or many, the judgment of a Court of "record changes the nature of that cause of action and prevents its "being the subject of another suit; and the cause of action being "single, cannot afterwards be divided into two. Thus it has been "held that if two commit a joint tort, the judgment against one is "of itself, without execution, a sufficient bar to an action against "the other for the same cause (*d*). And though, in the report in "Yelverton, expressions are used which at first sight appear to take "a distinction between actions for unliquidated damages and debts, "yet, upon a comparison of all the reports, it seems clear that the "true ground of the decision was not the circumstance of the dam-"ages being unliquidated. Chief Justice Popham states the true "ground. He says (*e*): 'If one hath judgment to recover in

(*a*) Doorga Churn *v.* Kassy Chunder Moitree, Marsh, 539, Raikes and Levinge, JJ.

(*b*) Kissnonund Ashram Dundy *v.* Nursingh Doss Byragee, Marsh., 485, Norman and Kemp, JJ.; Golab Chand Baboo *v.* Sreemutty Prosonno Coomaree Dabee, 11 B. L. R., 332, Markby and Birch, JJ.; Juggut Chunder Sein *v.* Kishnanund, 2 Sel. Rep., 126.

(*c*) 14 L. J., Exch., 32.

(*d*) Brown *v.* Wootton, Cro. Jac., 73

(*e*) Cro. Jac., 74.

"trespass against one, and damages certain,' that is, converted "into severalty by the judgment, 'although he be not satisfied, he "shall not have a new action for this trespass; by the same reason, "*e contra*, if one hath cause of action against two, and obtains judg-"ment against the one, he shall not have remedy against the other: "and the difference betwixt this case and the case of debt and "obligation against two is, because there every of them is chargeable "and liable to the entire debt, and therefore recovery against the one "is no bar against the other, until satisfaction.' And it is quite clear "that the Chief Justice was referring to the case of a joint and several "obligation, both from the argument of the counsel, as reported in "*Cro. Jac.*, and the statement of the case in *Yelverton*. We do "not think that the case of a joint contract can be distinguished "from a joint tort. There is but one cause of action in each case; "the party injured may sue all the joint tort-feasors or contract-"ors, or he may sue one subject to the right of pleading in abate-"ment (*i. e.*, for the non-joinder of the others) in the one case, and "not in the other; but for the purpose of this decision" (the action was against a joint contractor after judgment recovered against another joint contractor, but without execution) "they stand on the "same footing. Whether the action is brought against one or two, "it is for the same cause of action; the distinction between the case "of a joint contract and a joint and several contract is very clear. "It is argued that each party to a joint contract is severally liable; "and so he is in one sense, that, if sued severally, and he does not "plead in abatement, he is liable to pay the entire debt; but he is not "severally liable in the same sense as he is on a joint and several "bond, which instrument, though on one parchment or paper, in "effect comprises the joint bond of all and several of each of the "obligors, and gives different remedies to the obligee."

Where an action was brought for the detention of a pianoforte, and it appeared that the defendant and one A. T. had jointly detained it, and judgment, but without satisfaction, had been recovered against A. T., it was held that the second suit was barred (*a*). The reason given was, that otherwise there would be much vexatious proceeding, and different damages might be given in the various cases. But it appears that, in America, there have been decisions the other way (*b*), and some difference of opinion exists in this

(*a*) Brinsmead *v.* Harrison and another, 41 L. J., C. P., 190, in Exch.

(*b*) 41 L. J., C. P., 192.

matter among Indian Judges (*a*). A judgment recovered *with* satisfaction against one of two or more joint *and several* debtors will be a bar to an action against another of them (*b*); but not if the judgment be not satisfied (*c*).

The fact that one of two defendants who are jointly and severally liable, is excluded from a decree for want of jurisdiction, does not debar the plaintiff from his remedy in a Court possessing jurisdiction with respect to the balance of claim irrecoverable from the other defendant (*d*). Where a creditor had resorted to the summary but now obsolete procedure provided by s. 53 of Act XX of 1866, and had on a registered bond recovered a portion of his claim in execution of the decree so obtained, a regular suit subsequently brought to enforce his remedies on the bond, giving the defendant credit for the amount already recovered, was held to be barred. But where the property mortgaged has passed into the hands of third parties, there is nothing in the fact that the mortgagee has obtained a money-decree on the bond to prevent him from bringing a separate suit to enforce his lien against the transferees (*e*).

In another case (*f*) K. sued to establish his title to a house purchased by him from D.'s guardians during his minority, alleging that the greater part of the purchase-money was employed in paying off a mortgage claim upon the house; that after he had obtained possession under his deed, one D. S., the holder of a decree against D.'s guardians, attached the house; and that he brought a suit to raise the attachment, in which having failed, he paid into Court the amount of D. S.'s claim. It was held that K. was not estopped from bringing his suit against D. by the decree in the former suit to raise the attachment, which declared that the deed of sale was fraudulent and void as against D. S. (*g*).

A suit is not barred by reason of a prior suit decided against plaintiff's father while the plaintiff was a minor, in which the father was sued in his personal capacity, and in which the plaintiff was not a party, either actually or by representation (*h*).

(*a*) Ramnath Roy Chowdhry *v.* Chunder Seekur Mohapattur, 4 Suth. W. R., 50, dissented from in the case of Nuthoo Lall Chowdhry *v.* Shonkee Lall, 10 B. L. R., 200.

(*b*) Morgan and Price, 4 Exch., 619.

(*c*) King and Hoare, *supra*.

(*d*) Sreeram Mitter *v.* Nobin Kristo Mookerjee, 22 Suth. W. R., 290, L. S. Jackson and McDonell, JJ.

(*e*) Syud Emam Momtazoodeen Mahomed *v.* Rajcoomar Dass, 14 B. L. R., 408, Full Bench, Couch, C. J., Kemp, L. S. Jackson, Markby and Ainslie, JJ.

(*f*) Dagdu *v.* Shekh Saheb, 2 Bom. H. C. Rep., 348.

(*g*) See also Balaji *v.* Dharma, 2 Bom. H. C. Rep., 363.

(*h*) Raj Doollub Sircar *v.* Ooma Churn Biswas, 21 Suth. W. R., 109, Kemp and Glover, JJ.

Where an administrator executed a mortgage in his representative capacity of the property of a minor, and was sued as representing the minor by the mortgagee and made no defence to the suit, and the property was sold under decree in the suit to the mortgagee, who again sold to a third person, who knew that the administrator had executed the mortgage in his representative capacity, it was held, that the decree did not protect either the mortgagee or his vendee from a suit by the minor for recovery of the property (*a*). Where a plaintiff sued a defendant for damages for non-delivery of goods, treating him as principal, and failed on the ground that the defendant was an agent, he was not allowed to sue again treating the defendant as agent, but alleging that he was, nevertheless, by the usage of trade in the particular case, liable as a principal (*b*). M., on 28th August, 1860, executed deeds of gift of the two moieties of certain mouzahs in favor of her two married daughters. One of the daughters, G., died, and the plaintiff, her husband, thereupon sued for a share of the property given to her, claiming as her husband. M. was defendant. For the defence, M. alleged that the transaction was benami, and not intended to take effect until after her own death. At the same time a suit was brought by B. against the mother, M., to set aside the deeds of gift as fraudulent and void as against creditors. The plaintiff in the first suit got himself made a party to this second suit. Both suits were tried together, and one judgment was delivered in both, to the effect that the deeds were fraudulent and void, and a decree was given for the plaintiff in the creditor's suit, and for M. in the first suit. There was no appeal in the creditor's suit. Held on appeal to the Privy Council that the decree in the creditor's suit did not operate as an estoppel in the other; the parties were not the same, and the issues were different (*c*).

When a question of right or title has been adjudicated on in a suit, the bar of the judgment cannot (see Explanation II) be avoided by suing in a new form of claim which might have been, but was not, raised or determined in the former suit, if such claim or ground arises out of, and depends upon, the same right or title as that which was directly in question in the former suit (*d*).

(*a*) Debi Dutt Sahoo *v.* Subodra Bibee, I. L R, 2 Cal., 283, Garth, C. J, and Ainslie, J.

(*b*) Devrao Krishna *v.* Halambhai, I. L. R., 1 Bom., 87, West, J, Jan. 24th, 1876.

(*c*) Ramanugra Narain *v.* Mahabundur Koonwar, 12 B. L. R., P.C., 433.

(*d*) Chinniya Mudali *v.* Venkatchella Pillai, 3 Mad. H. C. Rep., 321, Scotland, C.J, and Holloway, J.; see also Henderson *v.* Henderson, 3 Hare, 115; Hunter *v.* Stewart, 13 L. J., Ch., 349; Denkee Nundun Roy *v.* Kally Prosad, 4 Wym. Rep., 189; S. C., 8 Suth. W. R., 366, Bayley and Phear, JJ.

T. claimed a zemindari as the representative of a devisee under a will. In 1845, A., one of the zemindar's widows, had sued T.'s father for the zemindari, and he in his answer set up the will. In 1856, K., the zemindar's second daughter and A.'s successor, had sued T.'s guardian for the zemindari, and he, in his rejoinder, also relied on the will. Both suits were decided against the plaintiffs, but in one the parties were restricted to evidence on a point which was raised as to division, and in the other no points or issues were settled. On an appeal by K. to the Privy Council against the decree of 1845 and 1856, the will was not relied on, because, as such, it was considered and admitted to be untenable, and the Judicial Committee decided against T. and reversed the former decrees. T. now sued K. for the zemindari, grounding his claim on the will. The Civil Judge rejected his plaint under this section. Held, on regular appeal, that although the Privy Council had given no direct decision upon the will, their judgment and final order involved the decision of all claim of title under that will, and must be considered, as between the parties, tantamount to an express adjudication upon such claim. A party is bound to bring forward his whole case in respect of the matter in litigation and open to him upon the points for decision in the suit. He cannot abstain from relying upon, nor abandon, a ground of claim which is in question and proper for consideration and decision in the suit, and afterwards make it a cause of fresh suit in respect of the same subject-matter. To give effect to the plea of *res judicata*, the Court must be satisfied that the ground of legal right on which the plaintiff sues was a point raised and opened for decision in the former suit, and that it was dealt with by the judgment and decree therein (*a*).

6. A. sued B. and recovered possession of land. B. defended the suit on the ground that he had bought the land at an auction. B. afterwards sued A. to recover the same land on the ground that he had a right of pre-emption. He might have put this forward as a defence to A.'s suit. It was held that B.'s suit was barred (*b*).

(*a*) Udaiya Tevar *v.* Katama Nachiyar, 2 Mad. H. C Rep., 131 ; affirmed by the Privy Council on appeal, 10 Suth. W. R., P. C., 3 ; S. C., 11 Moo. I A., 50.

(*b*) Baldeo Sahai *v.* Bateshar Singh, I. L. R., 1 All., 75, Turner (offg.) C. J., and Spankie, J., 20th August, 1875, citing the above case, Srimut Rajah Mootoo Vijaya *v.* Katama Natchiar, 11 Moo. I. A., 73.

Where a plaintiff sued to recover possession, as being part of her own talook, of land which she had in a former suit claimed as *towfeer* reclaimed and occupied, it was held that she was barred, the difference in title did not change the cause of action (*a*). The above was confirmed on appeal by the Judicial Committee of the Privy Council (*b*) referring to a judgment of Lord Westbury, who said, that where a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward (*c*) A suit cannot be maintained to recover a specific Company's note when the cause of action in a former suit was the misappropriation by the same defendant of similar Company's notes, and the claim for the individual note might and ought to have been included in the former suit (*d*). The test is whether the claim is in fact founded on a cause of action distinct from that which was the foundation of the former suit; and secondly, that it included accidental error and involuntary omission of the subject of the new suit (*e*).

A Hindu conveyed property to his daughter by deed of gift, after her marriage as her stridhan. Some time after the daughter's death, the father's widow sued the daughter's husband to recover the property, contending that the deed of gift was forged, and she was unsuccessful; the deed was found to be genuine. The widow again sued the daughter's husband to recover the same property, on the ground that she, and not the husband, was the heir to the deceased daughter. It was held (Garth, C. J., dissenting) that the second suit was barred (*f*). This case was referred to a Full Bench by Garth, C. J., and Birch, J, in consequence of the conflicting decisions in two cases (*g*) on the question whether a plaintiff, who has brought a suit to recover property upon the strength of one title, can bring a suit to recover the same property

(*a*) Woma Tara Dabee *v.* Unnopoorna Dossee, 10 Suth. W. R, 426, Phear and Hobhouse, JJ.; S C., *nom.* Umatara Dabi *v.* Kishankamini Dasi, 2 B L R., A C, 102.

(*b*) 11 B L R, 158.

(*c*) See also Maktum Valad Mohidin *v.* Imam Valad Mohidin, 10 Bom. H. C Rep, 293; Janaki Ammal *v.* Kamalath Ammal, 7 Mad H C. Rep, 263; Abhiram Das *v.* Sriram Dass, 3 B. L R., A. C., 421.

(*d*) Moonshee Buzloor Ruheem *v.* Shum Soonissa Begum, 11 Moore's I. A., 551.

(*e*) *ib*

(*f*) Denobundhoo Chowdhry *v.* Kristomonee Dossee, I. L R, 2 Calc., 153, F. B.

(*g*) Nufur Chunder Pal Chowdhry *v* Luckhee Monee Dabee, 9 Suth W. R., 300, and Aughore Nath Ghosal *v.* Roopchand Mundul, 13 *ib.*, 97.

on the strength of another title, of which he might have availed himself at the time the former suit was brought, but which he did not set up in the plaint then filed. It was insisted, on behalf of the plaintiff, appellant, that the suit was barred, the title being a distinct thing from the cause of action, and the case of *Umatara Debi* was relied on. On the other hand it was contended that the two titles set up by the plaintiff were contradictory, the second could not be put forward until the first had been decided to be untenable. It was held, however, by the majority of the Court, that the plaintiff might have put her case in the alternative, and that she was consequently concluded by the first decision.

When foreign judgment no bar to suit in British India.

14. (S.) No foreign judgment shall operate as a bar to a suit in British India—

(*a*) if it has not been given on the merits of the case:

(*b*) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India:

(*c*) if it is in the opinion of the Court before which it is produced contrary to natural justice:

(*d*) if it has been obtained by fraud:

(*e*) if it sustains a claim founded on a breach of any law in force in British India.

A foreign judgment is the judgment of a Court situated beyond the limits of British India, and not having authority in British India, nor established by the Governor General in Council; see s. 2, interpretation clause, *ante*.

A question seems to arise whether the plaintiff has the option of suing on the foreign judgment or on the original cause of action. Section 13, excep. vi, would have the effect of barring a second original suit on the same cause of action if the proceedings in the former suit had been decided by a Court of competent jurisdiction, and its judgment was not open to objection under that section. A suit may be brought upon the foreign judgment itself, as it constitutes a new cause of action, and cannot be satisfied by process of execution merely, as the judgment of a Court subject to this Code can

be, but such a suit must be brought in the place where the defendant is subject to the jurisdiction (*a*).

The foreign judgment cannot be impeached upon the merits, but only for want of jurisdiction or on any of the grounds enumerated in this section. See the notes to *Doe* v. *Oliver* (*b*), in which will be found various instances in which such judgments have been impeached on the grounds specified in this section (*c*).

CHAPTER II.

OF THE PLACE OF SUING.

Court in which suit to be instituted.

15. (S.) Every suit shall be instituted in the Court of the lowest grade competent to try it.

See Act VIII of 1859, s. 6, first paragraph, with which this section corresponds.

Suits to be instituted where subject-matter situate.

16. (S.) Subject to the pecuniary or other limitations prescribed by any law, suits

(*a*) for the recovery of immoveable property,

(*b*) for the partition of immoveable property,

(*c*) for the foreclosure or redemption of a mortgage of immoveable property,

(*d*) for the determination of any other right to or interest to or in immoveable property,

(*e*) for compensation for wrong to immoveable property,

(*f*) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that suits to obtain relief respecting, or compensation for wrong to, immoveable property held by

(*a*) Siveking Droop & Co. *v.* Focke, 9 Suth. W. R., 215, Peacock, C. J., and Bayley, J.

(*b*) 2 Smith's L C., 751.

(*c*) See Havelock *v.* Rockwood, 8 T. R., 268; Bowles *v.* Orr, 1 Y. & Coll., Exch., 464.

or on behalf of the defendant may, when the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction he actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.—In this section 'property' means property situate in British India.

This clause corresponds with Act VIII of 1859, s. 5. It does not apply to a High Court in the exercise of its ordinary or extraordinary civil jurisdiction (see s. 638). Those Courts are governed in this respect by their Charters; see cl. 12 of the Letters Patent (Bengal), and the corresponding clauses relating to the High Courts at Bombay and Madras. The rule, it will be seen, is slightly varied.

It has been held, under Act VIII of 1859, s. 5, and cl. 12 of the Letters Patent, 1865, that suits for redemption of mortgages (*a*) and for foreclosure (*b*) and for sale of mortgaged property in satisfaction of the mortgage debt (*c*) are suits for land. It has also been held that where a plaintiff sues on a mortgage bond, both for the money and on the mortgage in the Court of S., the land hypothecated being in district P., the Court of S. can only give him a decree for the money due (*d*).

In one case (*e*) it was held by Vice-Chancellor Bacon, that a decree in a suit for foreclesure was a decree *in personam*, depriving the mortgagor of his personal right to redeem; and that, consequently, the Court of Chancery in England had jurisdiction in respect of a mortgage between an English mortgagor and mortgagee, where the land was situated in the colonies. The Vice-Chancellor entertained no doubt as to the jurisdiction (*f*).

(*a*) Palmoney Dossee *v.* Judonath Shaw, 1 In. Jur., N. S., 319, Macpherson, J.

(*b*) Bibee Jaun *v.* Mirza Mahomed Hadee, *ib.*, 40, Macpherson, J.

(*c*) Leslie *v.* The Land Mortgage Bank, 18 Suth. W. R., 269, Markby and Ainslie, JJ.; *contra*, Yenkoba *v.* Rambhaji, 9 Bom. H. C. Rep., 12.

(*d*) Mahomed Khaleel *v.* Musst. Sona Koer, 23 Suth. W. R., 123; see Musst. Ahmedee Begum *v.* Dabee Persaud, 18 *ib.*, 287.

(*e*) Paget *v.* Ede, L. R., 18 Eq., 118.

(*f*) See too Tawell *v.* Slate Company, L. R., 3 Ch. Div., 629.

There are some old cases cited in the note to *Penn* v. *Lord Baltimore* (*a*) to the same effect. In one of them (*b*), Lord Keeper Wright had held, that a suit for foreclosure of a mortgage of the Island of Sark, was a personal matter, "otherwise there might be a failure "of justice, if the Chancery could not hold plea in such a case, "the party being here." That case was peculiar, the mortgagor was the owner of the whole island, and the fact that the owner of the island has himself exclusive jurisdiction in all suits, would account for the expression of the Lord Keeper. It has been considered that where the land lies partly within and partly without the limits of the jurisdiction, the High Court has jurisdiction, under cl. 12 of the Charter of 1865, when the leave of the Court has been obtained (*c*).

In another case (*d*) the purpose of the suit was to compel the sale of the whole of the land out of the jurisdiction, including the share of L. The suit was brought to carry out the trusts of a certain deed which had been executed for the benefit of the creditors of M. and L., and relating to this property. The trustees were both resident in Calcutta. L. objected that his share was not subject to the trust at all, because M., who, owning himself a 14-anna share, had executed the deed of trust on his own behalf and as attorney for L., who had a 2-anna share, had no authority to execute the deed. The question arose, therefore, as to the trustees' title to L.'s 2-anna share. It was held that the suit affected land, and could not be maintained in the High Court (*e*). See also another case (*f*), where Phear, J., held, that a suit to establish a boundary line between two adjacent properties (coal mines) was a suit for land, and the land being out of the jurisdiction, the suit would not lie in the High Court. Phear, J., thought that *Paget* v *Ede* was rendered inapplicable by the express words of cl. 12 of the Letters Patent. In these two cases numerous decisions of the Courts in

(*a*) 2 White and Tudor, 788.

(*b*) Toller *v* Carteret, 2 Vern., 494, reported also in 1 Salk., 404.

(*c*) Prasanamayi Dasi *v.* Kadambini Dasi, 3 B. L R., O. C., 85, Norman, J. In a later case, which has been heard by Peacock, C J., and Markby, J., the point of jurisdcition was not raised on appeal; S. M. Jagadamba Dasi *v.* S. M. Padmamani Dasi, 6 B. L R, 686, Phear J.; and see Bank of Hindustan *v.* Nundolall Sen, 11 B. L. R., 301, Macpherson, J.

(*d*) Delhi Bank *v.* Wordie, I. L. R., 1 Calc., 249.

(*e*) Garth, C. J., and Pontifex, J. confirming the decision of Phear, J.

(*f*) E. I. Ry. Co. *v.* Bengal Coal Co., I. L. R., 1 Calc., 95.

India were referred to in argument and by the Court, and will be found in the reports (*a*).

In a case (*b*) where the suit was for the administration of the estates of several members of the plaintiff's family, it was considered by Pontifex, J., that the fact of the property, which was the subject of one of the settlements, being wholly situate without the local jurisdiction, was not of itself enough to constitute a valid objection to the suit, where the trustees (who presumedly were subject to the jurisdiction) had, for some period, paid money under the settlement, and the plaintiff questioned the propriety of these payments; even although the decision in the suit would be binding as to title.

In a suit to obtain a construction of a deed of endowment, by which land was given for the worship of an idol, and sebaits and managers were appointed, and praying that the plaintiffs might be declared jointly entitled with the defendants to be the sebaits and managers of the land, it was held that the High Court had jurisdiction without leave having first been obtained, although the land was not situated within the limits of its jurisdiction (*c*).

In another case (*d*), the Court (Phear, J.) construed a will relating to lands out of the jurisdiction; the representative being within it, no question of jurisdiction was raised in the case, which was heard *ex parte*. It has been held that the obtaining of probate or letters of administration from the Court is no ground by itself for subjecting the party obtaining them to the jurisdiction in matters connected with the estate in respect of which probate or letters of administration has been so obtained (*e*).

A suit was held to be maintainable in Calcutta against the East Indian Railway Company, which has its chief place of business in Calcutta, for damages for a nuisance committed by certain furnaces, &c., in the district of Hooghly (*f*). In this instance two cases (*g*) were cited, in the last-mentioned of which, Phear, J., entertained a suit for arrears of rent on a covenant for payment in a lease

(*a*) See also Surwan Hossein *v.* Shahzadah Gholam Mahomed, 9 Suth. W. R., 170; Kellie *v* Fraser, I. L. R., 2 Calc., 445, Kennedy, J.

(*b*) Treepoora Soondery Dassee *v.* Debendronath Tagore, I. L. R., 2 Calc, 52.

(*c*) Juggodumba Dassee *v.* Puddomoney Dassee, 15 B. L. R., 318.

(*d*) Broughton *v.* Mercer, 14 B. L. R., 442.

(*e*) Leslie *v.* Inglis, 1 Hyde, 67, Wells, J.

(*f*) Rajmohun Bose *v.* The E I. Ry. Co., 10 B L. R., 248, Macpherson J.

(*g*) Chintaman Narayan *v.* Madhavram Venkatesh, 6 Bom. H. C. Rep., A. C., 29; and Khalat Chunder Ghose *v.* Minto, 1 In. Jur., N. S., 426.

of land out of Calcutta, the defendant residing in Calcutta. Several analogous English cases may be usefully referred to, *e.g.*, the Court of Chancery will entertain a bill to account for the profits of an estate in Ireland (*a*), or to relieve against a fraudulent deed obtained in England, or perform a contract, or execute a trust concerning such estate (*b*); but will not decree a partition, which is in the realty (*c*). A bill to have a discovery concerning the general title of the Isle of Man, and to have relief upon a particular point of equity, relating to the rectories and tithes within that island, was held maintainable in Chancery; and the authority of this case allowed (*d*).

It was held by Trevor and Campbell, JJ. (*e*), that a sum of money having been recovered in a suit in Calcutta for mesne profits of land in the Nuddea district, the suit having been instituted by the former owner, who was to pay the money over to a person who had purchased the land from him, the Nuddea Court had jurisdiction to entertain a suit brought by the purchaser against the former owner to make him pay the money that he had recovered in Calcutta. This was on the ground that the money recovered was mesne profits issuing out of the land in Nuddea.

A suit for trespass to personalty in a foreign state, the title to such personalty depending on the right to land in such foreign state, is cognizable by a British Court, so as to rebut a *primâ facie* title to such personalty acquired within the Court's jurisdiction (*f*).

It has been held that an objection to this head of jurisdiction cannot be waived by the parties (*g*). When an objection to the jurisdiction is first taken at a late stage of the suit, instead of being brought forward, as it should be, at the first stage of the suit, when the plaint is presented for admission, the proper course is, even if the jurisdiction be doubtful, to proceed and determine the suit (*h*). But if a plain defect of jurisdiction appears at the

(*a*) Cartwright *v.* Pettus, 2 Ch. Ca., 214.

(*b*) Earl of Arglas *v.* Muschamp, 1 Vern., 75 & 135; Archer *v.* Preston, cited, *ib.*; Earl of Kildare *v.* Eustace, 1 Vern., 405; 1 Eq. Ca. Ab., 133.

(*c*) Cartwright *v.* Pettus, 2 Ch Ca, 214.

(*d*) Earl of Derby *v.* Duke of Athol, 1 Ves., Sen., 202, cited also in the note to Penn. *v.* Lord Baltimore, 2 White & Tudor, 783, and reported also in 1 Ch. Ca., 220.

(*e*) Sarodapersaud Mookerjee *v.* The Bengal Indigo Co., 1 In. Jur., N. S., 32.

(*f*) Saya Lao *v.* Nga Paw Lao, 2 Wym. Rep. S. C. C. and other Ref., 6; S. C., 6 Suth W. R., Civ. Ref., 4, Peacock, C. J., and L S. Jackson, J.

(*g*) Lalmoney Dossee *v.* Judonath Shaw, 1 In. Jur., N. S., 319, Macpherson J.

(*h*) Bagram *v.* Moses, 1 Hyde, 285.

hearing, the Court, acting on equitable principles, should not proceed to decree (*a*). The High Court cannot exercise ordinary jurisdiction with respect to land which is situated out of its local limits, even though it be in possession of the Receiver of the Court (*b*).

The proviso in the section of the New Code now under consideration enables the Court to give relief where it can be entirely obtained by the personal obedience, but it treats suits for redemption and foreclosure as primarily suits for land ; and where relief against the person is sought, he must be actually voluntarily resident or carrying on business, or personally working for gain within the jurisdiction. The word 'property' also is limited to property situated in British India.

Suits to be instituted where defendants reside or cause of action arose.

17. (S.) Subject to the limitations aforesaid, all other suits shall be instituted in a Court within the local limits of whose jurisdiction—

(*a*) the cause of action arises, or

(*b*) all the defendants, at the time of the commencement of the suit, actually and voluntarily reside, or carry on business, or personally work for gain; or

(*c*) any of the defendants, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain: provided that either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain as aforesaid, acquiesce in such institution.

Explanation I.—Where a person has a permanent dwelling at one place and also a lodging at another place for a temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging.

Explanation II.—A Corporation or Company shall be deemed to carry on business at its sole or principal

(*a*) See Penn *v.* Lord Baltimore, 2 W. & T. L. C., 923.

(*b*) Denonath Sreemoney *v.* Hogg, 1 Hyde, 141.

office in British India, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations.

(*a.*) A. is a tradesman in Calcutta. B. carries on business in Dehli. B., by his agent in Calcutta, buys goods of A., and requests A. to deliver them to the East Indian Railway Company. A. delivers the goods accordingly in Calcutta. A. may sue B. for the price of the goods either in Calcutta, where the cause of action has arisen, or in Dehli, where B. carries on business.

(*b.*) A. resides at Simla, B. at Calcutta, and C. at Dehli. A., B., and C. being together at Benares, B. and C. make a joint promissory note payable on demand, and deliver it to A. A. may sue B. and C. at Benares, where the cause of action arose. He may also sue them at Calcutta, where B. resides, or at Dehli, where C. resides; but in each of these cases, if the non-resident defendant objects, the suit cannot be maintained without the leave of the Court.

1. This clause corresponds with Act VIII of 1859, s. 5, and does not apply to the High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction (see s. 638). Here the Charters (cl. 12, Bengal, &c.) must govern the case.

As to the first head of jurisdiction (a) where the "cause of action" arises:

These words may be almost said to be historical: they have so often been used in English Statutes and Indian Acts and Regulations, and their proper meaning has been the subject of so much discussion and difference of opinion.

They have been used in India from a very early date. See Bengal Reg. II of 1803, s. 5; and there have been numerous cases decided upon their construction as used in that section and in Act VIII of 1859, s. 5; cl. 12 of the Charters; the Limitation Act, &c.

In dealing with the decisions, both in the English and Indian Courts, it should be observed in the first instance that the words have been used in different Statutes in very different connections and for very different purposes.

That they cannot always bear the same construction is evident; for example, in Act VIII of 1859, s. 2, it is provided that "no Court shall take cognizance of any suit brought on a 'cause of action' which shall have been heard and determined, &c." These words have been held to mean, as used in this connection,

the matter substantially in question between the parties, not only matter of attack but of defence. It is obvious that they cannot bear the same interpretation when used in the present s. 17, corresponding with Act VIII of 1859, s. 5, or in s. 50, *post*, which deal only with matters of attack.

This consideration should be borne in mind if decisions in supposed analagous cases are sought to be put forward in argument in support of any particular construction of the words.

The old Statutes, 6 Rich. II, c. 2, and 4 Hen. IV, c. 18, laid down certain rules as to the venue. They neither of them contain these words, but applications to change the venue involved the question whether the "cause of action" arose in one place or the other. The Courts of Common Law, in which these actions were tried, were Courts of general jurisdiction. But the Statutes obliged the plaintiff to institute his suit in the county in which the contract was made, where the action was for debt, or account, or any other such action (6 Rich. II), not in a foreign county (4 Hen. IV); these were matters of procedure.

Again, the Acts relating to limitation obliged the plaintiff to institute his suit within a certain time from the date when the "cause of action" arose. See, for example, Act XIV of 1859, ss. 1, 11, and 12. These sections relate to the time when, and not to the place where, the "cause of action" arose. The new Indian Limitation Acts, IX of 1871 and XV of 1877, use the words "right to sue," and dispose of the question by enumerating various suits in its schedule, and fixing in each case a particular date from which the period of limitation is to begin to run.

The County Courts Act, 9 and 10 Vict., c. 95, s. 60, *gives jurisdiction* in certain cases to the Court for the district in which the "cause of action" arose.

Another section (63) prohibits the splitting of the "cause of action" for the purpose of bringing two suits for sums within the amount over which the County Courts have jurisdiction when the whole claim exceeds that amount. Another section (128) allows the plaintiff to elect to sue in the superior Courts where the plaintiff dwells more than twenty miles from the defendant, or where the "cause of action" did not arise *wholly or in some material part* within the jurisdiction of the County Court within which the defendant dwells or carries on business.

These clauses deal with questions of jurisdiction, and the first

and last with the placew here the "cause of action" arose, in the same way as the 5th section of Act VIII of 1859 and s. 17 of the present Code.

The Common Law Procedure Act, 1852, again, relates to procedure, and does not seek to amplify or limit the jurisdiction. But as ss. 18 and 19 authorise the issuing of a writ of summons for service out of the jurisdiction of the superior Courts, if the Court or Judge is satisfied that, among other things, the "cause of action" arose within it, it is necessary, when the question of construction arises, to enquire into the question of jurisdiction.

2. The most important decision as bearing on Indian cases, being a decision of the Court of last resort in suits from India, is the decision in the case of *Luckmee Chand* v. *Zorawur Mull* (*a*). The question arose upon the construction of Bengal Reg. II of 1803, s. 5, which is as follows :—

"The Zillah Courts are empowered to take cognizance of all "suits and complaints respecting the succession or right to real or "personal property, land rents, revenues, debts, accounts, contracts, "partnerships, marriage, caste, claims to damages for injuries, and "generally of all suits and complaints of a civil nature in which "the defendant may come within any of the descriptions of persons "mentioned in s. 4, (*i.e.*, natives and other persons not British "subjects). Provided that the landed or other real property, to "which the suit or complaint may relate, shall be situated, or in "all other cases the 'cause of action' shall have arisen, or the "defendant at the time when the suit may be commenced shall "reside as a fixed inhabitant, within the limits of the zillah over "which their jurisdiction may extend."

The facts of the case were these: A contract was entered into at Rutlam, in the independent State of Malwa, between the firm of L., who resided and carried on business at Muttra, within the jurisdiction of the Zillah Court at Agra, and the firm of Z, carrying on business at Rutlam and elsewhere, for the establishment of a co-partnership for the purchase and sale of opium. The co-partnership was carried on principally at Muttra, and the business was conducted there by means of capital advanced in the concern by the firm of L. The partnership books were kept at Muttra. At the close of the partnership, which was attended with loss, a balance was struck at Muttra, which showed a debt due by the firm of Z. to the firm of

(*a*) 8 Moo. I A, 291.

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L. In an action brought by the firm of L. against the firm of Z., in the Zillah Court of Agra, for recovery of the amount of this balance, it was pleaded by Z. that as the contract was made at Rutlam, where the firm resided, the Zillah Court at Agra had, by Bengal Reg. II of 1803, no jurisdiction to entertain the action, which objection the Zillah Court allowed, and afterwards the Sudder Court at Agra, on appeal, sustained. Upon appeal this decision was reversed by the Judicial Committee, on the ground that the cause of action arose in Muttra, and was, by Bengal Reg. II of 1803, within the jurisdiction of the Zillah Court of Agra. Because Muttra was the central place of business, at Muttra the partnership books were kept. At Muttra the partners would have recourse to those books for the purpose of ascertaining the state of the transactions between them, and if in the result a balance was due to the appellants, Muttra would be the place where the payment of that balance would have to be made.

Before the report of this case appears to have reached India, the point arose in certain suits instituted in the High Court at Madras, whose original jurisdiction was then defined by the 12th section of the Charter of 1862, in terms similar to those used in Act VIII of 1859. The first of these cases which is reported was *Winter* v. *Way* (*a*). This was a suit instituted on the Original Side of the High Court at Madras for the recovery of the price of goods sold and delivered. The defendant resided at Secunderabad, outside the limits of the original jurisdiction of the High Court. The plaintiff, who resided and carried on business at Madras, proved the sale to the defendant at different times of various articles, all of which were delivered to him at places beyond the local limits of the High Court's original jurisdiction. The goods were forwarded to him at his request, sometimes by sea, sometimes by banghy parcel through the post office, but, however sent, they were always at the risk of the plaintiff during the journey. Bittleston, J., held, that there was no jurisdiction to entertain the suit. The case stood over for judgment in consequence of a decision of Wells, J., in Calcutta, in a case (*b*) somewhat similar, but the party to whom the goods were delivered in Calcutta had been expressly made the agent of the defendant to receive delivery. It was decided, apparently, that the High Court at Calcutta had in that case jurisdiction.

(*a*) 1 Mad. H. C. Rep., 200. (*b*) Dollet v. Russell, not reported.

Winter v. *Round* (*a*), decided by the same Judge at the same time with *Winter* v. *Way*, was a suit brought in the High Court on its Original Side by the payee against the maker of a promissory note. The defendant dwelt at Secunderabad. The note was dated at Madras, but was in fact made at Secunderabad. The body of the note was written at Madras, and it was sent by post to the defendant, who returned it with his signature through the post to the plaintiff at Madras. The note was given in renewal of a former note, which had been signed by the defendant at Madras, and the original consideration was goods supplied at Madras. Bittleston, J., held, that the Court had jurisdiction: 1*stly*, because the defendant signed the note as made at Madras, and 2*ndly*, because it was delivered in Madras, and the delivery to the plaintiff was necessary to complete the title; and a case (*b*) was referred to, in which Coleridge, J., pointed out the distinction between an acceptance of a bill of exchange which is complete without delivery and an endorsement which is incomplete without delivery. The making of a promissory note being altogether the act of the maker, requires delivery to perfect it.

The next case was *Rajendra Rau* v. *Sama Rau* (*c*), which had been originally rejected by Bittleston, J. It appeared that the defendant, who lived at Coimbatore, laid claim to abungalow at St. Thomas' Mount, and caused it to be sold by auction. The plaintiff then sued the defendant and the purchaser and succeeded in his suit, whereupon the defendant signed an agreement in the district of Coimbatore binding himself to pay to the plaintiff the arrears of rent by instalments. The agreement was to pay the money generally, and on failure of payment the plaintiff sued in the High Court, on its Original Side, to recover the money due upon the agreement. It was held that the Court had no jurisdiction. The following were the remarks of the Court (Scotland, C.J., and Bittleston, J.) in this case:—"The maxim of the common law, *debitum et contract-*
"*us sunt nullius loci*, was, at a very early period, restrained by
"Statute (6 Rich. II, c. 2) with the view of requiring that debt,
"account, and other such actions should be brought in the county
"where the contract was made; and though that Statute failed in
"accomplishing the object, it led to the adoption by the Courts of
"the practice of changing the venue upon an affidavit that the cause

(*a*) 1 Mad. H C. Rep, 202.

(*b*) Wilde *v.* Sheridan, 21 L. J, Q B., 260.

(*c*) 1 Mad. H. C. Rep. 436, Scotland, C. J., and Bittleston, J.

"of action arose in another county than that in which the venue "was laid, and not elsewhere (*a*). So, as regards actions in inferior "Courts, it has always been held that the cause of action, that is the "whole cause of action, must appear to have arisen within the local "limits of the Court's jurisdiction; and in Comyn's Digest, Title "'Courts,' p. 9, many cases will be found illustrating the sense in "which Courts have employed the expression that the cause of "action must appear to have arisen within the jurisdiction. In "*R.* v. *Danser* (*b*), the question was whether the cause of action on "a promissory note arose within the jurisdiction of an inferior "Court, the note having been signed, and the consideration given, "out of the jurisdiction, and the Court held that it did not; but "the money was payable generally upon that instrument, and if "that circumstance would have justified the Court in saying that "the cause of action arose wherever the money was payable, the "decision should have been the other way. In the 60th section "of the English County Courts Act (9 and 10 Vict., c. 95), the "very same words are used as in the 12th section of the High "Court Charter, and in s. 5 of the Civil Procedure Code" (and now the 17th section of the New Code); "and the decisions upon that "section confirm the view which I have expressed. Coleridge, J., "said (*c*),—'the question upon 9 and 10 Vict., c. 95, s. 60, is, "whether the cause of action, that is the whole cause of action, "arose within the jurisdiction of the County Court,' and he held "that it did not, on the ground that though there might have "been a breach within the jurisdiction (as the acceptance of the "bill of exchange, on which the action was brought, was "general, and bound the defendant to pay everywhere), yet the "contract was made elsewhere, and therefore the whole cause "of action did not accrue within the jurisdiction."

Cases of the same nature had arisen in Bengal. The first that is to be found in the reports, is a case (*d*) decided by Norman, offg. C. J., and Macpherson, J., on the 2nd May, 1862. In that case the defendant contracted to tow some cargo boats down the River Hooghly, out of the jurisdiction of the High Court, in which the suit was brought. In consequence of his negligence, one of the

(*a*) See the note to Peacock *v.* Bell, 1 Wms. Saund., 74.

(*b*) 6 T. R., 242.

(*c*) Wilde *v.* Sheridan, 21 L. J., Q. B., 260, and 1 Bail. C. C., 56.

(*d*) Greesh Chunder Bonnerjee *v.* Collins, 2 Hyde, 79.

boats was sunk. The suit was brought to recover the damages sustained. It was held, on the authority of the English decisions on the County Courts Act, that the cause of action meant the whole cause of action, and as the damages were occasioned out of Calcutta, the Court had no jurisdiction, on the ground of the cause of action occurring within the limits of its jurisdiction.

In a case (*a*) decided shortly afterwards, a Hindu lady engaged with the plaintiff that if he would marry her daughter she would allot certain lands to him for her daughter's maintenance, and if she could not do that, a sum of money to provide an equal annual sum by way of maintenance was to be paid. This agreement was made at M. The land did not belong to this lady, but was under the charge of the Court of Wards on behalf of her minor son R. When R. came of age, however, he ratified his mother's agreement, and executed a contract in the district of J., where the land was situate. It has held that, as the original contract had been made at M., R.'s ratification of it must be referred to M., and a suit arising out of the breach of it was properly instituted in the Court of M. In another case (*b*) Sir Barnes Peacock, C. J., adopted the views of the Courts of Common Law on the construction of the words "cause of action" as used in the County Courts Act. In the judgment, after referring to the reported cases, he said—"the cases "establish that the words 'cause of action' mean the whole cause "of action, and that in a suit for breach of contract not only must "the contract have been executed within the jurisdiction, but "the breach must also have been committed within the jurisdiction," in which Morgan, J, concurred. In a suit (*c*) in Calcutta on a promissory note, it was held that, as the note was delivered out of the jurisdiction, the suit could not be maintained, although the note was payable within the jurisdiction, Phear, J., adopting the decision of Parke, B., in *Hernaman* v. *Smith* (*d*) that the "cause of action" means all things necessary to give a right of action whether they are to be done by the plaintiff or by a third person. Morgan, J., gave judgment for the plaintiff in another case (*e*) on a promissory note made and *delivered* in Calcutta, holding delivery

(*a*) Kishen Kinkur Ghose *v.* Rajah Borodokanth Roy, Marsh., 533, Peacock, C. J., and Levinge, J., 8th June, 1863.

(*b*) Feda Hossein *v.* Syedoonnesa, 1 In. Jur., N. S., 80, Feb. 7, 1866.

(*c*) Indian Carrying Company *v.* McCarthy, 1 In. Jur. N. S., 61.

(*d*) 10 Exch., 659.

(*e*) Issurchunder Sen *v.* D'Cruz, 1 In. Jur., N. S., 233 Feb. 27, 1866.

within the jurisdiction to be necessary (*a*). In a suit (*b*), which was for the price of goods sold and delivered, it was contended that some of the goods were delivered out of the local limits, and that the Court had no jurisdiction. Phear, J., holding that a material part of the cause of action arose within the jurisdiction, gave judgment for the full amount, leaving the defendants to dispute in execution those items which did not arise within the jurisdiction. In what way he was to do this does not appear. This case arose in 1866, and it appears that leave to sue in the High Court had been applied for under s. 12 of the Charter of 1865; but it seems doubtful on the report of the case whether the leave had been given. There is no allusion to this point in the judgment.

A suit (*c*) was brought to recover money lent upon a hoondee, drawn by the defendant beyond the local limits, but sent by him to Calcutta, and there accepted and paid by the plaintiff. Phear, J., held, that the suit was rightly instituted in the High Court, Original Side. No application for leave to bring the suit under s. 12 of the Charter of 1865 appears to have been made. It was alleged, also, that the defendant was resident within the jurisdiction, but that question was not dealt with by the learned Judge, who decided the point on the other head of jurisdiction, and was of opinion that it was necessary, in order to maintain the suit on this ground, that the whole cause of action should have arisen within the jurisdiction. He considered the hoondee equivalent to a simple written request which was complete when it reached the plaintiff, and that the suit might be considered as one for money paid by the plaintiff for the defendant at his request. The learned Judge cited the case of *Newcomb* v. *DeRoos* (*d*), and considered that the decisions on the English County Courts Act might be properly used as guide in the interpretation of the clause in the Code of Civil Procedure (VIII of 1859, s. 5).

In another case (*e*), heard by three Judges—Peacock, C. J., Norman and Markby, JJ.—apparently for the purpose of considering

(*a*) See also Ramgopal Law *v.* Blaquiere, 1 B. L. R., O. C., 35, Sep. 16, 1867, Norman J.; Hajiban Das *v.* Bhagwan Das, 7 *ib.*, 102, Phear J.; and Mothoormohun Roy *v.* Judoomoney Dossee, 10 *ib.*, 122, Macpherson, J., December 11, 1872; to the same effect.

(*b*) Doorgapersaud Bose *v.* Waters, 1 In. Jur., N. S., 191, May 8, 1866.

(*c*) Joan Mull *v.* Munnoololl, 1 In. Ju. N. S., 219, June 4th, 1866.

(*d*) 29 L. J., N. S., Q. B., 4; S. C., 6 Jur., N. S., 68.

(*e*) Dhanraj *v.* Gobindoram, 1 B. L. R., O. C., 77, 22nd April, 1868.

this point, for it was an undefended case on the Original Side, it was held, in the case of hoondees drawn up-country but accepted and paid in Calcutta, that the liability arose on the implied contract between the parties that the money was to be repaid. The bills were made payable in Calcutta and were presented there. The *whole* cause of action arose in Calcutta. An application had been made in a case (*a*) under the 12th section of the Charter of 1865, for leave to commence a suit on the Original Side of the High Court, part of the cause of action arising within the local limits of the jurisdiction of the High Court. This application was refused by Collett, J., and the plaintiff appealed. The plaintiffs were trustees of the firm of S. & Co., and the suit was for the recovery of Rs. 21,452. S. & Co. were merchants and agents at Madras. The defendant resided at Bimlipatam. S. & Co. shipped goods from Bimlipatam through the defendant, who was their agent. The terms of the contract between S. & Co. and the defendant were, that the latter should be entitled to a one-half share of the shipments made by him at Bimlipatam under instructions from S. & Co. upon his electing to take the risk. The defendant did elect to take the risk in respect of certain shipments, which resulted in a loss. The loss upon these shipments, amounting to Rs. 17,693, was the principal item of the plaintiffs' claim. It was stated in the plaint that S. & Co. were, under the contract, to supply the defendant with funds. The grounds of the refusal to admit the plaint were, that it appeared to the learned Judge that there were several causes of action in respect of the several sums of money claimed in the plaint, and in particular that the cause of action in respect of the Rs. 17,693 did not arise within the local limits of the ordinary original jurisdiction of the High Court; or if in part it did so arise it was a distinct and separate cause of action in respect of which the defendant ought not to be sued in that Court.

This head of jurisdiction was discussed at great length by Bittleston and Holloway, JJ., the former Judge holding that the High Court, more particularly when exercising its ordinary original civil jurisdiction, is bound to adopt the interpretation of the words "cause of action" and "part of the cause of action" laid down by the English Courts interpreting the County Courts Act, and that the cause of action means the whole cause of action, and

(*a*) DeSouza *v.* Coles, 3 Mad H. C Rep, 384.

includes every fact essential to the maintenance of the action, and each of these facts separately is but a part of the cause of action. The learned Judge, after commenting upon the decided cases, observed, that "the result of these cases as to bills of exchange and "promissory notes is, that the obligation of the maker of a promis-"sory note or of the indorser of a bill of exchange, and probably of the "acceptor also, is not complete without delivery of the instrument "to the payee, indorsee, or drawer; and in a suit against the maker "or indorser or acceptor, the whole cause of action does arise where "the complete contract is made, but not elsewhere; subject to this "qualification as regards actions against indorsers, in which notice "of dishonour is necessary, that such notice is also a material part of "the cause of action, as was held by Coleridge, J. (*a*), and must also "be given within the jurisdiction." Mr. Justice Holloway held that, irrespective of the domicile of the defendant, there is a complete forum wherever a place can be indicated to which the right and its infraction can both be referred, because there is a cause of action and the whole cause of action. His Lordship also expressed an opinion that the High Court was not bound by the English decisions in Westminster Hall, where such decisions conflicted with decisions of the Privy Council. This was with reference to a case (*b*) which the learned Judge considered "involved implicitly the "following propositions:—

"(1) The making of the contract is a matter perfectly in-"different, and is no part of the cause of action.

"(2) The place at which an obligation is to be performed is its "seat and the place of jurisdiction.

"The place of expected performance may be determined by the "circumstances of the case, and in a contract of partnership, its "main seat is the place at which each of the partners is bound to "pay what may be due."

Again, the same learned Judge expresses himself as follows:—

"There are many pieces of evidence, and other things even more "remote, which are essential to the successful maintenance of an "action which are no part of its cause. The action is neither an "independent right nor an excrescence from the right, but the right "itself in its quality of judicial enforceability" (*c*).

(*a*) Huth *v.* Long, 19 L. J., Q. B., 325.

(*b*) Luckmee Chund *v.* Zorawur Mull, 8 Moo. I. A., 291.

(*c*) Pattaravy Mudali *v.* Audimula Mudali, 5 Mad. H. C. Rep, 420.

See also the judgment of Holloway, J., in another case (*a*). The learned Judge, however, appears to use an inapt expression when (*b*) he says that the English cases were "a string of "cases following one upon the other, and of no more authority than "the first that was decided;" many of them appear from the published reports to have been strongly contested and carefully considered by very eminent Judges.

The English Judges went so far in one case (*c*) as to hold an attorney guilty of negligence for bringing an action in a Mayor's Court, where the suit was for goods supplied out of the jurisdiction, but the promise to pay was within the jurisdiction, holding that he was bound to know that the consideration for the promise must also arise within the jurisdiction (*d*).

Where the defendant, who carried on business in the city of London, posted a letter there, containing an order for goods addressed to the plaintiff in Surrey, and no letter was sent accepting the offer, but the goods were taken by a servant of the plaintiff and delivered to the defendant in London, it was held that the whole cause of action arose in the city (*e*).

Where the plaintiffs carried on business at Manchester, and one of them, going his usual rounds to solicit orders, received an order from the defendant at Oxford, for goods to be forwarded in the usual way by railway from Manchester to Oxford, it was held, that the whole cause of action did not arise at Manchester, so as to give the County Court there jurisdiction under the 60th section of the County Courts Act (*f*). But the expression "cause of action" does not necessarily mean a cause of action on one single entire contract, for there may be one cause of action on several debts contracted at different times (*g*). Where a defendant offered £20 to be paid on conviction of any person for stealing a sheep, and the plaintiff apprehended one Rock within the jurisdiction of the Newnham County Court, Rock was tried and convicted at Hertford Assizes, out of the jurisdiction of Newn-

(*a*) Lee Morris *v.* Sambamúrthi Ráyan, 6 Mad. H. C. Rep., 122.

(*b*) DeSouza *v.* Coles, 3 Mad. H. C. Rep., 384.

(*c*) Williams *v.* Gibbs, 5 Ad. & Ell., 208

(*d*) See also Cooke *v.* Gill, 42 L. J., N. S., C. P., 98.

(*e*) Taylor *v.* Jones, L. R., 1 C. P. Div., 87; following Dunlop *v.* Higgins, 1 H. L. C., 381.

(*f*) Borthwick *v.* Walton, 15 C. B., 501.

(*g*) Grimbly *v.* Ackroyd, 1 Ex., 479.

ham County Court,—it was held, that the conviction was an essential part of the cause of action, and that the *whole cause of action* did not arise in that district (*a*). In an action by a carrier for freight or hire, the cause of action may be considered to arise at the place where the goods are delivered to the consignee (*b*). Where a plaintiff, within the jurisdiction of the County Court of G., received from the defendant at L., without the jurisdiction of G., an order for plants, the description of which was taken from a price list of the plaintiff, in which he undertook to pay the carriage of goods ordered from him; the defendant ordered the plants by letter, and requested that they should be sent by a particular carrier, and the plaintiff having sent the goods to the defendant by carrier, brought an action in the County Court of G.,—it was held, that the cause of action did not arise wholly in the jurisdiction of the County Court of G., as the delivery there was not a delivery to the defendant (*c*).

It is a general rule that delivery to a common carrier is a delivery to the consignee (*d*); but it is a question for the jury—*i.e.*, for the Judge in a Civil Court in this country—"at whose risk the goods were carried" (*e*); and as long as they are at the risk of the consignor, there is no delivery (*f*). And so where A. sued B. for goods sold in Madras and delivered to B. personally outside the local limits of the High Court's original jurisdiction, and B. dwelt outside those limits, and the goods were sent to him at his request, sometimes by sea, sometimes through the Post Office, but always at A.'s risk during the journey,—it was held, that the suit must be dismissed for want of jurisdiction. So long as goods, though delivered to a common carrier appointed by the consignee, remain at the risk of the consignor, they are not delivered to the consignee (*g*); but where the goods are bought and the vendor afterwards delivers them to the carrier at the request of the purchaser as in Illustration (a), the cause of action for the price is complete at the place of the sale and purchase.

And where the defendant, residing out of the jurisdiction,

(*a*) Hernaman *v.* Smith, 10 Ex., 659.

(*b*) Kemp *v.* Clark, 12 Q B., 647.

(*c*) Wheeler *v.* Pearson, 28 *Law Times*, 255.

(*d*) Dawes *v.* Peck, 8 T. R., 330; Dutton *v.* Solomonson, 3 Bos. and P., 582; Brown *v.* Hodgson, 2 Camp, 36.

(*e*) Dunlop *v.* Lambert, 6 Cl. and Fin., 600; Freeman *v.* Birch, 3 Q. B., 492 note.

(*f*) *Ib.*

(*g*) Winter *v.* Way, 1 Mad. H. C. Rep., 200.

wrote and sent a letter giving an order to the plaintiff, which order was received and executed by the plaintiff entirely within the jurisdiction of the County Court of L., it was held, that as the letter was no request till it reached its destination, the cause of action arose within the County Court of L. (*a*).

In a case (*b*) the defendant applied for a rule for a prohibition to the Judge of the County Court at Towester, the cause of action not arising within the jurisdiction. The plaint was for a breach of warranty of soundness on the sale of a horse. The defendant resided at Biddlesdon, without the jurisdiction. The plaintiff resided within the jurisdiction. The defendant's affidavits, in support of the rule, went to show that the plaintiff, on the 14th August, came to his (defendant's) residence, and there bargained with him by word of mouth for the purchase of the horse, at a certain price above £10, the horse to be delivered next day. But the affidavits on the part of the plaintiff went to show that though there was a bargaining, there had not been, on the first day, a complete bargain; and though the defendant said the horse was sound, the Court considered that there was not then a warranty; but on the next day, the 15th, the defendant came to the plaintiff's residence (within the jurisdiction) and there the parties finally agreed together that there should be a warranty (the breach of which was complained of), and the horse was then and there delivered, and the price first mentioned paid. It was objected before the County Court Judge, on the part of the defendant, that he had no jurisdiction, seeing that the original contract of sale was out of the jurisdiction, and that this was a part of the "cause of action." The Judge, however, overruled the objection, on the ground that there was no binding contract until the delivery, which was within the jurisdiction. The Judges of the Court of Exchequer upheld this decision on the same ground; see the judgment of Pollock, C.B., who said—"Then, on the next day, "within the jurisdiction, the warranty was agreed to before the "contract was completed, and the horse was then delivered. The "whole cause of action, therefore, then and there occurred. It "appears to me clear, that though there may have been a bargain "before without a warranty, yet, when the parties afterwards "came together to complete the transaction, and they then agreed

(*a*) Newcomb *v.* De Roos, 29 L. J., Q. B., 4.

(*b*) Aris *v.* Orchard, 6 H. & N. 160.

"upon a warranty, there was then, for the first time, a contract "complete and perfect. The real contract here, that is, the one "upon which the plaintiff sued, was not entered into until the "second occasion within the jurisdiction." Wilde, B. said—"Now, "whatever may be the proper logical meaning of the words 'cause "of action' (which I should have supposed meant something "entire, indivisible), the words 'whole cause of action' have had "a judicial construction, and have been held to mean everything "material and essential for the plaintiff to prove in support of his "case. The question then is, whether it was an essential part of "his case to prove what had occurred on the first occasion. I "think not, for the contract was entire and indivisible for the sale "of the horse with a warranty. There can be no contract until "there is a final and mutual assent: an agreement of the minds of "the parties upon the same terms. When that assent has taken "place—and no matter what may have taken place before—there "is a contract, and a cause of action on that contract then and "there arises."

Again, where a carrier and wharfinger at Swindon, in Wiltshire, agreed in writing with M., who resided in Surrey, to barge timber from the river wharf to London, at any wharf there, at 16s. per ton, to include all charges except wharfage, it was necessary to haul the timber from the place where it lay to be loaded on board the barges, and at times, when the horses of M. were not on the spot, the carrier provided horses and hauled the timber. A plaint was afterwards brought in the County Court for the district of Swindon against M. for £50, the balance of account claimed by the carrier, including two items amounting to £1-16, for hauling. The Court held that the hauling of the timber and the carriage of it to London constituted but one cause of action, and that as such cause of action did not arise until the delivery of the timber in London, the Judge of the County Court of Swindon had no jurisdiction to try the plaint under 9 and 10 Vict., c. 95, s. 60 (*a*).

A contract was made in Liverpool, whereby it was agreed that a cargo on board a ship at Queenstown, in Ireland, should be sold and delivered in any part of the United Kingdom which the plaintiff might direct, and on handing over the shipping documents and policy of insurance the price was to be paid. The plaintiff directed the cargo to be delivered at Drogheda, in Ireland, and made a demand on the defendant at Liverpool to hand over the shipping documents and policy of insurance. The action was brought upon

(*a*) Barnes *v.* Marshall, 21 L. J., Q. B., 388.

the whole contract in the Liverpool County Court; it was held that the plaintiff might sue in that Court for that breach of the contract consisting in not delivering over the shipping documents and policy of insurance, but that that part which consisted in not delivering over the cargo could not be sued for in the Liverpool County Court (*a*). Where a bill of exchange was drawn, accepted, and endorsed by the drawer within the city of London, but delivered over to the indorsee in the County of Middlesex, it was held that, in an action by the indorsee against the acceptor, the cause of action did not arise in the city of London (*b*). A plaintiff drew a bill at Norwich, addressed to the defendant in London, and there accepted by him generally; the plaintiff indorsed the bill over to a third party at Norwich, but it was dishonoured. It was held that the Norfolk County Court had no jurisdiction (*c*).

Lord Kenyon, in an action for damages for the infringement of a patent, held, that the patent having been obtained at Westminster and the infraction having taken place in Northumberland, the whole cause of action did not arise in Northumberland (*d*).

With regard to the decisions on the Common Law Procedure Act, 1852, s. 18, which have been often cited as analogous, there was a difference of opinion among the learned Judges of the Courts of Common Law, which ended in their agreeing, in the case of *Vaughan* v. *Weldon* (*e*), for the sake of uniformity, to treat the words as they have been construed in *Jackson* v. *Spittal* (*f*), where it was held that it was not necessary to show that the whole cause of action arose within the jurisdiction (*g*). Pollock, C. B., said in

(*a*) Walsh *v.* Ionides, 1 E. & B., 383; S. C., 22 L. J., N. S., Q. B., 138.

(*b*) Buckley *v.* Hann, 5 Ex., 43. See also Chapman *v.* Cotterell, W. R., Exch., June 17th, 1865; S. C., 31 L. J., N. S., Ex., 186; and Wood *v.* Perry, 3 Ex., 442.

(*c*) Wilde *v.* Sheridan, 21 L. J., Q, B., 260.

(*d*) Cameron *v.* Gray, 6 Term Rep., 363.

(*e*) L. R., 10 C. P., 47.

(*f*) L. R., 5 C. P., 542; S. C., 39 L. J., C. P., 321.

(*g*) The cases cited are: Durham *v.* Spence (L. R., 6 Ex., 46; S. C., 40 L. J., N. S., Ex, 3), being in accordance with that view; and Sichel *v.* Borch, 2 Hurlst. and C., 954, S. C., 33 L. J., N. S., Exch., 179, the plaintiff being defeated in the Q. B. brought another action in the C. P., and got an order from Williams, J., for service of the summons abroad, and ultimately succeeded in his action; see 39 L. J. C. P., 323. The case is reported in the *Law Times*, June 19, 1869, vol. 47, p. 142. Williams, J. said—"The cases affecting the jurisdiction of the inferior Courts are, I think, quite inapplicable." See also the judgment of Brett, J., in Jackson *v.* Spittal (39 L. J., N. S., 324) and Allhusen *v.* Malgarejo (L R., 3 Q. B., 340; S. C., 37 L. J., N. S., Q. B., 169); and Cherry *v.* Thompson (L. R., 7 Q. B., 573; S. C., 41 L. J., N. S., Q B., 243), against it.

Fife v. *Brown* (*a*), that the construction of the words as used in the County Courts Act was inapplicable to this Act.

The above being the state of the English authorities and the purpose of the English Acts, Green, J., was rather inclined to apply the constructions of the County Courts Act than of the Common Law Procedure Act, 1852 (*b*).

The plaintiff at A. agreed to sell and deliver goods to the defendant, the goods to be measured at B., and delivered at C.; in default of delivery the value of the goods should be paid at the market-rate at A. Default was made. It was held; that in an action to recover the value of the goods at the market-rate at A., the cause of action arose at C. (*c*).

A suit (*d*) was brought upon a bond. The consideration for the bond passed in the plaintiff's shop at Dehra, and upon receiving it the defendant promised to execute a bond in favour of the plaintiff upon his return to his house at Saharunpore. This he did. The bond was not paid, and the plaintiff instituted his suit in the Court at Dehra. It was held that the cause of action arose at Dehra. The following were the reasons of this decision :—

"When the law (s. 5 of Act VIII of 1859) gives juris-"diction to the Court within the limits of which the 'cause of "action shall have arisen,' we understand the meaning of the legis-"lature to be, that the suit or proceeding in Court shall be in the "local tribunal of the place where the facts which immediately "confer the right to sue shall have occurred. Several facts may be "necessary to entitle a person to maintain a suit, but it is not till "the last has happened that there is a cause of action. A thing may "be the foundation of a cause of action without being itself a cause "of action. In the present case the nonpayment of the amount of "the bond is the circumstance which has immediately conferred the "right to sue; but to maintain the suit the plaintiff must prove the "bond, the non-payment of which is the cause of suit. The bond "was executed, we understand, in the Saharunpore district. When "made, whether it was delivered to the plaintiff there or at "Dehra, it created a debt which was payable to the plaintiff at

(*a*) 6 W. R., 282.

(*b*) Mulchand Joharimal *v.* Suganchand Shivodas, which will be referred to presently.

(*c*) Chunilal Maniklalbhai *v.* Mahipatrav Valad Khandu, 5 Bom H C. Rep.. Ap., 33, Couch, C. J., and Newton, J.

(*d*) Prem Shook *v.* Beechoo, 3 H. C Rep., N. W. P., F. B., 242, Morgan, C. J, Roberts, Pearson, Turner, and Spankie, JJ.

"Dehra where he resides. The consideration for the bond arose "at Dehra, and it was there also that the defendant agreed to give "the bond. The suit being on the bond for the money payable under "it, and the money being legally payable at Dehra, we think that "the bare fact that the bond was made at Saharunpore, is not "sufficient to create a cause of action there, and we further think "that the facts which gave rise to the suit (except the mere writing "of the bond) having occurred at Dehra, the Court there has juris-"diction."

It was suggested in the order referring the case to the Full Bench, that as it had been held that the words "cause of action" meant "whole cause of action," and as the consideration for the bond itself go to make up the whole cause of action, this head of jurisdiction failed. That in some cases this would produce a hardship where the jurisdiction merely arises from the occurrence within the local limits of a cause of action. On the other hand it was thought that the legislature did not intend to give the plaintiff a right of selecting the Court in which he would sue. There was no evidence of the place of delivery of the bond, and the case must be taken as an authority in favor of the view that the words do not mean the "whole cause of action." And this view was taken by L. S. Jackson and McDonell, JJ., in another case (*a*) which was decided upon the same section, and it was considered that the English cases afforded no guide. In that case the plaintiff entered into a contract in the district of N. to supply indigo seed in the district of N. to the defendant; the seed to be paid for on delivery by an order to be sent to the plaintiff on receipt of the seed. The plaintiff resided in the district of M. The defendant resided in that of N. The plaintiff delivered the seed in the district of N., and it was accepted by the defendant who failed to pay the price. The suit was brought in the Court at M., and it was held that the Court at M. had jurisdiction.

Again a question has arisen on this head of jurisdiction in a case (*b*) originally heard by Green, J., whose decision was confirmed and approved by Westropp, C. J., and Sarjent, J. That was a case on cl. 12 of the Charter and leave had been obtained. Reference is there made to English decisions, (1) on applications to change the venue, (2) on the County Courts Act 9 and 10 Vict., c. 95,

(*a*) Hills *v.* Clark, 14 B. L R., 367; S. C., 23 Suth. W. R., 63.

(*b*) Mulchand Joharimal *v.* Suganchand Shivodas, I L. R, 1 Bom., 23.

s. 128, and (3) on the Common Law Procedure Act, 1852, 15 and 16 Vict., c. 76, ss. 18 and 19, and to decisions of the Courts in India upon similar words contained in Bengal Reg. II of 1803, ss. 3 and 4, and on Act VIII of 1859, s. 5. The learned Judge Green, J., was clearly of opinion that the second and first class of cases should be treated as authorities. That was a case in which a *hundi* drawn out of the jurisdiction upon a person within the jurisdiction, was indorsed and delivered to one who, out of the jurisdiction ,indorsed it and sent it to a person who within the jurisdiction received it, got it accepted, and presented it for payment to the drawee by whom it was dishonoured within the jurisdiction. It was held that the dishonour of the *hundi* by the drawee within the jurisdiction was a material part of the cause of action by the holder against the first indorser, and consequently that such material part of the cause of action having arisen within the jurisdiction, and the holder having obtained leave to bring his suit under cl. 12 of the High Court Charter of 1865, the Court had jurisdiction to entertain the suit. The plaintiff had originally instituted his suit without obtaining the leave of the Court, and his plaint was rejected. He filed his plaint again, after leave obtained. Green, J. (see p. 34) referring to the opinion of Holloway, J., in *De Souza* v. *Coles*, as to the result of the case of *Luckmee Chund* v. *Zorawur Mull*, was unable to agree with that opinion. He observed :—"The suit was not one for a "breach of any term of the partnership contract, but rather, as "appears what in English pleading would be called, an action on an "account stated, the statement of such account having taken place "within the jurisdiction of the Court where the suit is brought. "The only other form the suit can have assumed would be for a "partnership account; and where else could the cause of such ac-"tion be said to arise, except where, by consent of the parties, the "head-quarters of the partnership had been established, the moneys "advanced, the accounts kept, and the final accounts of the part-"nership dealings closed? The language of the judgment is, to "say the least, consistent with the existence of the opinion, on "the part of the Judicial Committee, that the making of the con-"tract not being a part of the cause of action, the fact that it was "made out of the jurisdiction was immaterial, and did not preclude "the Court from entertaining the suit, which was either on an account "stated within the jurisdiction in respect of partnership transac-"tions the head-quarters of which were within the jurisdiction, or "for an account of such partnership transactions."

As to the second and third heads of jurisdiction, *viz.* : where—

(b.) All the defendants, at the time of the commencement of the suit, actually and voluntarily reside, or carry on business, or personally work for gain; or,

(c.) Any of the defendants do so, and either the leave of the Court is given, or the defendants, who do not reside or carry on business, or personally work for gain as aforesaid, acquiesce in such institution.

Explanation 1 qualifies the term "reside." And the question arises whether the words "cause of action," as used in this explanation, are to receive an interpretation different from that which they bear, as used in the earlier part of this section, para. (a). If so, they will probably prove a fruitful source of litigation. If, on the other hand, they are to receive the same interpretation, the explanation is apparently unnecessary, for the defendant can already be sued where the cause of action arose, and an enquiry into the question where he resides seems to be unnecessary.

With regard to the *permanent* residence, the word "reside" is equivalent to the word "dwell." It has been held that the word "dwelling" is synonymous with "place of abode" or "residence;" it is domicile or home (*a*). Where a man has a temporary residence at one place, but intends to return to another, which he has quitted only for the time, as for instance when he was in prison temporarily out of the Court's jurisdiction, but had his fixed residence and his wife and family within it, he was held to reside within the jurisdiction for the purpose of the suit (*b*). And this condition is enforced in this Code by the introduction of the word "voluntarily." A man's dwelling is *primâ facie* the place where his wife and family reside, and if he has a family dwelling in one place, and occupy a house and occasionally sleep in another, he will not be a resident in the latter place, for his residence is his domicile, and his domicile is his home, and his home where his family reside (*c*). But a man may have two dwelling places, living sometimes at one and sometimes at the other; and during his temporary absence, each house, though empty, if there be an *animus revertendi*, will still be his dwelling house (*d*). Where

(*a*) See Lambe *v.* Smythe, 15 L. J., Ex., 287; see also Alexander *v.* Jones, L. R., 1 Exch., 133.

(*b*) Gopal Chunder Sircar *v.* Kurnodhar Moochee, 7 S. W. R., 349, Peacock, C. J., and Jackson, J.

(*c*) Story's Conflict of Laws, p. 63; R. *v.* The Duke of Richmond, 6 T. R., 560; Whithorne *v.* Thomas, 7 Man. and Gr., 1.

(*d*) R. *v.* Murray, 2 East, P. C., 496.

the dwelling is abandoned without an *animus revertendi*, it ceases to be a dwelling, though no new one be acquired (*a*). I do not know that it has ever been decided where the dwelling place of a man with several wives and families ought to be considered to be.

In England, the superior Courts have concurrent jurisdiction with the County Courts, where plaintiff and defendant "dwell" more than twenty miles apart. And where the plaintiff dwelt at Inverness, but came down to London, from March to October, merely for the purpose of convenience, to get orders and carry on his business with his customers who at that time of year were in London—at the time the action was brought he had lodgings in London—it was held, that the plaintiff did not dwell in London. Jervis, C. J., said: "Each case must depend upon its particular "circumstances; but where a party has a permanent place of "dwelling, we do not think that he dwells, in the sense of the word "as used in the Statute, at a place where he has a lodging for "a temporary purpose only" (*b*). *Harjiban Dass* v. *Bhagwan Dass* (*c*) was a case in which the circumstances were similar, and it was not contended that the plaintiff dwelt in Calcutta within the meaning of the Act, but it was urged that he carried on business in Calcutta within the meaning of these words, as used in the Charter, 12th clause. This contention, however, failed. Where a plaintiff, for three years prior to the bringing of the action, hired a house at Margate for his wife, family, and servants, and permanently established them there, he and his family occupying the house as their dwelling and home, at the same time he occupied a house and carried on business in London, and stayed on business and slept there three or four days a week; but he came and resided at Margate whenever his business allowed of it,—it was held, that he had his dwelling at Margate, sufficient for the purpose of jurisdiction (*d*). Where a man had a shop and private parlour in which he carried on his business and entertained his friends, but neither himself nor his servants slept there, held, it was no dwelling (*e*). In an action in the High Court at Calcutta, brought on a promissory note and draft made at Meerut, out

(*a*) Nutbrown's case, 2 East, P. C., 496; Gopal Chunder Sircar *v.* Kurnodhar Moochee, 7 Suth. W. R., 349, Peacock, C.J., and Jackson, J.; Fatima Begum *v.* Sakina Begum, I. L. R., 1 All, 51.

(*b*) MacDougall *v.* Paterson, 11 C. B., 755; S. C., 21 L. J., N. S., C. B., 27.

(*c*) 7 B. L. R, 112.

(*d*) Kerr *v.* Haynes, 29 L. J., Q. B., 70.

(*e*) R. *v.* Martin, Russ. and Ry., 108.

of the original jurisdiction of the Court, the defendant stated that he rented a house at Mussoorie, also out of that jurisdiction, where he usually resided from March till October, though he paid rent for the whole year, and left his children there during his absence; that during the winter months he travelled about from place to place, attending the different race meetings; that the horses in which he had an interest, or owned, ran at these meetings, and amongst other places, at the meeting at Calcutta; he did not run the horses for gain, nor consider horse-racing his business, though he followed no other pursuit or occupation;—it was held, that though this was not a "carrying on business" within the words of the Charter, there was a sufficient "dwelling" to give the Court jurisdiction, the defendant having, at the time the action was brought, given up his house at Mussoorie and left his children with a friend (*a*). See also another decision on Act IX of 1850, s. 28, of a like signification with the section (*b*). Mere casual presence, or even residence for a temporary purpose, without the intention of remaining, is not "dwelling." A person resided in Coimbatore, but had some cultivation within the local jurisdiction of Ootacamund, to which he came to answer another demand against him; held, that he did not "dwell" within the jurisdiction of the Ootacamund Small Cause Court (*c*). Three cases were referred to in this case (*d*), in the first of which it was decided that a compulsory and temporary residence without the intention of remaining was not a dwelling within the meaning of the 60th section of the County Courts Act.

It was decided by the Court of Exchequer, in a case (*e*) upon the County Courts Act, that a party may come into the Court's jurisdiction for the very purpose of giving the Court jurisdiction; and this ruling was followed in a case (*f*) decided by Mr. Justice Macpherson on the Original Side of the High Court. This case is in some degree analogous to that of *Winter* v.

(*a*) Morris *v.* Baumgarten, 1 Bourke, 127, Macpherson, J.

(*b*) R. *v.* The Judges of the Small Cause Court, 2 Taylor & Bell, 4, Peel, C. J.

(*c*) Saminatha Pillay *v.* Varisai Mahomed Ravattan, 2 Mad. H. C. Rep., 304, Scotland, C. J., and Holloway, J.

(*d*) Dunston *v.* Paterson, 28 L. J., C. P., 97; Kerr *v.* Haynes, 29 L. J. Q. B., 70; and Adams *v.* G. W. Railway Company, 6 Hurl. and N., 404.

(*e*) Massey *v.* Burton, 27 L. J., Ex., 101.

(*f*) Kally Kristo Ghose *v.* S. M. Nishandiney Dossee, unreported, July, 1865.

Round (*a*), where Bittleston, J., held, that the making of a promissory note purporting to be made within the jurisdictoin, was, for the purpose of giving the Court jurisdiction, equivalent to making it within the jurisdiction. But where a suit is brought merely for the purpose of bringing the defendant into the jurisdiction, he is not thereby made subject to the jurisdiction for the purpose of another suit (*b*). Where an officer in the Bombay Staff Corps, holding an appointment in Scinde, came to Bombay on leave for ten days, and during his stay was served with a writ of summons in an action the cause of which had arisen in Scinde, it was held, that he did not "dwell" in Bombay (*c*). An occasional visit within the jurisdiction, in a case where the defendant has a fixed residence out of the jurisdiction, is not sufficient to confer jurisdiction by reason of residency (*d*). A suit to enforce the specific performance of an agreement for the compromise of a former suit instituted in the late Supreme Court in Calcutta, does not lie in the High Court in Calcutta, where it appears that the defendant dwells out of the jurisdiction (*e*).

A trading corporation "dwells" at the principal office where its business is carried on (*f*); but (Expl. 2) in British India, under this Act, may be deemed to carry on business at its sole or principal place of business in British India, or in respect of any cause of action arising at any place where it has also a subordinate office at such place.

The word "dwell" cannot be considered applicable to suits against Government, or at all events no distinction can be made between dwelling and carrying on business; for if the Government can be said to dwell anywhere, it must be in the place where the business of Government is carried on (*g*).

In suits brought against the Government *eo nomine* under this Code, the Secretary of State for India in Council must be sued (s. 416); and it seems that the jurisdiction to entertain suits against

(*a*) 1 Mad. H. C. Rep., 202.

(*b*) Emritloll *v.* Kidd, 2 Hyde, 117, Levinge, J.; Saminatha Pillay *v.* Varisai Mahomed Ravattan, *supra*.

(*c*) Cowasjee Framjee *v.* Wallace, 1 Bom. H. C. Rep., 113.

(*d*) Lelim Tewarree *v.* Govindgeer Gosain, Marsh., 64, Seton-Karr and L. S. Jackson, JJ.

(*e*) Feda Hossein *v.* Syedoonissa, 1 In. Jur., N. S., 80, Peacock, C. J., and Morgan, J.

(*f*) Taylor *v.* Crowland Gas Company, 11 Ex., 1; Shiel *v.* Great Northern Railway Company, 30 L. J., Q. B., 331; Brown *v.* The L. and N. W. R. Co., 32 L. J., Q. B., 318.

(*g*) *Per* Scotland, C. J., in Subbaraya Mudali *v.* The Govt. and Cunliffe, 1 Mad. H. C. Rep., 286.

the Government exists only where the cause of action arose (*a*). Under cl. 12 of the Letters Patent constituting the High Courts, the Government must be considered as carrying on business at the place where its members exercise all the functions of Government (*b*). The words "carry on business" in that clause imply a personal and regular attendance on business within the local limits (*c*). A suit will not lie in the High Court at Madras against the Collector of Madras, residing and carrying on business at Sydahet (out of its jurisdiction), in respect of matters arising at Chingleput (also without it), though his Deputy Collector carried on business within its local limits, and the orders and proceedings in reference to the matters in question were in his name of office as Collector of Madras (*d*). The Secretary of State for India cannot be said to carry on business or personally work for gain within the jurisdiction of the High Court at Calcutta, on its original side, although, in one sense, the business of the Government may be carried on within the jurisdiction (*e*). In this case Mr. Justice Wells went very fully into the question of the jurisdiction of the High Court. In two English cases (*f*), it was held that clerks in Government offices cannot be said, by reason of their being so, to carry on business within the jurisdiction of the County Courts in which those offices are situate. So where the defendant held the office of Deputy Sealer in the Court of Chancery, and followed the person of the Lord Chancellor, performing his duties sometimes at Westminster Hall, sometimes at Lincoln's Inn, and (when the Lord Chancellor was not sitting) at the Great Seal Office, Quality Court, Chancery Lane, the Court held that he could not be considered to have any fixed place of business within the meaning of the 60th section of the County Courts Act above quoted (*g*). But in these cases, no doubt, the clerk or officer personally works for gain, and the High Court, under the Indian Act, would have had jurisdiction (*h*). It seems that carrying on business by an agent, such as a clerk or a gomastah, would not be enough to give the HighCourt jurisdiction (*i*).

(*a*) Subbaraya Mudali *v.* the Government and Cunliffe, 1 Mad. H. C. Rep., 286, Scotland, C. J.

(*b*) *ib.*

(*c*) *ib.*

(*d*) *ib.*

(*e*) Rundle *v.* The Secretary of State for India, 1 Hyde, 37.

(*f*) Sangster *v.* Kay, 5 Ex., 386; and Buckley *v.* Hann, 5 Ex., 43.

(*g*) Mitchell *v.* Hender, 23 L. J., Q. B., 273.

(*h*) See Subbaraya Mudali *v.* The Govt. and Cunliffe, *ante*.

(*i*) *ib.*

As a general rule, a plaintiff bringing his suit in a Court of superior jurisdiction, when he might have adopted the less expensive process of suing in an inferior Court, will run the risk of losing his costs, or he may possibly have to pay those of his opponent as well, although he succeed in the action; thus, persons improperly bringing suits in the High Court, which fall within the jurisdiction of Small Cause Courts of the Presidency Towns, may be mulcted not only in their own costs, but in those of the defendant (*a*). See Act XXVI of 1864, s. 9 (Small Cause Court, Presidency, Amending Act)—"If any action shall, after the passing "of this Act, be commenced in the High Court for any cause other "than those specified by s. 100 of Act IX of 1850, for which a "summons might have been taken out from a Court held under the "said Act IX of 1850, or under this Act, (XXVI of 1864,) and in "which such Court would have had jurisdiction, and if a verdict "be found for a sum less than 1,000 rupees if the action be "founded on contract, or less than 300 rupees if it be founded on "wrong, the plaintiff shall have judgment to recover such sum only "and no costs, unless the Judge who shall try the case shall certify "that by reason of difficulty, novelty, or general importance of the "case, or of some erroneous course of decision in like cases in the "Court of Small Causes, the action was fit to be brought in the High "Court." And even when the plaintiff in a suit for land originally brought properly in the Calcutta Court of Small Causes, is obliged to sue on the judgment of the Small Cause Court, in an action on the record in the High Court, owing to the fact that the process of execution in the Small Cause Court does not apply to land, the High Court invariably refuses costs (*b*).

Where the cause of suit, as stated by the plaintiff, appears to be within the cognizance of the Court, the mere denial of the plaintiff's right or title on the part of the defendant is not sufficient to oust the jurisdiction of the Court to hear the case. It is for the Judge to consider whether a *bonâ fide* question of right, which it is not within the jurisdiction of the Court to decide, is fairly raised in the suit; and when that reasonably appears, and not before, his jurisdiction in the matter ceases (*c*).

(*a*) See Sikhurchund *v.* Sooringmull, 1 Hyde, 272, Wells, J.

(*b*) See Mohendronath Ash *v.* Beedobudun Dutt, 1 In. Jur., N. S., 220.

(*c*) Ammallu Ammal *v.* Subbu Vadiyar, 2 Mad. H. C. Rep., 184, Scotland, C. J., and Phillips, J.

The preceding case was decided on the question of the jurisdiction of a Small Cause Court under Act XLII of 1860, but the principle is the same in all Courts, except where, by some special enactment, the Court's jurisdiction is ousted immediately the plea to the jurisdiction is raised; as, for instance, and merely by way of example, where a Magistrate is precluded from trying a question as to the title to land immediately that question is raised. When the ground of jurisdiction is that the cause of action arose within the local limits of the Court, the plaintiff must bring his suit in the Court within whose jurisdiction the cause of action arose, and it is no excuse for him that he was not aware of the fact, or even that he had no means of knowing it (*a*). The representative of a deceased person may be sued in that Court within the jurisdiction of which the cause of action with the deceased person arose (*b*). A suit upon a foreign judgment (which in India includes a judgment of a Court in England), cannot be brought in a Court in India, governed by this Act, unless the defendant dwells or (in the case of the High Courts at the Presidency towns or Recorders' Courts in Burma), carries on business, or personally works for gain within the limits (*c*).

Where a person who owned a house in Calcutta, which he let to another person, was in the habit of coming once or twice a week to a friend of his tenant and saw people on business, it was held, that he carried on business or worked for gain within the local limits of the High Court (*d*).

A judicial investigation of allegations and facts sufficient to guide the Court should precede the admission or rejection of a suit on the point of jurisdiction (*e*).

An objection to the jurisdiction cannot be waived by the parties (*f*). The Court is bound to take the point (*g*).

(*a*) Huth *v.* Long, 19 L J., Q. B., 325.

(*b*) Ladd *v.* Parbutty, 2 Hyde, 18, Peacock, C. J., and Norman, J., overruling Morgan, J.

(*c*) See Siveking Droop & Co. *v.* Focke, 9 Suth. W. R., 215, Peacock, C. J, and Bayley, J.

(*d*) Greschunder Bonnerjee *v.* Collins, 2 Hyde, 79, Norman and Macpherson, JJ.; see however Harjiban Das *v.* Bhagwan Das, 7 B. L. R., 102, Phear, J.

(*e*) Nusrun Bebee *v.* Watson, 3 Suth. W. R, 215, Bayley and Phear, JJ.; Hurree Persad Malee *v.* Koonjo Behary Shaha, Marsh., 99, Peacock, C. J., Bayley and Kemp, JJ.

(*f*) S. M. Lalmoney Dossee *v.* Juddoonath Shaw, 1 In. Jur., N. S., 319, Macpherson, J.

(*g*) Motilal Ramdas *v.* Jamnadas Javerdas, 2 Bom. H. C. Rep., 42, Couch, Newton, and Warden, JJ.

Suits for compensation for wrongs to person or moveables.

18. (S.) In suits for compensation for wrong done to person or moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain within the local limits of the jurisdiction of another Court, the plaintiff may, at his option, sue in either of the said Courts.

Illustrations.

(*a.*) A., residing in Delhi, beats B. in Calcutta. B. may sue A. either in Calcutta or in Delhi.

(*b.*) A., residing in Delhi, publishes in Calcutta statements defamatory of B. B. may sue A. either in Calcutta or in Delhi.

(*c.*) A., travelling on the line of a Railway Company whose principal office is at Howrah, is upset and injured at Allahabad by negligence imputable to the Company. He may sue the Company either at Howrah or at Allahabad.

This is a new provision. It marks the distinction pointed out by Bittleston, J., between actions on contracts and actions for damages for torts in this respect (*a*); the learned Judge cited a case (*b*), where a ditch cut in one jurisdiction conveyed waters into and damaged the plaintiff's field in another jurisdiction. It was held that the suit would lie within the latter jurisdiction. So it had been held by the Court of Common Pleas (*c*), that a contract to convey the plaintiff by a coach was immaterial to the cause of action where damages were sought by the plaintiff for an injury sustained by the upsetting of the coach.

Suits for immoveable property situate in single districts, but within jurisdictions of different Courts.

19. (S.) If the suit be to obtain relief respecting, or compensation for wrong to, immoveable property situate within the limits of a single district, but within the jurisdictions of different Courts, the suit may be instituted in the Court within whose jurisdiction any portion of the property is situate ; provided that, in respect of the value of the subject-matter of the suit, the entire claim be cognizable by such Court.

(*a*) DeSouza *v.* Coles, 3 Mad. H. C. Rep., 391.

(*b*) Sutton *v.* Clarke, 6 Taunt., 29.

(*c*) Williams *v.* Land, 4 Taunt., 729.

Suits for immoveable property situate in different districts.

If the immoveable property be situate within the limits of different districts, the suit may be instituted in any Court, otherwise competent to try it, within whose jurisdiction any portion of the property is situate.

This section corresponds with the first portions of ss. 11 and 12 of Act VIII of 1859, but the necessity for an application by the lower Court to the Court above for leave to proceed with the suit is done away with. The suit may be instituted in the first instance without any such leave, and if the defendant object, he may apply for a transfer under ss. 22, 23, and 24, or 25.

It was held, with reference to Act VIII of 1859, s. 12, that, as the section was merely permissive, it was optional with the plaintiff to resort to this provision or not as he might be inclined; that he might, if he chose, institute separate suits in the different jurisdictions (*a*). A contrary opinion was expressed in another case by Bayley and Macpherson, JJ. (*b*). There is no change in this respect—nothing imperative in the new enactment, although it is not now necessary to obtain the leave of the Court above in order to institute the whole suit in one Court; but that perhaps affords stronger ground for the view taken by Bayley and Macpherson, JJ., and an omission to include the whole matter would, probably, be held to be intentional under s. 43, *post*.

It was held that where the superior Court had, under Act VIII of 1859, s. 12, directed a Judge to try a suit regarding land situated partly within the limits of his own jurisdiction and partly without those limits, the Judge could, under the circumstances of that case, go on and try the suit when the plaintiff had abandoned that part of it which referred to land within his own jurisdiction (*c*). In that case the Court proceeded with the case being ordered by the superior Court to do so; it may, however, be a question whether, where the suit is entertained by the Court of its own motion, and pending the trial the plaintiff abandons his claim in part as above described, the Court would have any jurisdiction.

(*a*) Súbba Ráu *v.* Ráma Ráu, 3 Mad. H. C. Rep., 376, Scotland, C. J., and Ellis, J.

(*b*) Jumoona Dassee Chowdhranee *v.* Bamasoondaree Dassee Chowdhranee, 2 Suth. W. R., 148.

(*c*) Moonshee Syed Ameer Ali *v.* Mohendronath Bose, 2 Suth. W. R., 271, Loch and Seton-Kair, JJ.

This section supersedes the provisions of the 12th clause of the High Court Charter, 1865, which directs an application to be made to the Court for leave to proceed in such a case (*a*).

Power to stay proceedings where all defendants do not reside within jurisdiction.

20. (S.)* If a suit which may be instituted in more than one Court is instituted in a Court within the local limits of whose jurisdiction the defendant or all the defendants does not or do not actually and voluntarily reside, or carry on business, or personally work for gain, the defendant or any defendant may, after giving notice in writing to the other parties of his intention to apply to the Court to stay proceedings, apply to the Court accordingly;

and if the Court, after hearing such of the parties as desire to be heard, is satisfied that justice is more likely to be done by the suit being instituted in some other Court, it may stay proceedings either finally or till further order, and make such order as it thinks fit as to the costs already incurred by the parties or any of them.

In such case, if the plaintiff so requires, the Court shall return the plaint with an endorsement thereon of the order staying proceedings.

Application when to be made.

Every such application shall be made at the earliest possible opportunity, and in all cases before the issues are settled; and any defendant not so applying shall be deemed to have acquiesced in the institution of the suit.

* Paragraph 4 of this section does not extend to Mufussal Courts of Small Causes.

The section is new. It is rendered necessary by cl. (c) of s. 17, which enables the Court to entertain a suit against several defendants, some of whom do not reside, &c, within its jurisdiction. The defendant takes the initiative, and he will have to show (1) that he or some other defendant does not actually and voluntarily reside, or carry on business or personally work for gain

(*a*) Narain Singh *v.* Ram Lall Mookerjee, MSS., 18th Feb., 1878, Pontifex, J.

within the limits of the jurisdiction of the Court in which the suit is instituted, and (2) that justice is more likely to be done by the suit being instituted in some other Court.

As to the first point, see s 17 and the notes. The second will depend upon a variety of circumstances.

Remission of court-fee where suit instituted in another Court.

21. (S.) Where the Court, under section 20, stays proceedings, and the plaintiff re-institutes his suit in another Court, the plaint shall not be chargeable with any court-fee; provided that the proper fee has been levied on the institution of the suit in the former Court, and that the plaint has been returned by such Court.

This is new.

Procedure where Courts in which suit may be instituted are subordinate to the same appellate Court.

22. Where a suit may be instituted in more Courts than one, and such Courts are subordinate to the same appellate Court, any defendant, after giving notice in writing to the other parties of his intention to apply to such Court to transfer the suit to another Court, may apply accordingly; and the appellate Court, after hearing the other parties, if they desire to be heard, shall determine in which of the Courts having jurisdiction the suit shall proceed.

This and the following sections, down to s. 25 inclusive, contemplate an application to the Court superior to that in which the suit is instituted. It will be noticed that there is no limit as to the time within which such an application may be made to the Court above, such as is imposed when the application is made to the Court of original jurisdiction for a stay of proceedings under s. 20, but a transfer may be made apparently at any time while the suit is pending,—*i. e.*, before decree.

Procedure where they are not so subordinate.

23. Where such Courts are subordinate to different appellate Courts, but are subordinate to the same High Court, any defendant, after giving notice in writing to the other parties of

his intention to apply to the High Court to transfer the suit to another Court having jurisdiction, may apply accordingly. If the suit is brought in any Court subordinate to a District Court, the application, together with the objections, if any, filed by the other parties, shall be submitted through the District Court to which such Court is subordinate. The High Court may, after considering the objections, if any, of the other parties, determine in which of the Courts having jurisdiction the suit shall proceed.

Procedure where they are subordinate to different High Courts.

24. Where such Courts are subordinate to different High Courts, any defendant may, after giving notice, in writing to the other parties of his intention to apply to the High Court within whose jurisdiction the Court in which the suit is brought is situate, apply accordingly.

If the suit is brought in any Court subordinate to a District Court, the application, together with the objections, if any, filed by the other parties, shall be submitted through the District Court to which such Court is subordinate,

and such High Court shall, after considering the objections, if any, of the other parties, determine in which of the several Courts having jurisdiction the suit shall proceed.

This corresponds with s. 13 of Act VIII of 1859. The application must, however, be submitted through the District Court in the cases mentioned in the second paragraph, as in s. 12 of Act VIII of 1859.

Transfer of suits.

25. (S.) The High Court or District Court may, on the application of any of the parties, after giving notice to the parties and hearing such of them as desire to be heard, or of its own motion, without giving such notice, withdraw any suit whether pending in a Court of first instance or in a Court of appeal subordinate to such High Court or District Court, as the case may be, and try the suit itself, or transfer it for trial to any other such subordinate Court competent to try the

same in respect of its nature and the amount or value of its subject-matter.

For the purposes of this section, the Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

The Court trying any suit withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

This clause corresponds with the second part of Act VIII of 1859, s. 6. Any of the parties may apply, not, as in ss. 22, 23, and 24, the defendant only, and notice is then to be given. The words of s. 6 were, "withdraw any suit instituted, &c.;" and it had been held, although not uniformly, that this precluded the operation of the section where the suit was partly heard, and also where a decree had been passed and the proceedings in execution had commenced (*a*). The present section includes a pending case, but not a case in execution.

The case must have been instituted; thus a superior Court cannot order the plaint to be filed in a Court other than that which has in the first instance jurisdiction (*b*).

The transfer of the case for the convenience of the public, or for the acceleration of business, from one subordinate Court to another, does not affect the jurisdiction of the Judge of the superior Court either to transfer it to his own Court or another, or to re-transfer it, if he see occasion for so doing. Nor would the circumstance that the case had been up in appeal upon a preliminary point, and had been remanded for trial on the merits, limit the authority of the Judge of the District Court to bring it on his own file or to transfer it to some Court other than that in which it was instituted (*c*).

Where the case, part heard, is transferred, the Judge to whom it is transferred ought to hear the evidence *de novo*. But the irregularity may be waived; and the decree in such a case ought not to be reversed in appeal unless the irregularity affects the merits (*d*). See s. 572, *post*, corresponding with s. 350 of Act VIII of 1859.

(*a*) Moulvie Abdool Hye *v.* Macrae, 23 Suth. W. R., 1; Ranee Ahmed Koonwur *v.* Tayler, *ib.*, Spl. No, 1864, p 15; Lutchmeeput Dokur *v.* Jugutinder Bunwary Loll, Marsh., 195; S. C., Hay, 459; but see 4 Bom. H. C Rep., App., 98.

(*b*) Motilal Ramdar *v.* Jamnadas Javerdas, 2 Bom. H. C. Rep., 43.

(*c*) Taruck Nath Mookerjee *v.* Gouree Churn Mookerjee, 3 Suth. W. R, 147.

(*d*) Naranbhai Vrijubkandas *v.* Naro Shankar Chandro Shankar, 4 Bom. H C., App, 98, F B

CHAPTER III.

OF PARTIES AND THEIR APPEARANCES, APPLICATIONS, AND ACTS.

Persons who may be joined as plaintiffs.

26. (S.) All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to relief, unless the Court in disposing of the costs of the suit otherwise directs.

This section is copied from Order xvi, Rule 1 of the Rules of Court, contained in the schedule to 38 and 39 Vict., c. 77 (1875) Supreme Court of Judicature (1873), amendment.

Court may substitute or add plaintiff for or to plaintiff suing

27. (S.) Where a suit has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may, if satisfied that the suit has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as the Court thinks just.

This corresponds with the above Order xvi, Rule 2, and, with the following sections, is substituted for s. 73 of Act VIII of 1859, but gives the Court enlarged powers. They are not imperative, but, as in the case of that section, the Court has a discretion in the matter (*a*). There is no power to strike out a plaintiff's name and to

(*a*) Poran Mundul Mollah *v.* Shamchand Ghose, 1 Suth. W R, 228; see also Gyaram Seal *v.* Issur Chunder Chuckerbutty, 2 Suth. W. R., 158, both before Bayley and Macpherson, JJ.

substitute the name of a purchaser of the plaintiff's rights after the suit was instituted. Such a purchaser might be added as a plaintiff. An order striking him out could be set right by the High Court under 24 and 25 Vict., c. 104, s. 15 (*a*).

Where a Hindu widow instituted a suit in respect of rights inherited by her from her deceased husband, and then adopted a son, it was held that the son might be made a co-plaintiff (*b*). It was objected in that case that the son ought not to have been added, because he came into existence after the suit was instituted. This was a case under s 73 of the old Act, which enacts that, "if it appear to the Court at any hearing of the suit, &c.," which includes an addition of a plaintiff after the suit has begun, the same rule would, however, apply under this clause. Where a minor was interested in contesting the validity of an alleged will made by his father, and had been improperly made a co-plaintiff, the Court of appeal reversed the decree of the Court of original jurisdiction, in order that the minor might be made a co-defendant, and a guardian *ad litem* appointed (*c*). Kennedy, J., in a late case, refused to add a minor son as plaintiff in a suit brought by his mother, and in which he was interested, after several witnesses had been examined, because he would be bound by evidence taken in his absence, and by the decree (*d*).

Persons who may be joined as defendants.

28. (S.) All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter. And judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities, without any amendment.

This corresponds with the above Order xvi, Rule 3, with the addition of the words "in respect of the same matter."

(*a*) Juddooputtee Chatterjee *v.* Chunder Kant Bhuttacharjee, 5 Wym. Rep., 273, Peacock, C.J., and L. S Jackson and Macpherson, JJ.; S. C., 9 Suth. W. R., 309.

(*b*) Paravartani *v.* Ambalavana Pillai, *ex parte* Paravartani, 1 Mad. H. C. Rep., 197.

(*c*) Krishnabai kom Depa Vaju *v.* Sonabai, 2 Bom. H. C. Rep., 327, Westropp and Tucker, JJ.

(*d*) Kadumbinee Dossee *v.* Koylash Kaminee Dossee, I. L R., 2 Calc., 421.

The general rule in equity is, that all persons are to be made parties who are either legally or equitably interested in the *subject-matter and result of the suit* (*a*). Some doubt is, however, thrown upon this, as applicable to the Courts in India, by Markby, J., in the case reported in 3 B. L. R., A. C., 23, who, at p. 26, states, that a decree of a Court here can easily be carried beyond its real scope, and that suits are, as a matter of fact, constantly brought against sham defendants in order to be made use of against parties who have the real right. It is not uncommon, for example, to make a person wholly uninterested in the estate of a deceased person a party to a suit, and then to proceed to make a decree, not against that person only, but against the estate of the deceased, and to issue execution against the representative; there is not in this or in any other Code of Procedure any warrant for such an extension of the operation of a decree. The representative ought to have the opportunity of considering the claim, and of admitting it if he thinks it is a just one, before he is forced into litigation. Where a person takes possession of the property of a deceased person, he may properly be made a party to a suit, the object of which is to administer and divide the estate, for he makes himself a representative *pro tanto* by taking possession (*b*). If a party, whose interests are identical with the plaintiff's, declines to join as a plaintiff, he may be made a defendant (*c*). Where a third person claims adversely to both plaintiff and defendant, he should not be made a party: he is not bound by the decision in the suit, and its result is not material to him (*d*).

Where the plaintiff sued the defendant as endorsee of a promissory note made by the defendant in favor of one Lane, who endorsed it to the plaintiff, and at a time when he (Lane) was an insolvent, and had obtained his personal but not his final discharge when the

(*a*) Story's Equity Jurisprudence, s. 1526, Vol. II, page 993. Koegler *v.* Prosonno Coomar Chatterjee, I. L. R., 2 Calc., 472.

(*b*) Nga Tha Ya *v.* Mi Khan Mhaw, 5 B. L. R., A. C., 371.

(*c*) Juggodumba Dassee *v.* Haran Chunder Dutt, 10 Suth. W. R., 109, Phear and Hobhouse, JJ.; Bishonath Ruckitt *v.* Gunnesh Chunder Dey, 2 In. Jur., N. S., 203, Peacock, C. J., and Macpherson, J.

(*d*) Joy Gobind Das *v.* Goureepersad Shahn. 3 Wym., 132; S. C., 7 Suth. W. R., 202, Peacock, C. J., and L. S. Jackson, J.; Ahmed Hosseiff *v.* Musst. Khadija, 3 B. L. R., A. C, 28 n.; S. C., 10 Suth. W. R., 369, Peacock, C. J., and Mitter, J. But see Saroda Persad Mitter *v.* Kylash Chunder Bannerjee, 7 *ib.*, 315, Kemp and Glover, JJ.; Kali Prasad Sing *v.* Jainarayan Roy, 3 B. L. R., A. C., 23, L. S. Jackson and Markby, JJ.

note was made,—it was held, that the Official Assignee had a right to come in, that he had a claim on the note (*a*). But the Court did not add him as a party defendant, the effect of which would have been to dismiss the suit; but postponed the final hearing in order to give the Official Assignee an opportunity of suing. A purchaser of property *pendente lite* need not be made a party to the suit; he purchases with notice, and is bound by the title of his vendor (*b*). A. sued B. for rent. B. pleaded that C. was his landlord, holding an intermediate lease under A., and that he had paid C. his rent. It was held that C. was properly added as a defendant, and a decision having been made partly against his interests, he could appeal, and that the Court of appeal could set aside the whole decree (*c*). See s. 544, *post.*

Where a plaintiff makes a third party a defendant, and the latter has reason to appear and to defend the suit, he ought to get his costs (*d*). Where the plaintiffs filed their plaint against parties *primâ facie* liable to them on a contract, and opposed a claim made by these defendants to have third parties added and to have the suit dismissed against themselves on payment of money into Court, the third parties were added, and eventually the decree was for the plaintiffs against these added defendants, it was held that the added defendants were liable for all costs (*e*).

Joinder of parties liable on same contract.

29. (S.) The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis, and promissory notes.

This corresponds with the above Order xvi, Rule 5; and see Act IX of 1872 (Contract), ss. 42, 43, and *Koegler* v. *Prosonnocoomar Chatterjee* (*f*).

(*a*) Kelly *v.* Hanlon, 10 B. L. R., App., 23, Macpherson, J.

(*b*) Umamoyi Burmoneea *v.* Tarini Prasad Ghose, 7 Suth. W. R., 225, Norman and Seton-Karr, JJ.

(*c*) Dyal Chand Sahoy *v.* Nabin Chandra Adhikari, 8 B. L. R., 180, Kemp and Ainslie, JJ. See also Jaggadanand Misser *v.* Hamid Rasul, *ib.*, 182, Bayley and Macpherson, JJ.; and Kungal Sahu *v.* Guru Buksh Koer, *ib.*, 184 n., Glover and Hobhouse, JJ.

(*d*) Fergusson *v.* Government, 5 Wym., 179, Bayley and Markby, JJ.

(*e*) Assaram Burteah *v.* The Commercial Transport Association, 2 In. Jur., N. S., 113, Phear, J.

(*f*) I. L. R., 2 Calc., 472.

30. (S.) Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend in such suit, on behalf of all parties so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable), then by public advertisement, as the Court in each case may direct.

One party may sue or defend on behalf of all in same interest.

Down to the word "interested," this corresponds with the above Order xvi, Rule 9; but that rule says, that one or more of such parties may sue or be sued without requiring the permission of the Court.

The provision requiring the authority of the Court for such proceedings, and the clause "but the Court shall give, &c," to "may direct," which is also added, are important amendments, and certainly necessary in this country. Without them, many a man might be concluded by a suit which he would have very good reason for not commencing, or of which he never may have heard.

The New York Code has a similar provision (s. 119). The cases which have been decided on that clause are all cases in which a plaintiff has sued, or tried to do so, on behalf of himself and others (*a*). There is no instance given of a defence by one on behalf of many.

It has been said (*b*) that, to enable a person to bring a suit in his own right, and on behalf of others having a common interest, it is not sufficient to allege that the other parties are so numerous that it would be impracticable to bring them all before the Court; but the nature of their common interest must appear to be such as would entitle them, were they all before the Court, to maintain the action in their own right, or in their own names. And the Judge said: "I add, that I incline very strongly to the "opinion that s 119 of the Code (*i. e.*, the New York Code of Proce-"dure) ought to be construed as merely re-enacting the rules "that otherwise might have been held to be abolished, which,

(*a*) See Voorhies, 4th edn, 111 (*b*) Habicht *v* Pemberton, 4 Sand, 657

"previously to the adoption of the Code, prevailed in Courts of "Equity, and consequently that it is to suits equitable in their "nature that the provisions of this section should still be exclusively "applied."

The rule of Courts of Equity is described as follows by Lord Langdale (*a*):—

"The Court, in conformity with the principles of equity, has "adopted a general rule—not to dispose of any matter, not to "bind any man's interest, or to make any declaration of any "man's right, in his absence. The complication of human "affairs has, however, become such, that it is impossible always to "act strictly on this general rule. Cases arise in which, if you hold "it necessary to bring before the Court every person having an "interest in the question, the suit could never be brought to a con-"clusion. The consequence would be, that if the Court adhered to "the strict rule, there would, in many cases, be a denial of justice. "This has induced the Courts to sanction a relaxation of the rule. "And, accordingly, they have said—if we can be satisfied that we "have before the Court persons whose interests are the same as the "interests of those who are absent, we will be content to hear the "cause upon the argument of such persons. And if we are then "satisfied that the case has been fairly and honestly presented, "we will order the distribution of the fund on the representation "of the persons present." *This will not bind the absent parties* so far as to cut them off from all chance of correcting any error which in consequence of their absence may have been made to their prejudice. In a note on Parties in Mitford on Pleading (*b*) it is said, that "it is a rule of necessity or convenience; and nothing is more vague: for the Court is under the necessity of considering the circumstances of each case and the degree of difficulty in the proceeding."

Suit not to fail by reason of misjoinder.

31. (S.) No suit shall be defeated by reason of the misjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

(*a*) In Powell *v.* Wright, 7 Beav., 449.

(*b*) 5th edn., 409, and further on in the same note.

Nothing in this section shall be deemed to enable plaintiffs to join in respect of distinct causes of action.

This corresponds with the above Order xvi, Rule 13.
Compare ss. 32, 34, and 53, and note to 53.

Court may dismiss or add parties.

32. (S.) The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or as defendant, improperly joined, be struck out ;

and the Court may at any time, either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

No one to be added as plaintiff or as next friend without his consent.

No person shall be added as a plaintiff, or as the next friend of a plaintiff, without his own consent thereto.

Parties to suits instituted or defended under section 30.

Any person on whose behalf a suit is instituted or defended under section 30 may apply to the Court to be made a party to such suit.

Defendants added to be served.

All parties whose names are so added as defendants shall be served with a summons in manner hereinafter mentioned, and (subject to the provisions of the Indian Limitation Act, section 22) the proceedings as against them shall be deemed to have begun only on the service of such summons.

Conduct of suit.

The Court may give the conduct of the suit to such plaintiff as it deems proper.

This clause is partly taken from the above Order, Rule 19.

The second clause as to transposing parties follows the decision in the case of *Pitambur Pyne* v. *Toolsee Dossee* (*a*). As to retaining parties for the purpose of costs, see *ante*, s. 26.

The section is permissive and not imperative. Peacock, C. J., and Macpherson, J., considered that where there was a misjoinder of plaintiffs, the proper course would be to amend the issues and allow the names of the misjoined parties to remain on the record, otherwise the defendants, had the decree been in their favour, would have lost the security of the plaintiff struck out for their costs (*b*). This course could be followed under this section, which gives even an unsuccessful defendant his costs occasioned by the misjoinder, unless the Court otherwise directs.

The proviso as to limitation is in accordance with the decisions in the cases noted below (*c*).

Compare ss. 31, 34, and 53, and note to 53.

Where defendant added, plaintiff to amend.

33. (S.) Where a defendant is added, the plaint, if previously filed, shall, unless the Court direct otherwise, be amended in such manner as may be necessary, and an amended copy of the summons shall be served on the new defendant and the original defendants.

This corresponds with the above Order xvi, Rules 15 and 16.

Time for taking objections as to non-joinder or misjoinder of parties.

34. (S.) All objections for want of parties, or for joinder of parties who have no interest in the suit, or for misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, and in all cases before the first hearing ; and any such objection not so taken shall be deemed to have been waived by the defendant.

Compare ss. 31, 32, and 53, and note to 53.

(*a*) 7 Suth. W. R., 39.

(*b*) The East India Railway Company *v.* Jordan, 4 B. L. R., O. C., 97.

(*c*) Rajkissoree Dossee *v.* Buddun Chunder Shaha, 2 In. Jur, N S, 49, S. C., 3 Wym, 5; and 6 Suth. W. R., 298, overruling Issurpersaud *v.* Urjunloll, 2 Hyde, 248 ; and Kalee Kishore Chatterjee *v.* Luckee Debia Chowdhrain, 6 Suth. W. R., 172.

35. (S.) When there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding under this Code: and in like manner when there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any such proceeding.

Each of several plaintiffs or defendants may authorize any other to appear, &c., for him.

The authority shall be in writing, signed by the party giving it, and shall be filed in Court.

Authority to be in writing signed and filed.

This corresponds with Act VIII of 1859, s. 115; see also Act XX of 1865 (Pleaders and Mooktars, amended by Act XXIX of 1865), s. 40.

Recognized Agents and Pleaders.

36. (S.) Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party to a suit or appeal in such Court, may, except when otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf:

Appearances, &c., may be in person, by recognized agent or by pleader.

Provided that any such appearance shall be made by the party in person if the Court so direct.

This corresponds with Act VIII of 1859, s. 16.

37. (S.) The recognized agents of parties by whom such appearances, applications, and acts may be made or done are—

Recognized agents.

(*a*) persons holding general powers-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance application or act is made or done,

Persons holding powers-of-attorney from parties out of jurisdiction.

authorizing them to make and do such appearances, applications, and acts on behalf of such parties;

Certificated mukhtárs.

(*b*) mukhtárs duly certificated under any law for the time being in force, and holding special powers-of-attorney authorizing them to do, on behalf of their principals, such acts as may legally be done by mukhtárs;

Persons carrying on trade or business for parties out of jurisdiction.

(*c*) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications, and acts.

Recognized agents in Panjab, Oudh, and Central Provinces.

Nothing in the former part of this section applies to the territories now administered respectively by the Lieutenant-Governor of the Panjáb, and the Chief Commissioners of Oudh and the Central Provinces; but in those territories the recognized agents of parties by whom such appearances, applications, and acts may be made and done shall be such persons as the Local Government may from time to time, by notification in the official Gazette, declare in this behalf.

This corresponds with Act VIII of 1859, s. 17 (amended by Act XIX of 1865); para. (c) is new. See Act XX of 1865, s. 11, which does not extend to Courts established by Royal Charter; and see Part IV of this Act, chap. xlviii, s. 635.

As to appearance, &c., on behalf of the Government, which was provided for in s. 17, see chap. xxvii, *post*.

The general principle is, that an agent to whom a power-of-attorney is directed, cannot delegate it (*a*); but a power being given to A. to execute it himself, or to give it to B., may be either executed by A. or B. (*b*). One partner has no general authority

(*a*) Sugden on Powers, p. 179, 8th ed

(*b*) Duke of Devonshire *v.* Lord G. Cavendish, 4 T. R., 741, note.

under a power-of-attorney granted to his co-partner (*a*); and it has been decided that a partner is not a recognized agent within the meaning of the second clause of s. 17, corresponding with cl. (c) of this section, which has reference to such an agent as a gomastah or person acting for others, not (as in the case of a partner) carrying on business in the name of the firm, and for the benefit of himself and partners. Thus, service of a summons intended for one partner of a firm who was out of the jurisdiction, was made upon another partner who was within it. This was held not to be a sufficient service (*b*). These cases were not followed by Paul, J., who allowed service upon a partner in Calcutta to be good service on a partner absent in London (*c*); but where the defendants carried on business as partners in Calcutta, and the summonses had been left, not at the place of business in Calcutta, but with one of the defendants in the mofussil at Furrackabad, Macpherson, J., agreeing with Paul, J., that a partner was an agent within the meaning of this clause, held the service bad, except as against the defendant actually served (*d*). A recognized agent cannot address the High Court, as that is the privilege of advocates and vakeels under the 10th section of the Charter, by which that Court is constituted (*e*).

By Act XX of 1865, s. 40 (Pleaders and Mookhtars Act), any suitor may appear, plead, and act in any suit, appeal, or other proceeding on behalf of any co-suitor. This Act was passed originally for Bengal and the North-Western Provinces, but by s. 47 can be extended, by order of any Local Government, to the territories subject to such Government. It has been amended by Act XXIX of the same year. The recognized agent under this clause cannot prosecute or defend the suit in his own name (*f*). Persons appointed pleaders in the Small Cause Courts in the Presidency Towns, cannot on that account plead in the mofussil (*g*).

(*a*) Edmiston *v.* Wright, 1 Campbell, 88.

(*b*) See the sections relating to service of summonses, *post*. Lutchmeput Dogure *v.* Sibnarain Mundle, 1 Hyde, 97, Wells, J.; Wiseman *v.* Snead, MSS., Phear, J., June 1, 1866.

(*c*) Ramchandra Bose *v.* Snead, 7 B. L. R., App., 58.

(*d*) Kustoor Mull *v.* Jookeeram, 11 7 B. L. R., App., 26.

(*e*) Prannath Chowdry *v.* Ganendro Mohun Tagore, 3 Suth. W. R., 108. See as to this s. 635, *post*.

(*f*) Mokha Harakraj Joshi *v.* Bisesswar Doss, 5 B. L. R., App., 11.

(*g*) See also Jomeeooddy Chowdry *v.* Brassey, Withes & Co, Suth. S. C. Cases, 55, F. B.

Service of process on recognized agent.

38. (S.) Processes served on the recognized agent of a party to a suit or appeal shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

The provisions of this Code for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

This corresponds with the last paragraph of s. 17 of Act VIII of 1859.

Appointment of pleader.

39. (S.) The appointment of a pleader to make or do any appearance, application or act as aforesaid shall be in writing, and such appointment shall be filed in Court.

When so filed, it shall be considered to be in force until revoked with the leave of the Court, by a writing signed by the client and filed in Court, or until the client or the pleader dies, or all proceedings in the suit are ended so far as regards the client.

No advocate of any High Court established by Royal Charter shall be required to present any document empowering him to act.

This corresponds with Act VIII of 1859, s. 18. The recognized agent must hold a power-of-attorney, general, or, in the case of a mukhtar, special, or must come within the description of recognized agents specified by cl. (c) of s. 37. The pleader only requires a written authority signed, it is presumed, by the person employing him, but it has been considered that a mukhtar may appoint a vakeel (*a*). It has been held that a mukhtarnamah under seal is as good as a mukhtarnamah under signature; and according to a rule of practice in the Bengal Courts (*b*), the vakeel is responsible for the authenticity of the signature, and the Judge should not enquire into it (*c*). The second paragraph

(*a*) Shaikh Nubee Buxsh Mookhtar, petitioner, 7 Suth. W. R., 481, L. S. Jackson, J.

(*b*) Carrau, 300.

(*c*) Maharajah of Burdwan, petitioner, 7 Suth. W R., 475, Peacock, C.J , and L. S. Jackson, J.

follows the case of *Shah Mukhun Lal* v. *Sreekishen Singh* (*a*), and would extend apparently, so far as to enable the pleader to make any applications, &c., in India, with reference to an appeal of the case to the Judicial Committee of the Privy Council.

The last clause corresponds with a clause in schedule B of the Stamp Act XXVI of 1867.

Service of process on pleader.

40. (S.) Processes served on the pleader of any party, or left at the office or ordinary residence of such pleader, relative to a suit or appeal, and whether the same be for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents; and, unless the Court otherwise directs, shall be as effectual for all purposes in relation to the suit or appeal as if the same had been given to or served on the party in person.

This corresponds with Act VIII of 1859, s. 18.

Agent to receive process.

41. (S.) Besides the recognized agents described in s. 37, any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

His appointment to be in writing, and to be filed in Court.

Such appointment may be special or general, and shall be made by an instrument in writing signed by the principal, and such instrument, or, if the appointment be general, a duly attested copy thereof, shall be filed in Court.

This corresponds with Act VIII of 1859, ss. 50 and 51.

The appointment, it will be noticed, requires the signature of the principal.

(*a*) 8 Suth. W. R., 92, L. S. Jackson, J.

CHAPTER IV.

OF THE FRAME OF THE SUIT.

Suit how to be framed.

42. Every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them.

See Macpherson's Civil Procedure, chap. ix, the object of this rule being to prevent the splitting up of claim, as more fully indicated by the next section.

Suit to include the whole claim.

43. (S.) Every suit shall include the whole of the claim arising out of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Relinquishment of part of claim.

If a plaintiff omit to sue for, or intentionally relinquish, any portion of his claim, he shall not afterwards sue for the portion so omitted or relinquished.

Omission to sue for one of several remedies.

A person entitled to more than one remedy in respect of the same claim may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted

Illustration.

A. lets a house to B. at a yearly rent of Rs. 1,200. The rent for the whole of the years 1874 and 1875 is due and unpaid. A. sues B. only for the rent due for 1875. A. shall not afterwards sue B. for the rent due for 1874.

This corresponds with s. 7 of Act VIII of 1859; but the words "or intentionally relinquish," in paragraph 2, are added; and paragraph 3 is new.

It seems to be at least doubtful whether, under the present Code, it is not incumbent upon the plaintiff to include in his suit land situated in two separate jurisdictions, where the value of the

whole subject of his claim is not greater than the limit of the jurisdiction of the Court. It is not necessary to obtain the sanction of a superior Court for this purpose, but the plaintiff may, in the first instance, include land both within and without the jurisdiction. If he elects not to do so, he makes his election voluntarily, and may be said to abandon intentionally a part of his claim. It is true that if the defendant do not reside within the jurisdiction, an application to stay proceedings may be made under s. 20, but that is an act of the defendant, not of the plaintiff. It was considered that s. 7 of Act VIII of 1859 did not oblige a plaintiff to proceed under s. 12 of that Act, which corresponds with s. 19, para. 2 of this, to try a suit relating to land situated in different districts. The section, it was observed, did not require a plaintiff having several distinct causes of action against one defendant to comprise them all in one suit, subject to the hazard of forfeiting all those not included in the first suit, but only against splitting a cause of action (*a*). But in another case (*b*) Bayley and Macpherson, JJ., held, that the plaintiff ought to have proceeded under s. 12. So far the Courts differed, but not as to the principle of the rule against splitting demands.

A second suit for partition can be brought in respect of land which was in possession of a mortgagee, and not available for partition when a former suit was brought. This was on the ground that the possession of the mortgagee was as much a possession under the plaintiffs as under the defendants (*c*).

The cases chiefly bearing upon this subject, which have been discussed and decided in the Courts at Westminster, have arisen generally where it was sought to divide one action into several for the purpose of giving jurisdiction to the County Courts. These

(*a*) Suba Rau *v.* Rama Rau, 3 Mad. H. C. Rep, 376, Scotland, C. J., and Ellis, J.

(*b*) Jamoona Dassee Chowdhranee *v.* Bama Soonderee Dassee Chowdhranee, 2 Suth W. R, 148.

(*c*) Balkrishna Vithal *v.* Hari Shankar, 8 Bom. H. C. Rep., A. C., 64, Westropp, C. J., and West, J., followed in Narayan Babaji Dabholkar *v* Pandurang Ramchandra Dabholkar, 12 Bom. H. C. Rep, 148, by Kemball and Nanabai Haridas, JJ.; and Pattzavy Mudali *v.* Audimula Mudali, 5 Mad. H C. Rep, 419, Holloway and Innes, JJ., in which case the land left out in the first suit was subject to Madras Reg. IV of 1831, and not subject to the jurisdiction of the Civil Court, but by leave of the Government it might have been included.

cases afford good illustrations of the principle involved in the section of this Code now under consideration.

The following are the provisions of the English Statute 9 and 10 Vict., c. 95, s. 63 (the County Courts Act) with reference to splitting demands:—"It shall not be lawful for any plaintiff to divide any "cause of action for the purpose of bringing two or more suits in any "of the said Courts, but any plaintiff having a cause of action for "more than £20 (now £50) for which a plaint might be entered under "this Act, if not for more than £20, may abandon the excess, and "thereupon the plaintiff shall, on proving his case, recover to an "amount not exceeding £20, and the judgment of the Court upon "such plaint shall be in full discharge of all demands in respect of "such cause of action, and entry of the judgment shall be made "accordingly." And it has been decided on that section that this term, "to divide any cause of action," does not necessarily mean a cause of action on one single entire contract, because there may be one cause of action on several debts contracted at different times, and in far the greater number of cases a count for *indebitatus assumpsit*, or debt, is founded on many distinct contracts, as was pointed out in the case of *Hesketh* v. *Fawcett* (*a*). "There may be a cause of action for work and labour," for instance "arising from ten different employments or contracts," and one count may be considered as one cause of action. "To provide that one cause of "action on one entire contract should not be divided would be "unnecessary and surplusage. We think we may safely conclude that "the term 'cause of action' ought to be interpreted 'one cause of "action,' and not be limited to an action on a separate contract. "But, on the other hand, if the term is to comprise all debts that "might be included in one count—debts for work and labor, goods "sold, use and occupation, &c.—though totally unconnected with "each other, which might be included in one *indebitatus* count, "would be prevented from being divided under this clause; and if "indivisible, and the creditor brought an action for any part, he "would virtually abandon all the remainder by the operation of the "latter part of the 63rd section. In such a case Mr. Justice Cole-"ridge held, that a similar clause in the Brighton Court of Requests "Act (3 and 4 Vict., c. 10, s. 24) did not apply, the demand there "being for three distinct things,—for a horse sold, for rent, and for "goods sold; but he made a distinction between that case and one "where a debtor has a bill running from day to day (*b*). In

(*a*) 11 Mee & W., 360. (*b*) Neale *v.* Ellis, 1 D. & L, 163.

"such a case, though each item of goods supplied, or work done, "constitutes a separate contract, so that if, after the stipulated "price becomes due, the tradesman were to bring separate actions "for each as a distinct debt, any superior Court would deal with "such a proceeding as vexatious. We think that the 63rd clause "does apply (whether to all debts which could be comprised in one "description in one count, we need not now decide), but at "all events to the cases of tradesmen's bills, in which one item "is connected with another in this sense, that the dealing is not "intended to terminate with one contract, but to be continu-"ous, so that one item, if not paid, shall be united with another, "and form one entire demand" (*a*). In this case two hundred and twenty-eight summonses were issued out of the County Court at the suit of the plaintiff against the defendant for sums amounting in the aggregate to £303-19, one claim only amounting to the sum of £5, and many to less than 20*s*. These demands arose out of an order alleged to have been given by the defendant, a railway contractor, to the plaintiff, a grocer, to supply with goods the workmen employed by certain persons, who were sub-contractors with the defendant. Tickets were given by the sub-contractors, and signed by them, each for a certain amount, and these tickets amounted to 3,000; but actions were brought, not for each supply, but, apparently, for the amount of all the supplies to one workman. It was held that these separate actions could not be brought with a view of giving the County Court jurisdiction.

Pollock, C B., in the course of his judgment in the case, quoted with approval as giving a very satisfactory reason a case (*b*), which was for the price of different parcels of malt sold at different times; and it was said, "because though there be several contracts, "yet for as much as the plaintiff might have joined them all in one "action, he ought so to have done, and sued in the Court above, *and* "*not put the defendant to an unnecessary vexation;* no more than "he can split an *entire* debt into divers, to give the inferior Court "jurisdiction in *fraudem legis.*"

In this case it was said that "if the causes may be joined in one action, they must."

It was held (*c*) that separate suits might be brought for rent and for double the value for holding over the same premises after

(*a*) Pollock, C. B., *In re* Aykroyd, 1 Ex., 479.

(*b*) Girling *v.* Alders, Vent., 73, reported in 2 Keble, 617, as Girling *v.* Aldar.

(*c*) Wickham *v.* Lee, 12 Q B, 521.

notice to quit, the double value being in the nature of a penalty. Referring to *In re Aykroyd* (*a*) Patteson, J., said, that he did not understand the Court of Exchequer to have said that wherever two causes of action could be joined it was splitting demands to separate them. If the claims are distinct, so that in case of a suit in the superior Courts they could not both be comprehended within one count, the plaintiff may bring a distinct plaint in respect of each in the County Court, notwithstanding the joint amount exceeds the sum within which the County Court has jurisdiction, provided each singly is within such amount (*b*). So it has been held that a claim in respect of liquors supplied, and another for money lent, were distinct, notwithstanding an account had been delivered comprising both, and that the plaintiff was justified in bringing separate plaints in respect of each (*c*). In this case there were two suits, one for work and labour, and another for money lent; the transactions were contemporaneous, but unconnected, and it was held that this was not a splitting of the cause of action.

The plaintiff, in an action for damages for a tort, is entitled to be placed in the same position as if the tort had never occurred, and the damages can be assessed generally.—See Addison on Torts, citing a case (*d*) where Best, C. J., said:—"When the cause "of action is complete, when the whole thing has but one "neck, and that neck has been cut off by the defendant, it "would be most mischievous to say—it would be increasing litiga-"tion to say—you shall be driven to bring a second, a third, or a "fourth action for the recovery of your damages."

"The true test of the proper application of this section to any "particular case, must be whether there has been a splitting of the "cause of action." Thus where a Hindu, subject to the Mitakshara law, brought a suit as reversioner to set aside deeds of gift of the property made by the widow of the deceased and his mother, and succeeded in his suit, and got possession under his decree, it was held by the Judicial Committee (*e*) that this was no bar to another suit by the same plaintiff to set aside a mortgage of the same property

(*a*) 1 Ex., 479.

(*b*) *Ibid.*

(*c*) Brunskill *v.* Powell, 19 L. J., Ex., 362; Kimpton *v.* Willey, 19 L. J., C. P., 269.

(*d*) Richardson *v.* Mellish, 2 Bing., 240.

(*e*) Koer Golab Singh *v.* Rao Kurun Singh, 10 B. L. R., P. C., 1; see p. 10; S. C., *now* Rao Kurun Sing *v.* Nawab Mahomed Fyz Ali Khan, 14 Moo I. A, 187; see p. 197.

made by the widow and mother. In the one case, the widow and mother, assuming an absolute power of disposition, had granted the inheritance in portions of the estate to the defendants. In the other case, the issue was whether they had duly exercised the limited power which belongs to a Hindu female having a Hindu female's right of inheritance in the estate of charging the estate for certain defined purposes. Again Mitter, J., says (*a*) that "the test in all cases of this description is, whether the cause "of action upon which the new suit is brought is distinct from "the cause of action upon which the former suit was instituted."

Where there are different defendants and different causes of action, the plaintiff need not join all his claims in one suit, and he may sue separately, relying in each case on the same title (*b*).

The fact that, at the time when the purchaser of certain lands sued, with a view of confirming his title to the lands under his purchase, for a declaration of title, he was in a position to have sued for possession, has been held not to be a bar to his subsequently suing for possession on the ground that "the cause of "action he then put in suit did not necessarily involve any breach "of the contract to deliver possession. The plaintiff might have "obtained a declaratory decree without entering on the question "of possession" (*c*).

A Hindu whose share in an ancestral estate had been alienated by a co-proprietor in different parcels to different alienees, should bring but one suit against his co-proprietor, and either include all the alienees in that suit, or sue the alienees separately for the respective parcels in their possession, and cause the proceedings to be stayed till the suit against the co-proprietor was determined (*d*). But a former suit for a share of property purchased in the name of G. alleging it to be joint property, does not bar the plaintiff from suing for other property which was bought in the name of M. at another time, the latter claim being no part of the claim arising out of the cause of action in respect of the property first mentioned so as to come within the meaning of this section (*e*).

(*a*) Ganes Chandra Chowdhry *v.* Ram Kumar Chowdhry, 3 B L. R., 265.

(*b*) Musst. Jehan Bebee *v.* Saivuk Ram, 1 H C, N. W. P, F B, 109.

(*c*) Tulsi Ram *v* Ganga Ram, I. L. R, 1 All, 252, Turner and Spankie, JJ, June 26, 1876

(*d*) Vithu *v.* Narain Dabhulker, 5 Bom. H C. Rep., App, 30, Tucker and Warden, JJ.

(*e*) Ramhurry Mondul *v.* Mothoor Mohun Mondul, 20 Suth W. R, 450, P C

Where a plaintiff unintentionally omitted to include a part of his claim, it had been held by Seton-Karr and Bayley, JJ., that he could sue for the part which he had thus omitted (*a*); but this decision was overruled by the Judicial Committee on appeal (*b*), who held that the words of the 7th section of Act VIII of 1859 were too clear to admit of such an exception (*c*). The Legislature has now made an alteration in the law, excluding the application of the section in those cases where the claim has been unintentionally left out. Where, however, the omission has been intentional, and a part of the claim has been abandoned, no suit can be brought in any Court in respect of it (*d*). B. sold to I. a turuf, of which 3½ kanees were subsequently attached on a decree by M. After objecting unsuccessfully to the attachment, I. brought a suit against the auction-purchaser, joining B. as a defendant, to have it declared that the 3½ kanees belonged to himself, but failed on the ground that he was holding it benamee for B. Subsequently, the auction-purchaser bought from B. the rest of the taluk, and sued her for possession: I. got himself entered as a defendant. It was held, that there was no identity between the subjects of the two suits, and I.'s former suits for all that he was then entitled to sue for on the cause of action that he had on the attachment, did not deprive him of his right to a fresh and independent judgment in the present case, and also that the former judgment did not operate as an adjudication of the cause in the latter suit, and if evidence, it was not conclusive evidence or binding on the Judge (*e*).

The representative of the plaintiff cannot sue for the part relinquished (*f*).

Where (*g*) the plaintiff complained that the defendant had induced him to take a putnee talook settlement at a certain yearly rent, on fraudulent and false representation as to mouzahs and lands alleged to be contained in the lots settled, but which

(*a*) Musst. Shamssoonissa Begum *v.* Moonshee Buzloor Rohim, Marsh. 286

(*b*) Buzloor Ruheem *v.* Shamssoonissa Begum, 8 Suth. W. R, P. C., 12.

(*c*) See also Ganes Chunder Chowdhry *v.* Ram Kumar Chowdhry, 3 B. L. R, 265.

(*d*) Mothoor Mohun Mundul *v.* Khemunkuree Dassee, 5 Suth. W. R, 182, Bayley and Sumbhoonath Pundit, JJ.

(*e*) Ram Chunder Chowdhry *v.* Kashee Mohun, 21 Suth W. R., 57, Kemp and Ainslie, JJ.

(*f*) Tewary *v.* Tewary, 3 Suth. W. R., 25, Bayley and Phear, JJ.

(*g*) Nil Monee Singh Deo *v.* Issurchunder Ghosal, 9 Suth. W. R, 121, Phear, J.

he stated did not exist, he sued to recover part of the consideration-money and of the rents paid by him, in proportion to the rent assessed on the non-existing land, and also an abatement in respect of those lands alleged to be, but not in existence, for the future. The Court gave him a decree for the full amount claimed, but refused to give him the abatement for the future, on the ground that it could not alter the contract between the parties. Held, that the plaintiff could not sue again for the excess rents paid under the pottah after the first suit. He should have included in his claim all the probable damage to accrue from the false representation. The illustration is in accordance with the decision of Couch, C. J, and Macpherson J, in a case (*a*) where there were several instalments due on a promissory note, payable on the face of it by instalments, and it was held that the holder of the note could not sue for each instalment separately, or for some of them, but must sue for all, or abandon those he did not include in his suit. A judgment recovered in a suit for one instalment when others are due, is a bar to a subsequent suit in respect of those which were not included. And the same rule would apply to bonds payable by instalments or to any other several debts on the same contract, some or all of which were due at the time the suit was brought; but a plaintiff may sue upon his bond as each successive instalment falls due, and then sue again when the others become due; and where a plaintiff did this, and obtained a decree for the full amount of two instalments, but recovered only part of the second instalment under his decree, it was held by Kemp and Glover, JJ., that he could sue for the part of the second instalment which he had not recovered, and for a further instalment which subsequently became due (*b*). Section 13, however, would now, and s. 2 of Act VIII of 1859 did then, apparently afford a good defence to that part of the suit which was already decided in the first instance. Where there was a covenant on a given event to make an abatement in the rent nominally fixed, and to refund a rateable portion of the consideration-money,—the event was, if it should turn out on enquiry and after preparation of the hustobood papers by the lessee, that the jumma stated by the defendant was not the real rent of the estate. The fact turned out to be so, and the defendant, without making

(*a*) Macintosh *v.* Gill, 12 B. L. R, 37.

(*b*) Bolakee Lal *v.* Chowdhry Bungsee Sing, 7 Suth. W. R, 309.

any deduction, recovered the full amount for the years 1271, 1272, and 1273. Held, that the plaintiff having sued in respect of over-payments for the three years preceding 1271, was not barred in a suit for over-payments in 1271, 1272, and 1273, which had not accrued when his former suit was brought (*a*). But every suit brought to recover mesne profits actually accrued must include the whole claim arising out of the cause of action which gives ground for the claim (*b*). In the same way, although a suit for arrears of rent is not estopped by the fact that the plaintiff has split his claim, *i.e.*, the jumma, but the circumstance that a part of the jumma has been omitted, would be a bar to the plaintiffs suing for that part (*c*).

Where the plaintiffs in a suit were permitted to withdraw from the same with a view to bringing a fresh suit, which should include a portion which had been omitted of the claim arising out of the cause of action, and such fresh suit was brought, the additional portion of the claim in that suit is of course not barred (*d*).

A second suit for new land formed by gradual accretion will lie after a decision in a former suit dealing with other accretions (*e*).

Where a defendant objects under this section that the plaintiff omitted in a former suit to include the portion which he now claims, and in respect of which he then had a cause of action, the objection being one of fact, the burden of proof lies with the objector (*f*).

Only certain claims to be joined with suit for recovery of land.

44. *Rule a.*—No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, or to obtain a declaration of title to immoveable property, except—

(*a*) claims in respect of mesne profits or arrears of rent in respect of the property claimed,

(*a*) Rajah Nil Money Singh Deo *v.* Unnoda Persaud Mookerjee, 10 Suth. W. R., 41, F. B.; S. C., 1 B. L. R., F. B, 97.

(*b*) Musst. Rookminee Kooer *v.* Ram Tohul Roy, 21 Suth. W. R, 223, Phear and Morris, JJ.

(*c*) Parson Gopal Paul Chowdhry *v* Poorunund Mullick, *ib.*, 272.

(*d*) Ilahi Baksh *v.* Imam Baksh, I. L. R, All., 324, Stuart, C. J., and Pearson, J.

(*e*) Pahalwan Singh *v.* Maharajah Muhessur Buksh Singh, 9 B. L. R, P. C, 150.

(*f*) Skinner *v.* Ranee Shama Soonduree, 19 Suth. W. R., 429, L. S. Jackson and Mitter, JJ.

(*b*) damages for breach of any contract under which the property or any part thereof is held, and

(*c*) claims by a mortgagee to enforce any of his remedies under the mortgage.

Claims by or against executor, administrator, or heir.

Rule b. (S.) No claim by or against an executor, administrator or heir as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir.

Rule (a) corresponds with the English Judicature Act, 1875, Order xvii, Rule 2.

Rule (b), with Order xvii, Rule 5, adding the words "or heir."

Plaintiff may join several causes of action.

45. (S.) Subject to the rules contained in section 44, the plaintiff may unite in the same suit several causes of action, and any plaintiffs having causes of action against the same defendant or defendants may unite such causes of action in the same suit.

Court may order separation.

But if it appear to the Court that any such causes of action cannot be conveniently tried or disposed of together, the Court may, at any time before the first hearing, of its own motion or on the application of the defendant, order separate trials of any such causes of action to be had, or make such other order as may be necessary or expedient for the separate disposal thereof.

When causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit, whether or not an order has been made under the second paragraph of this section.

The first two paragraphs of this section are taken from the English Judicature Act, 1875, Order xvii, Rule 1.

The last paragraph is rendered necessary by the general constitution of Courts of different grades of jurisdiction in India.

The plaintiff, a Hindu widow, sought relief in three different matters: 1*st*, the administration of the estate of the father of her deceased husband, who died twelve years before the husband; 2*nd*, the construction of a deed of settlement made by him, and which was confirmed by his will; and 3*rd*, the administration of the estate of her deceased husband, which might also involve the administration of the estate of his nephew, who died eleven years after him. Considerable stress was laid on the fact that if the plaintiff could combine in one suit these several subjects, she would be able to get a decree with respect to the settled property, which she could not get if she sued separately for an administration of that property, inasmuch as the whole of it was without the local limits of the Court's jurisdiction. This objection would, no doubt, in the opinion of the learned Judge who tried the case, have great force if the plaintiff was attempting to deal only prospectively with the property outside those limits. But, in fact, her case was, that, since 1860, the trustees of the settlement had paid a particular share of the rents of the property to her late husband's brother as executor of his father's will, and her principal object was to get a construction of the settlement with respect to the rents so paid, which construction, no doubt, would incidentally affect future rents, and would be a binding decision on title. Considering that the plaintiff had no right under the settlement beyond what she had already received, his Lordship held that the suit should be dismissed on that ground; but supposing that she had in fact any right or interest under the deed of settlement (other, it is presumed, than that which she had already received) and having regard to the more liberal view lately taken (*a*) with respect to objections for multifariousness, his Lordship would not have been inclined to dismiss the suit on that ground (*b*).

Defendant may apply to confine suit.

46. (S.) Any defendant alleging that the plaintiff has united in the same suit several causes of action which cannot be conveniently

(*a*) In the cases of Pointon *v.* Pointon, L. R., 12 Eq, 547; and Coates *v.* Legard, L. R, 19 Eq, 56.

(*b*) Treepoora Soondery Dossee *v.* Debendronath Tagore, I. L R., 2 Calc., 52, Pontifex, J; but see Cazi Muzhur Hossein *v.* Dinobundo Sen, Bourke, 8, Phear, J.; Munshi Maniruddin Ahmed *v.* Baboo Ram Chand, 2 B. L. R., 341, Norman and E. Jackson, JJ.

disposed of in one suit, may at any time before the first hearing, or, where issues are settled, before any evidence is recorded, apply to the Court for an order confining the suit to such of the causes of action as may be conveniently disposed of in one suit.

This corresponds with the English Judicature Act, 1875, Order xvii, Rule 8.

A plaintiff claimed to have an agreement for a partnership with the defendant in a land speculation cancelled, on the ground that he had been induced to enter into it by the misrepresentation of the defendant and in ignorance of its real effect; or, in the alternative, that the partnership created by the agreement might be dissolved and the accounts taken, and the defendant restrained from interfering with the management of the works in violation of his agreement. Lord Cairns, C., was of opinion that, independently of the Judicature Act, this was exactly the kind of case in which, so far as the pleadings were concerned, alternative relief might be asked for. In both alternatives the question arose between the same parties, and mainly upon the same facts. But the Judicature Act had enlarged the liberty of the plaintiff in claiming relief, for it is expressly provided, that, subject to certain regulations, alternative relief may be asked for and several causes of action may be joined in the same statement of claim (*a*).

Court on hearing application may exclude some causes and order amendment.

47. (S.) If, on the hearing of such application, it appears to the Court that the causes of action are such as cannot all be conveniently disposed of in one suit, the Court may order any of such causes of action to be excluded, and may direct the plaint to be amended accordingly, and may make such order as to costs as may be just.

Every amendment made under this section shall be attested by the signature of the Judge.

This corresponds with the same Act, Order xvii, Rule 9, but with the addition of the last paragraph requiring the signature of the Judge to the amendment.

(*a*) Bagot *v.* Easton, L. R., 7 Ch. Div., 1.

CHAPTER V.

OF THE INSTITUTION OF SUITS.

Suits to be commenced by plaint.

48. (S.) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

This corresponds with Act VIII of 1859, s. 25.

It has been held that a plaint cannot be presented on a holiday; if alleged to have been presented on a holiday, it will be considered to have been presented on the next Court day (*a*). But in another case (*b*) it was held that a plaint could be admitted on a Good Friday, which was a public holiday. However that may be, a suit will not be barred if not presented in proper time, when the period of limitation expires on a Sunday, holiday, or *dies non* (see Act IX of 1871, s. 5 *a*), provided it be presented on the next day that the Court re-opens.

Under this section the plaint may be presented to an officer of the Court, and, as would appear, when the Court is not sitting, or out of Court; but there is no power given to such an officer to reject or amend the plaint or order it to be amended. See ss. 31, 32, 34, and 53.

All suits should be begun in this way, for example, an administration suit (*c*) or a probate suit (*d*).

Language of plaint.

49. (S.) The plaint must be distinctly written in the language of the Court, provided that if such language is not English, the plaint may (with the permission of the Court) be written in English; but in such case, if the defendant so require, a translation of the plaint into the language of the Court shall be filed in Court.

This section corresponds with Act VIII of 1859, s. 26, first paragraph.

(*a*) Lutchmee Baie *v.* Luthe, S. D. A., N. W. P., 1863, p. 280; Shegobind Sing *v.* Dookheeram Sing, *ib.*, 1866, p. 62.

(*b*) Gobind Kumar Chowdry *v.* Hargopal Nag, 3 B. L. R., App, 72, Bayley and Hobhouse, JJ.

(*c*) MacIntosh *v.* Wilkinson, 3 B. L. R., App., 3.

(*d*) Toylucknath Doss *v.* Megnath Doss, 2 In. Jur., N. S., 245, Phear, J.

It has been considered that when the plaint is not written in the prescribed language, it should be treated as a nullity and not received (*a*).

Particulars to be contained in plaint.

50. The plaint must contain the following particulars:—

(*a*) the name of the Court in which the suit is brought;

(*b*) the name, description, and place of abode of the plaintiff;

(*c*) the name, description, and place of abode of the defendant, so far as they can be ascertained;

(*d*) a plain and concise statement of the circumstances constituting the cause of action, and where and when it arose;

(*e*) a demand of the relief which the plaintiff claims; and

(*f*) if the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished.

In money-suits.

If the plaintiff seek the recovery of money, the plaint must state the precise amount, so far as the case admits.

In a suit for mesne profits: and in a suit for the amount which will be found due to the plaintiff on taking unsettled accounts between him and the defendant, the plaint need only state approximately the amount sued for.

Where plaintiff sues as a representative.

When the plaintiff sues in a representative character, the plaint should show, not only that he has an actual existing interest in the subject-matter, but that he has taken the steps necessary to enable him to institute a suit concerning it.

Illustrations.

(*a*.) A. sues as B.'s executor. The plaint must state that A. has proved B.'s will.

(*a*) Mirza Ameer Koolu Khan *v.* Russick Lall Singh, 8 Suth. W. R., 495.

(*b*.) A. sues as C.'s administrator. The plaint must state that A. has taken out administration to C.'s estate.

(*c*.) A. sues as guardian of D., a Muhammadan minor. A. is not D.'s guardian according to Muhammadan law and usage. The plaint must state that A. has been specially appointed D.'s guardian.

Defendant's interest and liability to be shown.

The plaint must show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

Illustration.

A. dies leaving B. his executor, C. his legatee, and D. a debtor to A.'s estate. C. sues D. to compel him to pay his debt in satisfaction of C.'s legacy. The plaint must show that B. has causelessly refused to sue D., or that B. and D. have colluded for the purpose of defrauding C., or other such circumstances rendering D. liable to C.

Grounds of exemption from limitation law.

If the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the plaint must show the ground upon which exemption from such law is claimed.

This section corresponds with Act VIII of 1859, s. 26. The clause which requires that the plaint shall state (a) *the name of the Court* is in accordance with the general practice, but is new.

(b) *The name of the plaintiff.*

Where a purchase was really made by a vakeel from his client, but in the name of another person, it was held that the real purchaser must be plaintiff in a suit to enforce rights as purchaser, and the suit could not be maintained in the name of the other (*a*); or the real purchaser ought to be joined as a co-plaintiff (*b*). A plaint filed by a firm should set forth the names of all the members of the firm (*c*), but a corporation or company may be authorized to sue or be sued in the name of an

(*a*) Fuzeelun Beebee *v.* Omdah Beebee, 11 B. L. R., 60, note, Peacock, C. J., and Mitter, J.

(*b*) Kally Prosonno Bose *v.* Dinonath Mullick, *ib.*, 56, Couch, C. J., L. S. Jackson and Mitter, JJ.

(*c*) Watson *v.* Roopchund Sircar, Suth. S. C. C. Cases, 38, Peacock, C. J., and Sumbhoonath Pundit, J.

officer or trustee; see *post*, chap. xxix. Some suits brought by public officers should be brought in the name of their office—see Administrator-General's Act (Act II of 1874, s. 34); and after two months' notice, see s. 424, *post*.

(c) *Name of defendant.*

It was held by the Judicial Committee (*a*) that where the Government has recognized a person as having a right to bear particular titles, a plaint in a suit against such person does not contain the "description of the defendant" if such titles are omitted. In such a case the plaintiff should, on the objection being taken by the defendant, be ordered to amend the plaint; and if such order is not complied with, the plaint should be rejected; see now s. 53, *post*. In the case of an unincorporated or unregistered company, the plaintiff, if he does not know of what persons the company is composed, may sue them by the name under which they are carrying on business, and state his inability to describe them better (*b*).

(d) *The cause of action.*

See s. 17 as to cause of action; see Limitation Act (Act XV of 1877), schedule, as to *when it accrued*. This is for the purpose of informing the Court whether the suit is barred by the law of limitation. The Court is now bound to inquire into the question of limitation; see Act XV of 1877, s. 4. The suit must be dismissed although limitation is not set up as defence.

(e) *The demand for relief, &c.*

Under a prayer for general relief, the plaintiff is not entitled to any relief which is inconsistent with his plaint (*c*), but by consent of parties the Court may, in some circumstances, grant relief (*d*).

Act VIII of 1859, s. 26, required that the plaint should state, where the claim was for any property other than money, its estimated value. This provision is omitted in s. 50, but it is, nevertheless, necessary to determine the value of the thing sued for and to affix the proper stamp under the Court Fees Act, VII of 1870. If this is not done, the plaint cannot be admitted in any case in a Court other than a High Court (see s. 6), or in a High Court in a

(*a*) Maharajah of Vizianagram *v.* Raja Lakshmi Chattoya, 12 B. L. R., 443.

(*b*) Koylash Chunder Roy *v.* Ellis, 8 Suth. W. R, 45, Peacock, C. J., and Hobhouse, J.

(*c*) Hiralal Mullick *v.* Matilal Mullick, 5 B. L R, 682, Peacock, C. J., and Norman, J.

(*d*) Soorjomonee Dayee *v.* Suddanund Mohapatter, 12 B. L. R., 304, P. C.; see p. 315.

case (see s. 4) coming before it in the exercise of its extraordinary original jurisdiction, or sitting as a Court of appeal or reference from the Court below; if the plaint is not properly valued and stamped it must be rejected under s 54, *post*. See also another case (*a*) where it was held, overruling several earlier cases, that the question of the value of the stamp could be raised in appeal The decision of the Court of first instance was not final.

This valuation is for two purposes—*viz*, for the purposes of the revenue, a stamp duty is chargeable under Act VII of 1870, which enactment lays down special rules for the valuation of the matter in controversy (see s 7); and secondly, for the purpose of jurisdiction, the jurisdiction of the Court of first instance depending on the amount sued for or the value of the claim. For this purpose the valuation should be made according to the market-value of the property, and not under the special rules laid down in the stamp law (*b*).

Where a patni talook, belonging to several co-sharers, each of whom collected his own rent, was sold for arrears of rent, and one of the co-sharers sued in the Moonsiff's Court to set aside the sale, and recover possession of his own share, and valued his suit accordingly, making the other co-sharers defendants, it was held, that the suit could not be maintained in that form. The cause of action was the sale of the whole estate, and the suit ought to have been framed and valued accordingly (*c*).

The instances given in s. 26 of the Act of 1859 are omitted in this section, but the omission is supplied by the forms of plaints given in the schedule. Where the suit was for immoveable property, some description of the property was, and still is, required to be given; but all that it is necessary to do is to describe the property in such a manner as is sufficient for its identification. It is not absolutely necessary that boundaries should be set forth so long as the land can be identified (*d*); and where a whole estate bearing a name is sued for, the boundaries need not be given (*e*).

A paper referred to in the plaint is not a part of it (*f*).

(*a*) The Collector of Sylhet *v* Kali Kumar Dutt, 7 B L. R, F. B, 668.

(*b*) Naukoon Singh *v* Tofanee Singh, 12 B L R, 113, Phear and Ainslie, JJ.; Jeebraj Singh *v*. Inderjeet Mahtoon, *ib*, 115 note, Couch, C.J, & Ainslie, J.

(*c*) Unnoda Persad Roy *v* Erskine, 12 B L R, 370, F. B

(*d*) Meer Aftbooddeen *v*. Shumsooddeen Mullick, 18 Suth. W. R., 461, Kemp and Pontifex, JJ.

(*e*) Ramdoyal Khan *v*. Ajoodhia Khan, I, L. R, 2 Calc., 1, Markby and Mitter, JJ.

(*f*) Toulton *v*. Gwyther, Bourke, 273

51. (S.) The plaint shall be subscribed by the plaintiff and his pleader (if any), and shall be verified at the foot by the plaintiff or, with the permission of the Court, by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

Plaint to be subscribed and verified.

This section corresponds with the 27th and 28th sections of Act VIII of 1859.

It has been held in a suit instituted in the High Court, Fort William, that, when a plaint is verified by a person other than the plaintiff, notice should be given to the defendant; nothing more formal need be done by way of notice to support an application for the admission of such a plaint, if the person verifying it is qualified in other respects (*a*). It is, however, not always necessary to give notice. It seems that a partner can, at all events when leave is given, sign, and if he have the requisite knowledge, verify, a plaint on behalf of his co-partners. If such an act be necessary to the partnership, it would bind them under the Contract Act IX of 1872, s. 251. It has been the practice in Calcutta to allow a partner to verify for his co-partners and to subscribe the plaint with the name of the partnership (*b*). The object of the verification is to fix some competent person with the responsibility of stating, for the information of the Court, truly, so far as he can, what appears on the plaint or other document which is verified, thus a written statement is required (s. 115, *post*) to be verified in the same way as a plaint. It was the same under the Code of 1859, s. 123; and it was held that the Court would allow a written statement to be verified by a person having the required authority—in that case the constituted attorney of the party—without notice to the other side (*c*); and where an objection was made after that period, that the plaint had been verified by a recognized agent without first obtaining the leave of the Court, the Court overruled the objection and held, that as "anything which by this Act is required or permitted to be done by a party in person may be done by his recognized agent" (Act VIII of 1859, s. 17), it was not necessary for such an agent to get leave to verify the plaint (*d*); but s. 36 of

(*a*) S. M. Puddomokey Dossee *v.* Samachurn Chuckerbutty, 1 In. Jur., N. S, 226.

(*b*) Lachlan *v.* Shaik Abdulla, 5 B. L. R., App., 89.

(*c*) Finlay Campbell & Co. *v.* Steel, 1 In. Jur., 40.

(*d*) Ram Shastree *v.* Chintoo Punth, S. D. A., N. W. P., 1864, p. 669.

this Code, which corresponds with that section, adds, "except when otherwise expressly provided, &c.;" and this would apparently render it necessary for the recognized agent to obtain leave to subscribe and verify the plaint or written statement. The Court must make enquiries as to why the plaintiff does not personally verify the plaint (*a*). A Judge, on appeal, dismissed the suit, on the ground that the plaint was verified by an agent, when it might, and ought to, have been verified by the plaintiff himself. It was held that the plaint having been admitted, the suit ought not to be dismissed for this defect, but the Judge might properly have required the verification of the plaintiff to be supplied (*b*).

A plaint, being verified, is evidence as against the plaintiff of the facts stated in it (*c*). It is an admission (*d*).

As to the verification of plaints by corporations entitled to sue or be sued in the name of an officer or a trustee, see s. 435, *post*.

The plaint in an action to recover the amount of certain dishonoured bills of exchange, was filed by the attorneys of the plaintiffs and was verified by one of them, who held a general power-of-attorney from the plaintiffs. It was held that as it was incumbent on the party verifying the plaint to show that he was competent to do so; and as the fact of the bills having been protested, and appearing, therefore, on the face of them, to have been dishonoured, was not enough: the verification was insufficient (*e*). This case was decided in 1865. Act V of 1866 provides (s. 13), that protest of a bill of exchange, whether inland or foreign, when purporting to be made by a notary public, shall be *primâ facie* evidence that the bill has been dishonoured. The plaint in the above case was, on application, taken off the file on account of the informality above-mentioned, but was re-admitted on the plaintiffs' counsel calling the person who had made the verification, and on his satisfying the Court that he was competent to do so. And see the next section (52). The Court ought not to allow any other person than a plaintiff to verify a plaint, except only when the plaintiff is unable, by absence or other good cause, to subscribe it. This was expressly required by s. 28 of Act VIII, and although the words

(*a*) Mohessur Buksh Singh *v.* Sheo Narain Singh, 6 Suth. W. R., Mis., 59.

(*b*) Gokul Chunder *v.* Musst. Bureek Begum, Marsh., 344.

(*c*) Narappabin Appa Hegde *v.* Gapayabin Kapaya, 1 Bom. H. C. Rep., 361.

(*d*) See Act I of 1872 (Evidence), s. 21, and the following sections.

(*e*) Overend, Gurney and Co. *v.* Steel, 1 In. Jur., N. S., 39, Macpherson, J.; Watson *v.* Roopnarain Sircar, Suth. S. C. C. Cases, 88, Peacock, C. J., and Sumbhoonath Pundit, J.

are now omitted in this section, the principle is the same; and where the plaint is not presented by the plaintiff in person, the Court should be satisfied that the verification is actually signed by the plaintiff (*a*),—that is to say, by the plaintiff or the person whom the Court may consider competent to make the verification. The prejudices of natives of rank to depose in a Court of Justice will not be allowed to relax the rule that the best evidence must be produced of which the case is susceptible (*b*). Persons exempt from attendance in Court by reason of their rank, are not therefore, excused from verifying their plaints or written statements (*c*).

Contents of verification.

52. (S.) The verification must be to the effect that the same is true to the knowledge of the person making it, except as to matters stated on information and belief, and that as to those matters he believes it to be true.

Verification to be signed and attested.

The verification shall be signed by the person making it, and when he makes it out of Court he shall sign it in the presence of a witness, who shall also sign it.

The Court shall examine such witness as to the fact of the signature, unless the person making the verification is present.

The form of verification differs from that required under the Code of 1859. s. 27, which was as follows:—

"I (A. B.), the plaintiff named in the above plaint, do declare "that what is stated therein is true to the best of my information, "and belief."

The person making the verification must now distinguish what he knows to be true from what he does not actually know but believes to be true This is a new provision, so far as it allows the person verifying to do so as to matters he only states from information and belief.

The second and third paragraphs of this section are also new and as they do not leave to the Court any discretion in the matter, may greatly increase the difficulty and expense of litigation: they

(*a*) Rammohun Mookerjee *v.* Rajah Nursing Deb, Suth. F. B. Rul., 54, and 1 In. Jur., 63; Ranee Roshun Jehan *v.* Syud Inayet Hossein, Marsh, 127. Peacock, C. J., Bayley and Kemp, JJ.

(*b*) *Ib.*

(*c*) Kinoosing Roy *v.* Eshan Chunder Roy, 2 Wym. Rep., 25*c*.

may be difficult of application where the plaintiff or the party making the verification and his witness do not reside within the jurisdiction. The witness, when at a distance, may be exempt from attendance under s. 176; his signature may be proved by affidavit (s. 194), or by commission (s. 383). It would be advisable, when the Court is at a distance, to apply to it to adopt one of these modes of proof, either of which is, however, expensive.

When the plaint may be rejected, returned for amendment, or amended

53. (S.) The plaint may, at the discretion of the Court, and at or before the first hearing, be rejected, returned for amendment within a time to be fixed by the Court, or amended then and there, upon such terms as to the payment of costs occasioned by the amendment as the Court thinks fit,

(*a*) if it do not state correctly and without prolixity the several particulars hereinbefore required to be specified therein; or

(*b*) if it contain any particulars other than those so required; or

(*c*) if it be not subscribed and verified as hereinbefore required; or

(*d*) if it do not disclose a cause of action; or

(*e*) if it is not framed in accordance with section 42; or

(*f*) if it is wrongly framed by reason of nonjoinder or misjoinder of parties, or because the plaintiff has joined causes of action which ought not to be joined in the same suit:

Proviso.

Provided that a plaint cannot be altered so as to convert a suit of one character into a suit of another and inconsistent character.

Attestation of amendment.

When a plaint is amended, the amendment shall be attested by the signature of the Judge.

This section corresponds with Act VIII of 1859, ss. 29 and 32, but it defines the time within which an amendment may be made,—*i. e*, at or before the first hearing.

It was considered clear under the Code of 1859 that a plaint could be amended at any time during the progress of the cause (*a*). The words of the section in that Code relating to amendments of plaints (s. 29) are general and not limited to any time; here the amendment must be made at or before the first hearing, which excludes a subsequent amendment during the progress of the case The issues, however (see s. 149, *post*) can be amended at any time before the decree is passed, as could be done under the Code of 1859, s. 141; and this would enable the Court to deal with the case as justice might require, and the Court can, in its discretion, deal with any question of costs that may arise owing to a defect in the plaint or to an improper joinder of parties: and if the plaint is to be amended by the addition of a party, it seems that it must be done at or before the first hearing (ss. 32, 34, *ante*).

The Judge still has power, in his discretion, to reject the plaint altogether; and this he would do, no doubt, if it were altogether bad upon the face of it (*b*).

Where the institution of a suit is manifestly vexatious, the Court may properly reject the plaint, seeing plainly that there is no cause of action. Thus the Court of Queen's Bench (*c*) refused to let the plaintiff sue on a cause of action which had abundantly failed in similar suits brought by him against other persons. So, if it appears clearly that there is no right of suit; as to which, see notes to s. 11, and see s. 53 (d); but not where the plaintiff is only not likely to succeed (*d*). So if the suit is barred by limitation, which point the Judge is bound now to take (Act XV of 1877, s. 4) (*e*), and if he does not do so, it is an error in law, giving an appeal (*f*).

Where a plaint is originally presented in time and returned for amendment, and presented again within the time appointed by the Court for the amendment, but beyond the time prescribed by the Limitation Act, counting from the date when the plaintiff's right to sue accrued, the plaint should not be rejected on the ground of

(*a*) Hera Monee Dabee *v* Koonj Behary Haldar, 2 Suth. W. R., 207, F B.

(*b*) See the cases of Ameer Narain *v.* Musst. Rughoobunsee Koonwur, 5 Suth. W. R, 234, Seton-Kair and Macpherson, JJ.

(*c*) Dawkins *v.* Prince Edward of Saxe Weimar, L R., 1 Q B D, 499.

(*d*) Lakshmi Ammal *v.* Tikaram Tovaji, 1 Mad H C Rep, 240.

(*e*) See Payne *v.* Constable, 1 B. L. R, O. J, 49.

(*f*) Sabiji Kesraji *v.* Rajsangji Jalam Sangji, 2 Bom. H. C. Rep, 162, Couch, C.J., and Tucker, J.

limitation, for the date of commencing the suit is the date of the original presentation of the plaint (*a*).

If the plaint do not state at all when the cause of action accrued, it cannot properly be rejected on the ground of limitation, but it may be rejected for the defective allegation. It seems, however, that the proper course for the Judge to take in such a case is to enquire whether the suit is within time, and if so, to return the plaint for amendment, or direct an amendment then and there (*b*); and where a party is added, the suit begins as regards him when his name is added, not when the original plaint is filed (Act XV of 1877, s. 22) (*c*).

If the objection be allowed to pass and is noticed when the Court has evidence before it, evidence should be taken on this point before rejecting the plaint (*d*); but this is an irregularity which ought not to be permitted to occur. It is of the greatest importance that any defect in the plaint should be pointed out at once, otherwise all persons connected with the suit may be put to fruitless inconvenience and expense.

If a part only be barred by limitation, the Judge may reject that part and proceed to try the rest of the case (*e*). So, where a plaint asked for relief which it was competent to the Court to afford, and also sought to open up matters which had already been adjudicated upon in another suit, and which, therefore, the Court could not entertain, it was held that the Judge ought not to reject the plaint, but should strike out the matter already adjudicated upon and proceed with the rest of the case (*f*).

The next section (54) points out certain cases in which the plaint *must* be rejected. It does not include the case of a suit evidently barred by limitation, or where the Court has no jurisdiction to try the suit, but for the reasons above stated it would be obviously useless to allow the suit to proceed. Section 31 shows

(*a*) Ismail Sahib *v* Arumuga Chetti, 1 Mad H. C. Rep., 427, Phillips and Holloway, JJ.; Greeshchunder Singh *v.* Prankishen Bhuttachurjee, 7 Suth. W. R., 157, Kemp and Markby, JJ.; Syed Irtaza Hossein *v.* Hurry Persad Singh, *ib.*, 241, Kemp and L. S. Jackson, JJ.

(*b*) Kallynauth Shaw *v.* Rajeeblochun Mozoomdar, 2 In Jur., N. S., 343, Peacock, C. J., and Macpherson, J. See also Udaya Varma *v.* Nayara Chambithee, 1 Mad. H C. Rep., 322; and Sonamull *v.* Sudaram Rotti, 7 B. L. R., App, 23.

(*c*) Following Rajkisoree Dossee *v.* Buddun Chunder Shaha, 6 Suth. W. R., 298.

(*d*) *Ibid.*

(*e*) 2 Bom. H. C. Rep, 162.

(*f*) Ranee Roshan Jehan *v.* Syed Inayat Hossein, Marsh., 127, Peacock, C. J., and Bayley and Kemp, JJ.

that a Judge should not, in the first instance, reject a plaint for misjoinder of parties, but should cause it to be amended; and s. 34, that an objection as to want of parties, or joinder of parties who have no interest in the suit (*a*) must be taken before the first hearing, or shall be considered as waived by the defendant, which is somewhat inconsistent with s. 32, allowing an application to be made *on or before* the first hearing for striking out the name of a party improperly joined.

If the plaint be rejected at any stage, costs should be given against the plaintiff; but the Court has a discretion under s. 220, as to costs, even although it has no jurisdiction to try the suit; and this discretion would generally be exercised by making the plaintiff pay the costs of his neglect in the case of an amendment.

Where a plaint in a suit for land misstates the area, it should be amended (*b*). Where the plaint does not state the plaintiff's description and place of abode, it should be amended (*c*).

Sir Barnes Peacock, C. J., and Mr. Justice Macpherson considered (*d*), that where there was a misjoinder of plaintiffs, the proper course would be to amend the issues and allow the names of the persons misjoined as parties, to remain on the record, otherwise the defendants, had the decree been in their favour, would have lost the security of the plaintiffs struck out, for the costs of the suit. The practice (in the High Court, Fort William, Original Side) appears afterwards to have been in favour of allowing the amendments to be made in the plaint where it can be done without substantial injury to the parties (*e*). The Chief Justice in the course of the argument of another case stated that the practice of amending the plaint prevailed in Bombay; and in another case (*f*) the Judicial Committee of the Privy Council, under the circumstances of the case, which would otherwise have been one of great hardship, allowed an amendment of the plaint.

(*a*) As to which see Bhoyrub Chunder Doss *v.* Madhub Chunder Paramanic, 1 Hyde, 281.

(*b*) Rajah Joymungul Singh *v.* Mohender Narain Singh, 2 Suth. W. R., 154, Sumbhoonath Pundit and Macpherson, JJ.

(*c*) E. I. Ry. Co. *v.* Soorub Sook Dall, reported in the *Englishman* Newspaper, Dec. 19, 1865, supplement; see also Overend, Gurney and Co. *v.* Steel, 1 In. Jur., N. S, 39, Macpherson, J.

(*d*) East India Railway Company *v.* Jordan, 4 B. L. R., O. C., 97.

(*e*) See Gabind Chandra Dutt *v.* Ganga Dhye, 7 B. L. R., 335.

(*f*) Manomed Zahoor Ali Khan *v.* Musst. Thakooranee Butta Koer, 14 Moo. I. A., 468.

The plaintiff was allowed to amend his plaint in a case (*a*) by substituting parties on payment of costs. There the suit was brought at first against the Official Assignee, and the application was to substitute the names of Messrs. L. L. for that of the Official Assignee. There had been a hearing in the matter of the insolvency, and one of the insolvents had obtained his personal discharge.

Where a lessor sues to eject his tenant on the expiration of the latter's term, or for breach of the conditions of his lease, and fails to prove the lease, he is not ordinarily at liberty in the same suit, ignoring the lease, to fall back upon his general title, as though he had not set up and failed to prove the alleged lease (*b*).

"It is necessary that the determinations in a cause should be "founded upon a case either to be found in the pleadings, or involved "in or consistent with the case thereby made" (*c*).

A plaintiff must be limited to the case which he puts forward in his plaint, but he may put forward an alternative case in his plaint from the commencement, as the defendant will then know that he has more than one case to meet, and will not be taken by surprise. Where the plaintiff has not put forward an alternative case in the plaint, he may have leave to amend, and to state his case correctly, if the Court thinks that he has rested his claim upon wrong grounds from misinformation, ignorance of law or fact, mistake, or misconstruction of documents (*d*).

There are many instances of amendment being disallowed on the ground that they would alter the entire nature of the suit (*e*).

This Act cannot limit the power of the Queen in Council, and a plaint may be amended when the case is before the Judicial Committee (*f*).

(*a*) Delhi and London Bank *v.* Miller, 7 B. L. R, Apx., 65.

(*b*) Lakshmibai *v.* Haribin Ravji, 9 Bom. H. C. Rep, 1.

(*c*) Eshen Chunder Singh *v.* Shamachurn Bhutto, 11 Moo. I. A, 20, *per* Lord Westbury; and see Shah Mukhun Lall *v.* Baboo Sree Kishen Singh, 12 Moo. I. A., 189; and Sreemutty Dossee *v.* Lalunmonee, *ib*, 470; Arbuthnot *v.* Betts, 6 B. L. R., 273.

(*d*) Lakshmibai *v.* Haribin Ravji, 9 Bom H. C. Rep., 1.

(*e*) See Gobindo Mohapatur *v.* Gopeenath Pundit, 2 Wym, 256, F. B; Narainee Dossee *v.* Nurrohurry Mohonto, Marsh., 70, Peacock, C. J.; Mohendro Nath Mookerjee, defendant, 9 Suth. W. R., 206 Peacock, C. J., and Bayley, J., Modhoosoodun Gossamee *v.* Hills, 10 Suth. W. R, 242, Phear and Hobhouse, JJ; Musst. Fatima Beebee *v.* Arif Sookanee, Marsh., 263; Bizjee Beebee *v.* Monohur Doss, 2 In. Jur., N S., 118, Markby, J.

(*f*) Mohummud Zahoor Ali Khan *v.* Musst. Thakooranee Rutta Koer, 11 Moo. I. A, 468. See Joseph *v.* Solano, 9 B. L. R, 441; Ramdoyal Khan *v* Ajoodhia Ram, I. L R, 2 Calc, 14.

When the plaint shall be rejected.

54. (S.) The plaint shall be rejected in the following cases:—

(*a*) if the relief sought is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so:

(*b*) if the relief sought is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so:

(*c*) if the suit appears from the statement in the plaint to be barred by any positive rule of law:

(*d*) if the plaint having been returned for amendment within a time fixed by the Court is not amended within such time.

This corresponds with Act VIII of 1859, ss. 31, 32. The Court must give the plaintiff an opportunity of correcting the irregularity as to stamp (*a*). Clauses (a) and (b) do not apply to the High Court in the exercise of their ordinary or extraordinary original civil jurisdiction (s. 638), but no exception appears to be made in favour of the High Court exercising civil jurisdiction in any other matters where the proceedings are commenced by a plaint. Clause (d) is new.

Procedure on rejecting a plaint.

55. (S.) When a plaint is rejected, the Judge shall record with his own hand an order to that effect with the reason for such order.

This is a new provision.

When rejection of plaint does not preclude presentation of fresh plaint.

56. (S.) The rejection of the plaint on any of the grounds hereinbefore mentioned shall not, of its own force, preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

This corresponds with the last paragraph of Act VIII of 1859, s. 36. The words "of its own force" are added.

When the plaint shall be returned to be presented to the proper Court

57. (S.) The plaint shall be returned to be presented to the proper Court in the following cases:

(*a*) Musst. Chowra *v.* Wasil Khan, S. D. A., N. W. P., 1864, p. 18.

(*a*) If a suit has been instituted in a Court whose grade is lower or higher than that of the Court competent to try it, where such Court exists, or where no option as to the selection of the Court is allowed by law:

(*b*) If in a suit relating to immovable property, but not coming under the proviso to section 16, it appear that no part of such property is situate within the local limits of the jurisdiction of the Court to which the plaint is presented:

(*c*) If, in any other case, it appear that the cause of action did not arise, and that none of the defendants are dwelling or carrying on business, or personally working for gain, within such local limits.

Procedure on returning plaint

On returning a plaint, the Judge shall, with his own hand, endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reason for returning it.

This section does not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, see s 638, *post* Clauses (a) and (c) correspond with s 30 of Act VIII of 1859, and s 3 of Act XXIII of 1861. It has been held that the Court cannot go on with a suit if it is beyond its jurisdiction, and therefore although this clause provides for its return to the plaintiff at this stage, the objection will be fatal at any later stage of the suit. If it is discovered afterwards, the suit will be dismissed (*a*); But the propriety of the decision in this case has been doubted (*b*), where the plaint was returned by the Court of appeal—and *a fortiori* could be returned by the Court of original jurisdiction at any stage. Clause (b), see *Bibee Jaun* v *Meerza Mahomed Hadee* (*c*).

Procedure on admitting plaint.

58. (S.) The plaintiff shall endorse on the plaint, or annex thereto, a memorandum of the documents (if any) which he has filed

(*a*) Muzhur Ali *v* Musst Basoo, 8 Suth W. R., 47, Macpherson and Seton-Karr, JJ.

(*b*) Ramgutty *v*. Goonomonee Debia, 11 Suth W. R, 177, Bayley and Hobhouse, JJ; and see Nusurut Ali Chowdhry *v*. Mahomed Kanoo Sikdar, *ib*, 541, same judges; Musst. Jadu *v*. Shaikh Hafizat Hossein, 5 B. L R., App, 15, Bayley and Markby, JJ.

(*c*) 1 In. Jur, N. S., 40.

along with it; and if the plaint be admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permit him to present a like number of concise statements of the nature of the claim made, or of the relief or remedy required in the suit, in which case he shall present such statements.

Concise statements.

If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

The chief ministerial officer of the Court shall sign such memorandum and copies or statements if, on examination, he finds them to be correct.

The Court shall also cause the particulars mentioned in section 50 to be entered in a book to be kept for the purpose and called the Register of civil suits. Such entries shall be numbered in every year according to the order in which the plaint is admitted.

Register of suits.

Under Act VIII of 1859, s. 39, the plaintiff was called upon, as he is now (see the next section), to produce his documents. He is now also to annex to his plaint a memorandum of documents filed with the plaint, and also copies of the plaint, or concise statements, for the information of his opponent. Forms of concise statements are given in schedule iv, No. 114. These forms are copied from the Appendix A. of the English Judicature Act, 1875, Part II. The action in England is commenced by a writ, which gives no information to the defendant. Here the concise statement gives less information than the plaint, and omits one essential point which the writ contains,—namely, when the suit was instituted. If this fact appear on the statement, as it may be made to do, the defendant will know whether the suit be barred by limitation or no; and, consequently, whether he need defend the suit or leave the Judge to

dismiss it, as he is bound to do under Act XV of 1877, s. 4, on the score of its being barred.

The last clause corresponds with Act VIII of 1859, s. 38.

Production of document on which plaintiff sues.

Delivery of document or copy.

59. (S.) If a plaintiff sue upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

List of other documents.

If he rely on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

This corresponds with Act VIII of 1859, s. 39; but the words "in his possession or power" are added in cl. 1 of this section. The second clause, which does not include these words, comprehends *all* documents which are to be used in evidence. The first part of the section refers only to such documents as promissory notes, bills of exchange, &c., that are from their nature the very essence of the case. It is not necessary to file with the plaint all the documents that are to be given in evidence by the plaintiff. Phear, J., is reported to have said that it was not necessary that a translation should be made before the hearing of the case by the High Court (*a*).

A document given to the witness to refresh his memory only is not necessarily evidence, and need not be produced or entered in the list when the plaint is presented (*b*). As to the use of documents to refresh memory, see Act I of 1872 (Evidence), ss. 159, 160, 161.

The Court cannot reject a plaint merely because a document which should be, is not, produced with it on its presentation (*c*); and it is not fatal to the admission of documentary evidence that it is brought in subsequent to the filing of the plaint, if it appears to have been received with the sanction of the Court (*d*). The production of a document under this section does not of course

(*a*) Kameenee Dossee *v.* Hurromoney Dossee, 1 Bourke, 91.

(*b*) Ramji Madanji *v.* Rangajya Chetti, 1 Mad. H. C. Rep., 168, Scotland, C. J., and Bittleston, J.

(*c*) *Ex parte* Rayachand Amichand, 2 Bom. H. C. Rep., 369, Westropp and Warden, JJ.

(*d*) Goshain Tota Ram *v.* Rajah Rickmunee Bullub, 13 Moo. I. A., 77.

make it evidence: it must be proved as required by the Evidence Act, I of 1872, chap. v.

Statement in case of documents not in his possession or power.

60. (S.) In the case of any such document not in his possession or power, he shall, if possible, state in whose possession or power it is.

This is new.

Suits on lost negotiable instruments.

61. (S.) In case of any suit founded upon a bill of exchange or other negotiable instrument, if it be proved that the instrument is lost, and if an indemnity be given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may make such decree as it would have made if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

This provision is placed here instead of in Act V of 1866, s. 14, which is repealed.

Production of shop-book.

62. (S.) If the document on which the plaintiff sues be an entry in a shop-book or other book in his possession or power, the plaintiff shall produce the book at the time of filing the plaint, together with a copy of the entry on which he relies.

Original entry to be marked and returned.

The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original and attesting the copy if found correct, shall return the book to the plaintiff and cause the copy to be filed.

This section corresponds with Act VIII of 1859, s. 39, paragraphs 2 and 3.

The Court need not inspect the document at this stage of the suit with a view to its admissibility in evidence. It is only required

to mark for identification and to examine and compare the copy with the original (*a*).

Inadmissibility of document not produced when plaint filed.

63. A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

Nothing in this section applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant, or handed to a witness merely to refresh his memory.

The first paragraph corresponds with Act VIII of 1859, s. 39, para. 4. The second is new. See the note to s. 59, as to admissibility in evidence of documents, and as to documents used to refresh the memory of a witness (*b*).

The terms of this section that, on the plaint being presented, any written document relied on by the plaintiff as evidence of his claim must be entered in the list, are imperative, and not permissive; but, where a plaintiff can satisfactorily show at the hearing that a document on which he relies was not so entered because he was ignorant of its existence at that time, it is discretional with the Court to admit it or not (*c*). The accidental omission to file a copy of a document sued on, where the original is produced at the time the plaint is filed and marked by the Court, is no ground for rejecting the original as evidence, or for dismissing the suit (*d*).

The admission of a document not filed with the plaint cannot be made a ground of appeal (*e*).

(*a*) Atmaram Gulabrai *v.* Amirchand Rupchand, 3 Bom. H. C. Rep, App., 92, Couch, C J., and Newton, J.

(*b*) See also Ramji Madanji *v.* Ramgayya Chetti, 1 Mad. H. C. Rep., 168.

(*c*) Ritchie Stewart & Co. *v.* Gladstone, Wyllie, & Co., 2 In. Jur.,1 26; and Mohabeer Dass *v.* Lalla Roy, 1 Suth. W. R., 12.

(*d*) Thompson *v.* Jehangir Hormasji, 3 Bom. H C. Rep., 67, Couch, C.J., and Westropp, J.

(*e*) Gossain Tota Ram *v.* Rajah Rukimballub, 3 B. L. R., P. C., 34.

CHAPTER VI.

OF THE ISSUE AND SERVICE OF SUMMONS.

Issue of Summons.

Summons.

64. (S.) When the plaint has been registered, and the copies or concise statements required by section 58 have been filed, a summons may be issued to each defendant to appear and answer the claim on a day to be therein specified, or as soon thereafter as may be practicable,

(*a*) in person, or

(*b*) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(*c*) by a pleader accompanied by some other person able to answer all such questions.

Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court:

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

This clause corresponds with Act VIII of 1859, s. 41.

If written statements are required, the fact should be stated on the summons, and the written statements should be full enough to dispense with witnesses at the settlement of issues (*a*). Forms are given in the 4th schedule to this Act, Nos. 117 *et seq.* But although there are two forms of summons, one for fixing issues and one for final disposal, the fixing of issues in all cases is directed (see s. 146), except where, at the first hearing of the suit, the defendant makes no defence (*b*);—that is to say, where the case first comes up for trial. When the High Court directs an issue, and remands the case for re-trial, it ought to be tried on the issue so fixed. No further issues ought to be fixed or tried (*c*).

The summons should also mention the place where the defendant is dwelling with as much certainty as possible (see the same

(*a*) Anund Chunder Banerjee *v.* Woomes Chunder Roy, 1 Hyde, 147.

(*b*) See also Rewun Pershad *v.* Jankee Pershad, 11 Moo I. A., 25.

(*c*) Kachekalyanar Udiar *v* Kachivigajya Udiar, 2 B. L. R., P C., 72.

forms), otherwise the serving officer cannot proceed under s. 80, or give satisfactory evidence under s. 82.

A Judge has a discretion, 'when the parties to a suit have come to a mutual agreement, or when the defendant has confessed judgment, without issuing any summons the object of which is of course to bring the defendant into Court, to decide the suit at once in accordance with such agreement or confession.' He is not bound to do so till the time fixed for the regular hearing of the suit, and he cannot exercise that discretion where there is any doubt as to the good faith or identity of the parties (*a*). This was held in a case in which the suit was brought for Rs. 20,046-8. It was filed on a Monday; and immediately upon its presentation the defendants appeared by their advocate, and confessed judgment. On the Friday before, A. had sued the same defendants, and the advocate for the plaintiffs intimated that the defendants had no defence and were willing to confess judgment. He, therefore, asked for a summons returnable at an early date, but the Judge (the Recorder of Moulmein) refused to deviate from the ordinary course. The plaintiffs, the Bank of Bengal, having thus got their decree, were enabled to obtain attachment and execution at once on a proper application, in writing, as a matter of right (*b*), and to receive payment of their debt in full before any other attaching creditor. This was under Act VIII of 1859, s. 271, and it was a hardship on the other execution-creditors, because that section gave priority to the first attaching creditor. The present Code does not do so. Section 295, *post*, provides for the division of the proceeds of sales in execution rateably between the execution creditors, so that the hardship no longer exists.

The above case was sent up as a reference to the High Court by the Recorder of Moulmein. The remarks made by Markby, J., upon the unequal rights the law gave to the first attaching creditor, followed as they have been by many other Judges, probably led to the change in the law. The Recorder pointed out that a similar state of things may be brought about by an arrangement under, Act VIII of 1859, s. 327 (see *post*, ss. 525 and 526 of this Code), whereby the debtor can arrange with one of his creditors to the total exclusion of all the rest. If, however, the decree be obtained by fraud, it can be set aside. In a subsequent case (*c*) the plaintiffs applied to the High Court on affidavit for a rule to issue to

(*a*) Bank of Bengal *v.* Currie & Co., 3 B. L. R, A. C., 396, Markby and L. S. Jackson, JJ.

(*b*) See Davis *v.* Middleton, 4 Wym. Rep., S. C. C. Ref., 7; S. C., 8 Suth. W. R., 283.

(*c*) Comptoir d' Escompte de Paris *v.* Currie & Co., 3 B. L. R., App., 153.

the Recorder to show cause why he should not issue execution on a proper application, the defendant having confessed judgment. But the application was refused on the ground of the insufficiency of the affidavit, which did not show that there had been a judgment by confession, and that if there had been, the Recorder might have considered it void as a matter of law, in which case there would have been an appeal.

Copy or statement annexed to summons.

65. (S.) Every such summons shall be accompanied with one of the copies or concise statements mentioned in section 58.

This is new.

Court may order defendant or plaintiff to appear in person.

66. (S.) If the Court see reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

If the Court see reason to require the personal appearance of the plaintiff on the same day, it may make an order for such appearance.

This clause corresponds with the first paragraph of Act VIII of 1859, s. 42.

As to the consequences to a party omitting to comply with the requirements of this section, see ss. 100 and 107, *post.* On proof of the service on plaintiff or defendant of an order under this section, the case may be heard *ex parte,* on the non-appearance of the party so served with the order (s. 100) (*a*).

No party to be ordered to appear in person unless resident within 50 or, where there is a railway, 200 miles.

66. (S.) No party shall be ordered to appear in person unless he resides

(*a*) within the local limits of the Court's ordinary original jurisdiction, or

(*b*) without such limits and at a place less then fifty, or where there is railway-communication for five-sixths of the distance between the place where he resides and the place where the Court is situate, two hundred miles from the Court-house.

See Act VIII of 1859, s. 42, para. 2.

(*a*) See Kistodhone Dutt *v.* Nilmoney Sing, 1 Coryton, 3, Macpherson, J.

68. (S.) The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Summons to be either to settle issues or for final disposal.

Provided that, in every suit cognizable by Courts of Small Causes, the summons shall be for final disposal of the suit.

This corresponds with Act VIII of 1859, s. 41, except the *proviso*, which is an addition.

If the summons do not state whether it be for settlement of issues or for final disposal, the case, if disposed of without any issues being fixed, may be remanded on appeal (*a*). If written statements are to be filed, the summons should state so (*b*).

A summons originally drawn up for settlement of issues was allowed by Phear, J., to be altered to a summons for final disposal on good grounds being shown, the summons not having been taken out or acted on, and the defendant in no way prejudiced (*c*).

69. (S.) The day for the appearance of the defendant shall be fixed by the Court with reference to its current business, the place of residence of the defendant, and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

Fixing day for appearance of defendant.

What shall be deemed 'sufficient time' must be determined with reference to the circumstances of the case.

This corresponds with Act VIII of 1859, s. 45. As to the last paragraph, see a case (*d*) in which the appellate Court, considering that sufficient time had not been given, dealt with the case under Act VIII of 1859, s 351, which corresponds with s. 562 of this Code; and remanded it for re-trial, with directions that the suit be replaced upon the register, and be then pro-

(*a*) Syed Alberooddeen *v* Moulvie Mahomed Abusen, Marsh., 307.

(*b*) Anund Chunder Banerjee *v.* Woomes Chunder Roy, 1 Hyde, 147, Wells, J.

(*c*) Gregory *v.* Shircore, MSS., June 5th, 1866.

(*d*) Khadar Bhi *v.* Rahiman Bhi, 3 Mad H. C. Rep., 167, Innes and Collett, JJ.

ceeded with *de novo* in regular course, due notice being given to the defendant, in the summons, of such date for appearance as would allow her sufficient time to appear and answer in person or by pleader (*a*). A summons to appear immediately or within an unreasonably short time (*b*), or if ante-dated, would be bad (*c*).

It has always been the practice in the High Courts on their original side to set the causes down for hearing or for the settlement of issues on a list or lists which have been hung up in the Court, and which could be consulted by the suitors or their legal advisers; and the causes as they come on are heard in regular order. A contrary practice has prevailed in the Courts in the mofussil under the Code of Civil Procedure of 1859: a day has been fixed for the hearing, and if the case was not reached on that day, it was necessary to postpone it until some later day; the intermediate days being fully occupied by cases in like manner fixed to come on for hearing. The forms of summonses to appear, &c., Nos. 117 to 119, also provide for the hearing of the case on a particular day. The summons also is to provide (see s. 71) for the production of the witnesses. Where the distances are considerable, it is very inconvenient to suitors to be obliged to produce their witnesses day by day; and it may be a question whether it is more inconvenient to attend with witnesses in this manner from day to day until the case shall come on, or from adjournment to adjournment: but where the distance is not material, as is the case in the Presidency towns, there is no inconvenience in the practice of having a list of cases and hearing them as they come on in their turn. It seems to be doubtful, however, whether, under this Code, a defendant in an original suit in a High Court who appeared upon the very day fixed for the hearing, and not upon the day on which the case came on, would not have a good ground of complaint if the suit were decided against him in his absence. He would have done what the summons told him to do.

The chapter (xlviii, *post*), which relates to the procedure of the Chartered High Courts, does not except them from the operation of these sections; and although s. 639 enables the Judges to fix the form of the summons, it does not enable them to alter it in substance, and the date for appearance is a substantial part of the document, not a mere formal part.

(*a*) See also Lokeenath Thakoor *v.* Soboonath Misser, 5 Suth. W. R., Act X Rul., 39.

(*b*) R. *v.* Johnson, 1 Stra., 261; R. *v.* Mallinson, 2 Burr., 681.

(*c*) R. *v.* Kent, 2 Lord Raym., 1546.

Summons to order defendant to produce documents required by plaintiff or relied on by defendant.

70. (S) The summons to appear and answer shall order the defendant to produce any document in his possession or power, containing evidence relating to the merits of the plaintiff's case, or upon which the defendant intends to rely in support of his case.

This corresponds with Act VIII of 1859, s. 43, see ss 138 and 139, *post*

As s. 59 calls upon the plaintiff to produce with the plaint and deliver to the Court any document upon which he sues, and to annex a list of the documents on which he relies, if the documents are in his possession or power, and s 60 calls upon him to state, if he can do so, in whose possession any other such documents may be,—so this section obliges the defendant to produce, in obedience to the summons to appear and answer, any document in his possession or power, &c The object in each case being that the documents shall be produced in Court at the earliest opportunity.

And although chap. x provides means by which the discovery, inspection, and production of documents may be enforced, and by which a party may be required to admit the execution of a document at a late stage of the suit, it is of the greatest importance that all documentary evidence should be before the Court at the earliest opportunity In the case of the plaintiff, as has been seen, any document which ought to be, and is not so produced, can, under certain circumstances, be refused admission (s 63) There is no such provision in the case of a defendant, nor is he called upon to indicate where documents may be that are not in his possession or power, and there are some documents which need not, or ought not, to be produced. Thus, the Evidence Act (I of 1872), s 131, provides that no one shall be compelled to produce documents in his possession which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production, nor (*ib*, s. 23) can official records or copies of them be given in evidence without the consent of the head of the department, to the affairs of which they refer.

This section confines the production by the defendant of documents for the benefit of the plaintiff's case to such documents as contain evidence relating to the merits of that case. The Court would not assist an applicant whose object was collateral to the suit, not the furthering of his own case, but the picking out

matter for the purpose of discovering a flaw in the case of his opponent. The principle is the same as that which governs the case of a bill for discovery in a Court of Equity. And the right of a plaintiff in equity is limited, first, to a discovery confined to the questions in the cause; secondly, of such material documents as relate to the proof of his, the plaintiff's, case on the trial, and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to it (*a*). But it is not essential that the object should be solely directed to the establishment of the case of the applicant; it may include the obtaining of material evidence in answer to the case on the other side. Where (*b*) the action was brought to recover the price of gas which had been supplied by a gas company to the defendants, and the defendants alleged that the gas supplied was deficient in quantity and inferior in quality, and not according to the contract, it appeared from the affidavit of the plaintiffs that they were informed and believed that the defendants had, by their officers and others, made experiments and observations with regard to the lighting by the plaintiffs of the lamps in the defendants' parish under the contract, and that they had in their possession and power certain papers and writings showing the result of the said experiments and observations which would prove that the plaintiffs had performed their contract both as to the quantity and quality of the gas supplied in the parish of Chelsea; that they were informed and believed that it would be material and necessary for the plaintiffs, in order to enable them to prepare for the trial of the cause, to inspect and take copies of, and extracts from, the said papers in the defendants' possession, showing the result of the said experiments and discoveries. In answer to this, the defendants swore that these experiments and documents related only to their case. But Byles, J., ordered that the plaintiffs should have inspection and copies; and the Court of Common Pleas upheld his ruling. In that case the documents appear to have been all of one character, and no line could be drawn separating those which related solely to the respective cases of the plaintiffs and the defendants. Where (*c*) the action was against a railway com-

(*a*) *Per* Pollock, C. B., in Hunt *v.* Hewitt, 7 Exch., 236; S. C., 21 L. J., N. S., Exch., 210.

(*b*) The London Gas Light Company *v.* The Chelsea Vestry, 28 L. J., C. P., 276.

(*c*) Woolley *v.* The North London Railway Company, 38 L. J., N. S., C. P., 317.

pany for injuries to a passenger from an accident imputed to a defective locomotive engine, the Court made an order for the plaintiff to be at liberty to inspect reports about the accident made by the company's servants, on the ground that where it is part of the duty of a servant or officer to report, whether the occasion on which he does so be ordinary or extraordinary, and whether there be an action or not then existing, and whether the report contain facts or opinions, the report is obtainable for inspection (*a*). But where (*b*) the defendant was a freeholder of certain premises, and also assignee of a lease of other adjoining premises, the reversion of which was in the lessor of the plaintiff, a dispute arose respecting the boundary of the two properties, and ejectment was brought, at the expiration of the lease, to recover a plot of land which the lessor of the plaintiff alleged was parcel of the leasehold, but which the defendant claimed as his freehold; the lessor of the plaintiff thereupon applied to the Court for leave to inspect the lease—as he had no counterpart of it—the assignment of the lease, and the conveyance of the freehold; Mr. Justice Erle, while he granted so much of the application as related to the lease and assignment, refused to make any order with respect to the conveyance, as that deed could not in any way prove the title of the applicant to the land which he sought to recover.

In a suit in the High Court at Calcutta for wrongful dismissal of a servant of a gas company, in which the plaintiff alleged that the motive for dismissing him was the discovery of certain irregularities of the manager with regard to money matters of the company, it was held that the plaintiff was entitled to inspect the accounts which had been checked by himself while in the company's service, the press copy letter-book containing copies of the correspondence regarding his own conduct while in the company's service (the plaintiff alleged that the manager had given him a good character in writing home to the Board in England) and the account of a particular item in respect of which he alleged he had made discoveries of irregularities that he imputed to the manager, which discoveries, he alleged, were the cause of his dismissal (*c*).

(*a*) Byles, J., 38 L. J., N. S., C. P., 322.

(*b*) Doe *v.* Langford, 21 L. J., Q. B., 217.

(*c*) Mitchell *v.* The Oriental Gas Co, 1 In Jur., N. S., 323, Phear, J.

71. (S). When the summons is for the final disposal of the suit, it shall direct the defendant to produce, on the day fixed for his appearance, the witnesses upon whose evidence he intends to rely in support of his case.

On issue of summons for final disposal, parties to be directed to produce their witnesses.

This is a new section. It will not of course affect the witnesses themselves; if they will not come without process, the defendant must proceed under chap. xiv.

Service of Summons.

72. (S.) The summons shall be delivered to the proper officer of the Court, to be served by him or one of his subordinates.

Delivery of summons for service.

This section corresponds with s. 47 of Act VIII of 1859, omitting the proviso as to the responsibility of the officer for due service.

This is the first of a series of twenty sections relating to the service of the summons. Sections 93, 94, and 95 relate to service of process generally, which (s. 94) must be served in the same way as the summons. The object is to inform the person to be served of the proceedings which are being taken against him, and therefore, if he appears, as for instance, at the time of the filing of the plaint, and agrees voluntarily to come in and defend or answer the case, there is no necessity to serve him with a summons, and it would be wrong to saddle him or his adversary with unnecessary costs after appearance, indeed, he cannot object to any irregularity in the mode of service (*a*). There are several ways in which service of a summons may be made; it may be either personal, or on some sufficient representative of the person to be served, or in some manner by which that person may come to the knowledge of it, where service cannot be effected in either of the ways already mentioned. *Primâ facie* it is to be served as directed in the next section.

73. (S) Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

Mode of service.

(*a*) R. *v.* Berry, 28 L. J., M. C., 86.

This section corresponds with s. 48 of Act VIII of 1859 in part; but the Judge can now appoint an officer to sign the summons, and need not always sign it himself.

Service on several defendants.

74. (S.) When there are more defendants than one, service of the summons shall be made on each defendant:

Provided that, if the defendants are partners, and the suit relates to a partnership-transaction or to an actionable wrong in respect of which relief is claimable from the firm, the service may be made, unless the Court directs otherwise, either (a) on one defendant for himself and for the other defendants, or (b) on any person having the management of the business of the partnership at the principal place, within the local limits of the Court's ordinary original civil jurisdiction, of such business.

This corresponds with Act VIII of 1859, s. 48 (the second part), and the proviso is taken from Order ix, Rule 6, under the English Judicature Act 38 and 39 Vict., c. 77. It extends the power of service to service on a partner (*a*); but the service must be at the partner's place of business (*b*). Failure to prove the service of summons upon one defendant who does not appear, is no ground for dismissing the suit as against another who does appear (*c*).

Service to be on defendant in person, when practicable, or on his agent.

75. (S.) Whenever it may be practicable, the service shall be made on the defendant in person, unless he have an agent empowered to accept the service, in which case service on such agent shall be sufficient.

This corresponds with Act VIII of 1859, s. 49. Section 38 of this Act makes service upon a recognized agent as effectual as

(*a*) See Lutchmeput Dogare *v.* Sibnarain Mundle, 1 Hyde, 97, dissented from in the case of Ramchandra Bose *v.* Snead, 7 B. L. R., Apx, 58, Paul, J.

(*b*) Kustoor Mull *v.* Jookeeram, 11 B. L. R., Apx., 26, Macpherson, J.

(*c*) Soogundamoyee Debia *v.* Azimooddeen, Suth. W. R., 1864, p. 33; Ewing *v.* Gosai Das Ghose, 3 B. L. R., Apx., 7, Phear, J., where the suit was a joint promissory note.

if it had been served on the party in person, unless the Court otherwise directs; and s. 37 declares who are the recognized agents. A clerk to a Solicitor is not an agent to accept service for his master (*a*).

Service on agent by whom defendant carries on business.

76. (S.) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons issues, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

For the purpose of this section, the master of a ship is the agent of his owner or charterer.

This is new. The person to be served is a recognized agent under s. 38. A gomastah is such an agent, and service upon him would be sufficient (*b*). The agent must be personally carrying on the business or work; a person who is merely looking after the affairs of the defendant cannot always accept the service (*c*).

Service on agent in charge, in suits for immoveable property.

77. In a suit to obtain relief respecting, or compensation for wrong to, immoveable property, if the service cannot be made on the defendant in person, and the defendant have no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

This corresponds with Act VIII of 1859, s. 61.

When service may be on male member of defendant's family.

78. (S.) If in any suit the defendant cannot be found and if he have no agent empowered to accept the service of the summons on his behalf, the service may be made on

(*a*) Emritlall Saligram *v.* Kidd, 2 Hyde, 116.

(*b*) Lutchmeput Dogare *v.* Sibnarain Mundle, 1 Hyde, 97.

(*c*) Ram Sundaree Dassia *v.* Ranee Smut Soondurce Debia, 17 Suth. W R, 33

any adult male member of the family of the defendant who is residing with him.

Explanation.—A servant is not a member of the family within the meaning of this section.

This section corresponds with Act VIII of 1859, s. 53—the explanation is added; and before ordinary service on this form the Court should satisfy itself that an ineffectual effort has been made to find the defendant (*a*).

Person served to sign acknowledgment.

79. (S.) When the serving-officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

This corresponds with Act VIII of 1859, s. 54. The last provision of that section is omitted here, it was that if the person served refused to sign the acknowledgment, the service of the summons should, nevertheless, be held sufficient if it were otherwise proved to the satisfaction of the Court. Now, if the person served refuse to sign, the serving-officer is to proceed under s. 80 to fix a copy on the door of the house.

Procedure when defendant refuses to accept service.

80. (S.) If the defendant or other person refuse to sign the acknowledgment or to receive the copy of the summons,

or if the serving-officer cannot find the defendant, and

or cannot be found.

there is no agent empowered to accept the service of the summons on his behalf, nor any other person on whom the service can be made,

the serving-officer shall affix a copy of the summons on the outer door of the house in which the defendant ordinarily resides and then return the original to the Court from which it issued, with an endorsement thereon

(*a*) Anley *v.* Russickloll, Norman, J, April 24, 1865, MSS.

stating that he has so affixed the copy and the circumstances under which he did so.

The former Code (VIII of 1859, s. 55), with which the second and third paragraphs of this section correspond, provided that the copy should be affixed on the door of the house in which the defendant is dwelling,—*i. e.*, his actual dwelling-house (*a*). The house "in which the defendant ordinarily resides" would receive, probably, the same interpretation, although the defendant might be absent for a time, and staying elsewhere when the summons is so served. Where there is nothing to show that the house on which the process has been fixed is that in which the defendant ordinarily resides, and the means contemplated by this section have failed, the plaintiff should apply to the Court under s. 82 for substituted service (*b*).

Section 82 contemplates an enquiry into these matters. It may be that the house is occupied by the defendant temporarily so as to give the Court jurisdiction, and yet that he does not ordinarily reside there so as to make the affixing of the summons on the door a sufficient service (*c*). It will be observed that a residence sufficient to give jurisdiction may be a residence merely at the time of the commencement of the suit—*ante*, s. 17 (b) and (c)—but the defendant may have left the place before the summons is served, and may never intend to return; in such a case there is no probability of this mode of service being sufficient to bring the matter to his notice. The object is to serve the summons in such a manner as to make it probable that a knowledge of the service will reach the defendant; and a return stating that the summons has been stuck up on the house, not stating the "dwelling" house, is bad (*d*).

There is no proper service unless the defendant is actually dwelling in the house upon which the summons is fixed, and cannot, after diligent search, be found. Where a judgment-debtor applies to set aside an *ex parte* judgment on the ground that there was no actual service of the summons upon him, he should be called upon to give his evidence or to make out a *primâ facie* case (*e*).

(*a*) Buddoo Baboo *v.* Lambodar Mullick, 1 Hyde, 132, Wells, J.

(*b*) Gopaul Doss *v.* Baboo Greedhary Singh, 2 Wym, 22.

(*c*) Anantha Náraynna *v.* Pariyana Kone, 5 Mad. H. C. Rep., 101.

(*d*) Buddoo Baboo *v.* Lambodar Mullick, 1 Hyde, 132.

(*e*) Khudeerun Lall *v.* Chutterdharee Lall, 21 Suth. W. R, 242.

Endorsement of time and manner of service.

81. (S.) The serving-officer shall, in all cases in which the summons has been served under section 79, endorse or cause to be endorsed on the original summons the time when and the manner in which the summons was served.

This corresponds with Act VIII of 1859, s. 56.

The endorsement of the nazir is not evidence of the service of the summons, like the return of the sheriff, which, under the old Procedure, was evidence (*a*): hence the examination provided for in the next section.

Examination of serving-officer.

82. (S.) When a summons is returned under section 80, the Court shall examine the serving-officer on oath touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

Substituted service.

Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding the service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided, or in such other manner as the Court thinks fit.

The first part of this section is new, but in accordance with the practice in Courts not established by Charter; see note to the last section. The section applies to the High Court, see s. 636, *post:* hence it will be necessary to examine the sheriff's officer as to the service of the summons. The second clause corresponds with Act VIII of 1859, s. 57.

(*a*) Okhoy Chunder Dutt *v.* Erskine, 3 Suth. W. R., Mis., 11, Peacock, C. J., and Loch, J.; Shah Khoondun Lall *v.* Noor Ali, 10 *ib.*, 3, Mitter and Hobhouse, JJ.

It has been the practice of the High Court at Calcutta that an application for a fresh summons to appear, &c., should be on petition showing that a fruitless endeavour had been made on the part of the plaintiff to serve the first summons, and that it was not by any default of his that he failed (*a*). And a fresh writ of summons to appear and answer will not be granted till the old writ is returned into Court (*b*). When the first summons appears to have been improperly served, and the Court is asked to grant a second, it should enquire into any circumstances of delay, &c., before doing so, and may think it right to put the applicant upon terms. There is a rule of the High Court at Calcutta (1st May, 1875, Rule 12) on this subject, which is merely declaratory of the previous practice, and directs that a fresh summons shall not be issued without an order to be obtained by petition at Chambers (*c*).

The "place where the defendant is last known to have resided" means his present place of residence if he have any; the last which he had, if he has ceased to have any (*d*).

Effect of substituted service.

83. (S.) The service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

This corresponds with Act VIII of 1859, s. 57, last paragraph. The defendant cannot contend that the case was heard *ex parte*, and ask to have the decree set aside on the ground that he had no notice (*e*).

When service is substituted, time for appearance to be fixed.

84. (S.) Whenever service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

This corresponds with Act VIII of 1859, s. 58; see the note to s. 69, *ante*.

(*a*) Urquhart *v.* Gilbert, 1 In. Jur., N. S., 224, Phear, J.

(*b*) Issur Chunder Sein *v.* Aushotosh Chatterjee, 1 In. Jur., N. S., 283, Phear, J.

(*c*) Gourchurn Soor *v.* Peary Lall Paul, 15 B. L. R., Apx., 12, Garth, C.J., and Macpherson, J., July 2, 1875.

(*d*) *Ex parte* Jones, 1 L. M. & P., 357.

(*e*) See Kissur Chund *v.* Bhoobuneessur Chunder, 1 Bourke, 25.

Service of summons when defendant resides within jurisdiction of another Court and has no agent to accept service.

85. (S.) If the defendant resides within the jurisdiction of any Court other than the Court in which the suit is instituted, and has no agent resident within the local limits of the jurisdiction of the latter Court empowered to accept the service of the summons, such Court shall send the summons, either by one of its officers or by post, to any Court, not being a High Court having jurisdiction at the place where the defendant resides, by which it can be conveniently served, and shall fix such time for the appearance of the defendant as the case may require.

The Court to which the summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court from which it originally issued, together with the record (if any) made under this paragraph.

This corresponds with Act VIII of 1859, s. 59. It applies to all Courts. The High Court has no power to execute its own process out of the local limits of its jurisdiction (*a*).

Service within Presidency towns and Rangoon of process issued by Mufassal Courts.

86. (S.) Whenever any process issued by any Court established beyond the limits of the towns of Calcutta, Madras, Bombay and Rangoon is to be served within any such town, it shall be sent to the Court of Small Causes within whose jurisdiction the process is to be served,

and such Court of Small Causes shall deal with such process in the same manner as if the process had been issued by itself,

and shall then return the process to the Court from which it issued.

This is new. Hitherto the process has been served through the High Court, on its Original Side, by the Sheriff. It appears to be the practice of the Small Cause Courts not to serve a summons

(*a*) Sagore *v.* Ramchunder, 1 Hyde, 136.

unless the person interested in having it served applies or takes some steps to have it served as in the case of their own process (see Act IX of 1850, s. 26); and this practice is in accordance with the decision in the case of *Dowlut Mundur* v. *Omrao Singh Rana* (*a*).

Service on defendant in jail.

87. (S.) If the defendant be in jail, the summons shall be delivered to the officer in charge of the jail in which the defendant is confined, and such officer shall cause the summons to be served upon the defendant.

The summons shall be returned to the Court from which it issued, with a statement of the service endorsed thereon and signed by the officer in charge of the jail and by the defendant.

This corresponds with Act XV of 1869, ss. 15 and 16, an Act to provide facilities for obtaining the evidence and appearance of prisoners and for service of process upon them. So much of the above sections as relate to process issued by a Civil Court is repealed by this Code, sched. i. The 16th section made the certificate of the officer in charge of the jail, that the prisoner to whom the process is directed is a prisoner in the jail under his charge, and that he has received copy of the process, *primâ facie* evidence of the service of the process. Section 114 of the Indian Evidence Act (I of 1872) would enable the Court to presume service on receipt of such a certificate.

Procedure if jail be in a different district.

88. (S.) If the jail in which the defendant is confined is not in the district in which the suit is instituted, the summons may be sent by post or otherwise to the officer in charge of such jail, and such officer shall cause the summons to be served upon the defendant, and shall return the summons to the Court from which it issued, with a statement of the service endorsed thereon, and signed as provided in section 87.

Service when defendant resides out of British India and has no agent to accept service.

89. (S.) If the defendant resides out of British India, and has no agent in British India empowered to accept the service, the summons shall be addressed to the defend-

(*a*) 14 Suth. W. R., 336; see also the note to s. 93, *post*.

ant at the place where he is residing, and forwarded to him by post if there be postal communication between such place and the place where the Court is situate.

This corresponds with Act VIII of 1859, s. 60, the words "if there be postal communication, &c." being added.

Service through British Resident or Agent of Government.

90. (S.) If there be a British Resident or Agent of Government in or for the territory in which the defendant resides, the summons may be sent to such Resident or Agent, by post or otherwise, for the purpose of being served upon the defendant; and if the Resident or Agent return the summons with an endorsement under his hand that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be conclusive evidence of the service.

This is a new provision. Under the Code of 1859, s. 66, there was a difficulty about the proof of service in a territory to which no *registered* letter could be sent (*a*). This section admits of service by post or *otherwise*, and, coupled with s. 114 of the Indian Evidence Act, I of 1872, will enable the Court to satisfy itself of due service of the summons in most cases where steps have been taken to transmit it in the ordinary course of business.

Substitution of letter for summons.

91. (S.) The Court may, notwithstanding anything hereinbefore contained, substitute for the summons a letter signed by the Judge or such officer as he appoints in this behalf, when the defendant is, in the opinion of the Court, of a rank which entitles him to such mark of consideration.

The letter shall contain all the particulars required to be stated in the summons, and, subject to the provisions contained in section 92, shall be treated in all respects as a summons.

This corresponds with Act VIII of 1859, s. 64.

(*a*) See Kasim Ajim Duplay *v.* Kasim Mahomed Baracha, 2 B. L. R., App., 59; S. C., 10 Suth. W. R., 349.

Mode of sending such letter.

92. (S.) When a letter is so substituted for a summons, it may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; unless the defendant has an agent empowered to accept service of summons, in which case the letter may be delivered or sent to such agent.

This corresponds with Act VIII of 1859, s. 65.

Section 66 of the Code of 1859 provided that the letter should be *registered*. It is not repeated in the present Code. It was held under the former law that a letter could not be substituted for ordinary process, unless it could be sent by registered post all the way, (note to s. 90, *ante*). Under this Code there must be a *post*, but not necessarily a post which will convey registered letters all the way, although s. 95 contemplates the registration of the letter. A special bailiff cannot be sent to serve ordinary process in a foreign territory (*a*).

Service of Process.

Process to be served at expense of party issuing it.

93. (S.) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

Costs of service.

The court-fee leviable for such service shall be levied before the process is issued.

This corresponds with Act XXIII of 1861, s. 2.

It is not now necessary, as it was under the Code of 1859, for the Court to fix the time for payment. Such omission on the part of the Court will not, it seems, excuse the party as it did before (*b*); the party must take active steps, and must do so either himself or by a proper agent; he will not be excused for default if he employ a negligent one (*c*); and see *ante*, note to s. 86.

(*a*) See Kasim Ajim Duplay *v.* Kasim Mahomed Baracha, 2 B. L. R., App., 69; S. C., 10 Suth. W. R., 349.

(*b*) Purshadee Lall *v.* Umbica Pershad Lall, 11 Suth. W. R., 290.

(*c*) Pran Chunder Roy *v.* Juggeshur Mookerjee, 11 Suth. W. R., 417; Gooroodoss Dutt *v.* Wooma Churn Roy, 13 Suth. W. R., 83, Bayley and Hobhouse, JJ.

94. (S.) All notices and orders required by this Code to be given to or served on any person shall be in writing, and shall be served in the manner hereinbefore provided for the service of summons.

Notices and orders in writing how served.

This is new.

Postage.

95. (S.) Postage, where chargeable on any notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid before the communication is forwarded.

Postage.

This is new.

CHAPTER VII.

OF THE APPEARANCE OF THE PARTIES AND CONSEQUENCE OF NON-APPEARANCE.

96. (S.) On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard, unless the hearing be adjourned to a future day fixed by the Court.

Parties to appear on day fixed in summons for defendant to appear and answer.

This corresponds with Act VIII of 1859, s. 109.

The mere filing of a vakalutnamah is not appearing in person or by pleader (*a*).

97. If, on the day so fixed for the defendant to appear and answer, it be found that the summons has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee leviable for such service, the Court may order that the suit be dismissed:

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay fee for issuing it.

(*a*) Musst. Bibee Haloo *v.* Musst. Atwaro, 7 Suth. W. R., 81, Kemp and Markby, JJ.; Bhimacharya *v.* Fakirappbin Anandappa, 4 Bom. H. C. Rep, 207, App. Civ., Tucker and Gibbs, JJ.

Proviso.

Provided that no such order shall be passed, although the summons has not been served upon the defendant, if, on the day fixed for him to appear and answer, he attends in person or by a duly authorized agent, when he is allowed to appear by agent.

This corresponds with Act XXIII of 1861, s. 5.

Whether an appeal lay from an order dismissing a suit under the corresponding section of the old Code seemed doubtful. It was held that a fresh suit under s. 7 of Act XXIII of 1861, corresponding with s. 99 of this Code, or moving the Court to issue a fresh summons by satisfying it within thirty days as to the default, were the only remedies (*a*). In this case the appellant undertook to show reasons, under s. 7, why he had not made the required deposit, and he failed to do so. In a later case the same Judge admitted an appeal subject to objections; there the plaintiff had not undertaken to show cause (*b*). An appeal was admitted in the case of *Dinnobundoo Chutteraj* v. *Beharee Lall Mookerjee* (*c*), but it was disallowed in a later case decided by Phear and Hobhouse, JJ. (*d*). This last case appears to have been argued at considerable length by the pleader in support of the power of granting an appeal, but the Reporter omits all notice of the argument, and merely reprints the judgment. Where an appeal was admitted under the old Code it seems to have been done on the ground that the order was one *in the nature of a decree*, and not an order prior to decree, which, under s. 363, was not appealable. Section 588 of the present Code specifies certain orders which alone shall be appealable, making no distinction between orders in the nature of decrees and others, but simply using the word 'orders.' As an order under this section is not mentioned in that section; it seems clear that no appeal will lie now, but that the only remedy is that given by s. 99, *post*.

If neither party appear, suit to be dismissed.

98. (S.) If on the day fixed for the defendant to appear and answer, or on any other subsequent day to which the hearing of the suit is adjourned, neither party

(*a*) Mudhoosoodun Ghosal *v.* Beckwith, 1 Wym. Rep., 155, L. S. Jackson, J.

(*b*) Indur Chunder Baboo *v.* Oozeer Ali Khan, 7 Suth. W. R., 338.

(*c*) 3 Suth. W. R., Mis., 23.

(*d*) Kali Kisto Chunder *v.* Hureehur Chuckerbutty, 10 Suth. W. R., 161.

appears, the suit shall be dismissed, unless the Judge, for reasons to be recorded under his hand, otherwise directs.

This corresponds with the first sentence of Act VIII of 1859, s. 110; and applies only to the first hearing (*a*),—that is to say, either the day named in the summons or a subsequent day to which the first hearing may have been adjourned, but not including a day to which, after a hearing, the case has been adjourned, as for instance, where the summons is for settlement of issues, and the Court, after fixing the issues, postpones the case under s. 154, *post*. An order dismissing the suit for non-appearance cannot be appealed against (s. 588).

It has always been the practice in the High Court at Calcutta, Original Side, to set down cases in which the defendant does not enter appearance on a separate list; this is merely an arrangement for the sake of convenience; and the cases so set down are tried before the others are called on. It is of course open to the defendant to appear at the hearing and oppose the plaintiff's case, but if he desires to have the case transferred to the defended list for his own convenience after it has been set down on the undefended list, he will generally have to pay the costs occasioned by his delay. Thus leave was given to enter appearance, and the case was ordered to be placed on the defended list on application of the defendant's attorney, without any affidavit of defence upon the merits, but without prejudice to the plaintiff to apply, on summons, for the costs occasioned by the leave granted to the defendant (*b*).

Enquiry should be made as to the reason of the absence of parties, should there be any ground for supposing that they exist; thus, if a defendant who makes default is alleged to be insane, the Court ought not to dismiss the suit without enquiring into the question of his insanity (*c*).

In such case plaintiff may bring fresh suit;

99. (S.) Whenever a suit is dismissed under section 97 or section 98, the plaintiff may (subject to the law of limitation) bring a fresh suit; or if, within the period of thirty days from the date of the

(*a*) Comalammal *v.* Rungaswamy Iyengar, 4 Mad. H. C. Rep., 56, Bittleston and Ellis, JJ.

(*b*) Lutchmeechand Radhakissen *v.* Rakhub Dass, MSS., Nov. 17, 1865; and see s. 101, *post*.

(*c*) Musst. Moorut Koonwur *v.* Baboo Dhurm Narain Sing, 2 Suth. W. R., Mis., 7, Loch and Seton-Karr, JJ.

order dismissing the suit, he satisfies the Court that there was a sufficient excuse for his not paying the court-fee required within the time allowed for the service of the summons or for his non-appearance, as the case may be, the Court shall pass an order to set aside the dismissal and appoint a day for proceeding with the suit.

or Court may restore the suit to its file.

This corresponds with Act VIII of 1859, s. 110, second part, and with Act XXIII of 1861, s. 7.

A Court can, without the aid of any enactment, at its own discretion, for good cause, restore a case which it has itself removed from its list of cases undetermined (*a*). No appeal lies when the Court refuses to issue a fresh summons (*b*); nor where it orders one to issue (s. 588, *post*).

When a suit has been remanded by the Appellate Court, and then dismissed by the Court of first instance for non-appearance of parties, the plaintiff can bring a fresh suit (*c*).

100. (S.) If the plaintiff appears and the defendant does not appear, the procedure shall be as follows:

Procedure if only plaintiff appear,

(*a*) if it is proved that the summons was duly served, the Court may proceed *ex parte*:

when summons was duly served,

(*b*) If it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant:

when summons not duly served,

(*c*) If it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the

when summons served, but not in due time.

(*a*) Deen Dyal Puramanick *v.* Ramcoomar Chowdry, 9 Suth. W. R., 284, Phear and Mitter, JJ.; see also Damoodur Dass *v.* Dhoonee Bebee, 2 Hyde, 216, Phear, J.

(*b*) Loknath Sehoo *v.* Fukeer Singh, Marsh., 630.

(*c*) Raghunath Singh *v* Ramkumar Mandal, 5 B. L R., Apx., 64.

Court, and shall direct notice of such day to be given to the defendant.

If it is owing to the plaintiff's default that the summons was not served in sufficient time, the Court shall order him to pay the costs occasioned by such postponement.

The first paragraph of this section (a) corresponds with the first part of s. 111 of Act VIII of 1859; the second (b), with s. 112; the third (c), with s. 113 The last paragraph is new.

It is evident that this is a continuation of the subject of ss. 96, 97, and 98, and it should be read, "if the plaintiff appears, "and the defendant does not appear, on the day fixed for the defend-"ant to appear and answer, the procedure shall be as follows," &c.

Thus, where both parties had filed their evidence, and the defendant did not appear at the subsequent hearing, and the Court decided the suit *ex parte*, it was held to be erroneous; the Court should have proceeded under s. 147 of the Code of 1859, corresponding with s. 157 of this Code (*a*).

When a suit is heard *ex parte* it is of course as necessary for the plaintiff to substantiate his case by proper evidence as if it were defended; indeed, as the defendant is unrepresented, the Judge should be more than usually careful to see that no evidence is admitted the admissibility of which is at all questionable. The first summons should be returned into Court before a second is issued (*b*).

An order for the payment of costs under the last paragraph of this section is not appealable; see s. 588.

See ss. 108 and 109, *post*, as to setting aside decrees passed *ex parte* against a defendant under this section.

Procedure where defendant appears on day of adjourned hearing, and assigns good cause for previous non-appearance.

101. (S.) If the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise,

(*a*) Anund Chunder Mookerjee *v.* Digamburee Dossee, 2 Suth. W. R., 1.
(*b*) Issurchunder Sein *v.* Ausotosh Chatterjee, 1 In. Jur., N. S, 283.

be heard in answer to the suit, as if he had appeared on the day fixed for his appearance.

This corresponds with the second part of s. 111 of Act VIII of 1859.

In a suit (*a*) tried before Markby, J., on the Original Side of the High Court at Calcutta, the case had been placed on the list of undefended cases in consequence of the non-appearance of the defendant, and the hearing had been adjourned, at the instance of the plaintiff, to a subsequent day. On that day, when it was called on, the defendant was represented by counsel. It was contended by the plaintiff's counsel that the defendant could not be heard until he had shown good cause for his previous non-appearance, but Markby, J., let him in to defend. He questioned whether the corresponding section of Act VIII applied except to the case of a suit that had been *partly heard*. The section refers to the adjournment of the *hearing*; strictly speaking there had been no adjournment of the hearing in the above case. The plaintiff had, by his own conduct, given the defendant another chance.

Procedure where defendant only appears.

102. (S.) If the defendant appears and the plaintiff does not appear, the Court shall dismiss the suit, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

This corresponds with Act VIII of 1859, s. 114.

Decree against plaintiff by default bars fresh suit.

103. (S.) When a suit is wholly or partially dismissed under section 102, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set

(*a*) Newton *v.* Kumeedhone, 9 B. L. R., Apx., 15; Anund Chunder Mookerjee *v.* Digamburee Dassee, 2 Suth. W. R., 1, Trevor and Campbell, JJ.; Lutchmeechand Radhakissen *v.* Rakhub Doss, Broughton, 4th edn., 119.

the dismissal aside; and if it be proved that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall set aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

No order shall be made under this section unless the plaintiff has served the defendant with notice in writing of his application.

The first part of this section corresponds with the last part of s. 114 of Act VIII of 1859. The second part corresponds with the third paragraph of s. 119 of Act VIII.

As to the meaning of the words "sufficient cause from appearing," see note to s. 108, *post*. An order rejecting an application (in cases open to appeal) to set aside the dismissal of a suit, is appealable, s. 588 (f), *post*.

Procedure where defendant residing out of British India does not appear.

104. (S.) If, on the day fixed for the hearing of a suit against a defendant residing out of British India, who has no agent empowered to accept service of summons, or on any day to which the hearing has been adjourned, the defendant does not appear, the plaintiff may apply to the Court for permission to proceed with his suit, and the Court may direct that the plaintiff be at liberty to proceed with his suit in such manner and subject to such conditions as the Court thinks fit.

This corresponds with Act VIII of 1859, s. 60, second para.

Procedure in case of non-attendance of one or more of several plaintiffs.

105. (S.) If there be more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, and pass such order as it thinks fit.

This corresponds with the first paragraph of s. 116 of Act VIII of 1859.

Procedure in case of non-attendance of one or more of several defendants.

106. (S) If there be more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of passing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

This corresponds with the second paragraph of s. 116 of Act VIII of 1859.

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.

107. (S.) If a plaintiff or defendant, who has been ordered to appear in person under the provisions of section 66 or section 436, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing sections applicable to plaintiffs and defendants, respectively, who do not appear.

This corresponds with Act VIII of 1859, s. 117. Section 66 of this Act enables the Court, when it issues the summons against an individual, and s. 436, when against a corporation, to order that the individual or a director or other principal officer of the corporation shall appear personally, in the first case, if it see reason; in the second, if the person to appear be personally able to answer material questions relating to the suit.

Of setting aside Decrees ex parte.

Setting aside decree *ex parte* against defendant.

108. (S.) In any case in which a decree is passed *ex parte* against a defendant under section 100, he may apply to the Court by which the decree was made for an order to set it aside.

And if it be proved to the satisfaction of the Court that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree upon such terms as to costs, payment into Court, or otherwise, as

it thinks fit, and shall appoint a day for proceeding with the suit.

This section corresponds with s. 119 of Act VIII of 1859, the second and fourth paragraphs; which section, it was thought, did not apply to a decision passed in appeal against a respondent (*a*), notwithstanding that Act XXIII of 1861, s. 37, corresponding with s. 582 of this Code, gave the Appellate Court the same powers in appeal as are vested in the Courts of original jurisdiction; as to this, see s. 582, *post*. But the High Court at Madras expressed a different opinion (*b*), which was followed in a recent case by the High Court at Calcutta. In this last case, M. sued A. and others on a bond-debt, and obtained a decree against A alone. He appealed to the District Judge, who passed a decree declaring all parties to be liable jointly. On the decree-holder taking out execution, two of the defendants applied to the Subordinate Judge, and their application being rejected, they applied to the District Judge, who referred them to the High Court. Held, that the Subordinate Judge had no jurisdiction, but the proper course for the parties was to apply to the District Judge under this section (*c*). The application to set aside a judgment *ex parte* must be made within thirty days from the date of executing any process for enforcing the judgment: Act XV of 1877, sched. ii, No. 164.

When an application to set aside an *ex parte* decree is made on the ground of the summons not having been duly served, it must refer to the service on the defendant only who complains against the decree, and not to service on his co-defendants (*d*). Where one defendant appears and the other does not, and a decree is given against both, if the defendant who did not appear gets the decree set aside, the Court cannot open it up, in investigating the case again with regard to the other defendant (*e*). But where one who did not appear applied, and another who also did not appear did not in like manner apply, but came in with a petition on the second hearing, and the case was dismissed *in toto*,

(*a*) Omda Bibee *v.* Acouric Singh, 7 Suth W. R, 425, L S. Jackson, J.

(*b*) Devappa Setti *v.* Ramanadha Bhatt, 3 Mad. H. C. Rep, Innes and Collett, JJ.

(*c*) Zimutunnissa Bibee *v.* Muddun Mohun Pal, 22 Suth. W. R., 537, Kemp and Morris, JJ.

(*d*) Ewing *v.* Gosaidas Ghose, 3 B. L. R, App., 7.

(*e*) Huro Krishno Doss *v.* Motee Chand Baboo, 8 Suth. W. R, 260, Seton-Karr and Mitter, JJ.

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it was held that the second defendant could take advantage of the order of dismissal (*a*).

An appearance in person or by pleader, without putting in any answer or written statement, is still an appearance; and the judgment pronounced thereafter is not *ex parte* (*b*). So also it has been held that s. 119 of Act VIII of 1859 did not apply to a defendant who was absent at an adjourned hearing, but only to one who had never appeared (*c*); and that a defendant who appeared at the first hearing, but who was absent from an adjourned hearing, and against whom a decree was passed in his absence, could appeal (*d*). This he could not have done if the decision had been treated as *ex parte*, but a decree *ex parte* may now be appealed against in the same way as any other decree. In a later case, where a defendant was prevented by the fraud of the plaintiff from appearing on the last day of hearing, the suit was held to have been decided *ex parte*, notwithstanding that the defendant had been represented on the first day of hearing; and the first Court was held to have done right in restoring the case to the file (*e*). The hearing of a suit in which a pleader was appointed, but without instructions, has been held to be *ex parte* (*f*), and so, if the pleader appears, but too late (*g*).

In order to satisfy the Court, on an application to have the case restored to the file, that the plaintiff was prevented by any sufficient cause from appearing, it is enough to show that there had been a *bonâ fide* mistake, which was not unreasonable (*h*). Thus

(*a*) Koroona Moyee Debia *v.* Nubo Kishen Mookerjee, 11 Suth. W. R, 18, L. S. Jackson and Markby, JJ.; and see Nistarinee Dassee *v.* Debnath Bose, 20 Suth. W. R, 286, L. S. Jackson and Birch, JJ.

(*b*) Goluckbur *v.* Bishonath Geeree, Marsh., 32, Steer and Morgan, JJ.; S. C., 1 Hay, 70; Moona Lall *v.* Gopal Sing, S. D. A., N. W. P., 1863, p. 37; Jankee Ram Doss *v.* Chundra Bully Debia, 7 Suth. W. R., 295, Bayley and Sumbhoonath Pundit, JJ.; Raghapa bin Hanmapa *v.* Parapa bin Shivapa, I. L R., 1 Bom, 217.

(*c*) Gorachand Goswami *v.* Raghu Mandul, 3 B. L. R., App., 121; Amritnath Jha *v.* Roy Dhunput Singh, 8 B. L. R., 44, Bayley and Paul, JJ.

(*d*) Kalee Churn Dutt *v.* Modhoo Soodun Ghose, 6 Suth. W. R., 86.

(*e*) Denoo Paroye *v.* Chinta Monee Chowdhry, 18 Suth. W. R., 457, Kemp and Pontifex, JJ.

(*f*) Bhima Charya, &c., *v* Fakirappa, &c., 4 Bom. H. C. Rep., 206, Appeals, Tucker and Gibbs, JJ.; see also Musst. Bibee Haloo *v.* Musst. Atwaro, 7 Suth. W. R., 81, Kemp and Markby, JJ.

(*g*) Syed Mahomed Hossein *v.* Shaik Mantozol Huq, 18 Suth. W. R., 400.

(*h*) Hardatrai Shrikisondas *v.* Victoria, &c., Co., 3 Bom. H. C. Rep., O. C. J., 60, Couch, C. J.

the words "prevented by any sufficient cause from appearing" should be read so as to include the case of the absence of the plaintiff's counsel or attorney when caused by a *bonâ fide* mistake (*a*). In that case a judgment by default under s. 114 of the old Code was set aside upon payment by the attorney for the plaintiff of the costs of the hearing. So, where the appellant's pleader has died unknown to him, the time should not be counted until he has an opportunity of coming in (*b*).

The first day of hearing a case and fixing issues was appointed for some time in August, when the Judge postponed it till September, and in the month of September, owing to the Sessions, the Judge was unable to take up civil work, and postponed the case till the 5th of December, 1864. On both the above occasions the plaintiffs were present by vakeel. On the 5th December, one of the plaintiffs' vakeels was absent on account of certified sickness, and the other was away from the station. The Judge dismissed the case for default, adding that even if the vakeel had been present, no other order than that which was passed could have been made, for the plaintiffs, though duly warned, had done nothing in furtherance of their suit. The issues had been fixed in September, but the plaintiffs had filed no documentary evidence, nor given in any list of witnesses, so that it would have been impossible to have gone on with the case. On an application to restore the case to the file, the High Court (Loch and Glover, JJ.) considered the Judge's order to be perfectly correct; but, under special circumstances, directed its restoration to the file, on the plaintiffs paying the costs of the defendant (*c*). In another case (*d*), however, Paul, J., held, that the Court had no power to order the defendant to submit to terms and to pay costs; they should be costs in the cause. The thirty days during which a defendant may apply to get an *ex parte* judgment set aside begins to count from the date when the process for enforcing the judgment has been issued (*e*),—that is, from the issue

(*a*) The Oriental Finance Corporation *v.* The Mercantile Credit and Finance Corporation, 2 Bom. H. C. Rep., 282.

(*b*) *Ex parte* Alikhan Umarkhan, 4 Bom. H. C. Rep., A. C., 92, Couch, C. J., and Newton, J.; see also Mewa Lall Thakoor *v.* Bhujhun Jha, 22 Suth. W. R., 213.

(*c*) Sarodamoe Burmonee *v.* Rambaksh and Ramdhan, 9 Sev., 327.

(*d*) Administrator-General *v.* Lalla Dyram Das, 6 B. L. R., 688.

(*e*) Act XV of 1877, sched. ii, 3rd div., No. 164.

of the attachment (*a*). In that case, Peacock, C. J., states, that "the object of the Legislature seems to have been to take care that, "in the case of an *ex parte* decree, the party against whom it is "passed may have an opportunity of showing that he had no notice "of the suit" (*b*). The words "process for enforcing the judgment" mean process against the person or property of the defendant (*c*). And it has been held that a notice under s. 216 of the old Code to show cause why an old decree should not be enforced, is enough for the purpose of s. 119 of that Code (*d*). Where a decree is set aside, and a new trial granted, an attachment made under the decree falls to the ground (*e*); but a sale of the property which had been attached, made after the decree was set aside, was held not to be void under s. 240 of Act VIII of 1859, to which s. 276 of the present Code corresponds. These sections make void private alienation of property when it has been attached; the attachment being removed, the prohibition ceases (*f*). A sale in execution is binding, see note to ss. 311, 314. This section applies to rent suits under the Bengal Act VIII of 1869, see s. 34 of that Act (*g*).

The decision under this section is final; there is no appeal from it. But it was held under s. 119 of Act VIII that, if the order were made without jurisdiction,—as for instance, on an application made after the prescribed time had expired,—it might be set aside on appeal (*h*). An appeal is, however, now denied (see s. 588, *post*) in the case of a defendant, but not in the case of a plaintiff (s. 588 (f).)

(*a*) Radha Benode Chowdhry *v.* Digumburee Dassee, 5 Wym Rep., Rent Suit, 60, Full Bench; S. C., 9 Suth. W. R., 236.

(*b*) Overruling Radha Binode Chowdhry *v.* Modhoo Soodun Sircar, 7 Suth. W. R., 198, Kemp and Markby, JJ. See too Shaik Gholam Ahyah *v.* Sham Soondar Koonwaree, *ib.*, 375, Loch and Macpherson, JJ.

(*c*) Shib Chunder Bhadooree *v.* Luckhee Debia Chowdhrain, 6 Suth. W. R., Mis, 51.

(*d*) Obhoy Churn Dutt *v.* Muddoosoodun Chowdhry, 5 Wym. Rep., 172, Loch and Hobhouse, JJ.

(*e*) Lala Jagat Narayan *v.* Tulsiram, 1 B. L. R., A. C., 71, Phear and Hobhouse, JJ.

(*f*) Juggut Narain *v.* Toolsee Ram, 10 Suth W. R., 99, Phear and Hobhouse, JJ.; S. C., 1 B. L. R., 71, Appeals

(*g*) Musst. Drabamayi Guptia *v.* Taracharan Sen, 7 B. L. R., 207.

(*h*) Rung Lall Misser *v.* Tokhun Misser, I. L. R., 2 Calc., 114, Ainslie and Birch, JJ.; Bhyrub Chunder Surmah Chowdhry *v.* Madhubram Surmah, 11 B. L. R., 423, F. B.; Bimola Soonduree Dassee *v.* Kalee Kishen Mojoomdar, 22 Suth. W. R., 5, L. S. Jackson and McDonell, JJ.; Toolsee Dossee *v.* Durga Churn Paul, 15 Suth. W. R., 175, Kemp and Glover, JJ.; Kheshavram Hirachand *v.* Ramchandra Trimbak, 8 Bom. H. C., A. C., 44; Uluck Monee Chowdhrain *v.* Panchoo Coomar Chunder Chowdhry, 21 Suth. W. R., 124.

Where a Court improperly grants a rehearing, which has been refused properly by the Court below on the ground that the application was out of time, all the proceedings after the granting of the order for the rehearing are void (*a*), and that being so, the aid of the High Court under the 15th section of the Charter Act may be invoked; but where the defendant does not avail himself of his remedy under this section, or where he fails to make out a case, and the order is made with jurisdiction, he cannot come to the High Court (*b*). The non-service of a summons, &c., is not sufficient of itself to render the decree of a competent Court a nullity; it should be impeached within the prescribed period (*c*).

No decree to be set aside without notice to opposite party.

109. (S.) No decree shall be set aside on any such application as aforesaid, unless notice thereof in writing has been served on the opposite party.

When a party applying to have his case revived alleges that no notice was served upon him as the law requires, it is the duty of the Judge to examine on oath the officer by whom that service is reported to have been made, and not to be satisfied with the formal report of the nazir (*d*). This is also clear from s. 93, *ante*, and s. 82, *ante*.

CHAPTER VIII.

OF WRITTEN STATEMENTS AND SET-OFF.

Written statements.

110. The parties may, at any time before or at the first hearing of the suit, tender written statements of their respective cases, and the Court shall receive such statements and place them on the record.

This corresponds with Act VIII of 1859, s. 120.

(*a*) Rung Lall Misser *v.* Tokhun Misser, 25 Suth. W. R., 304.

(*b*) *In re* Leslie, 10 B. L. R, 70, Markby and Ainslie, JJ.; S. C., 18 Suth. W. R., 474.

(*c*) *Per* Mitter, J., in Mackintosh *v.* Kally Doss Mullick, 11 B. L. R., 8, Couch, C. J., and Jackson and Mitter, JJ.

(*d*) Sreenath Thakoor *v.* Watson, 4 Suth. W R., Mis., 4, Loch and Glover, JJ.; Koondunlal *v.* Noor Ali, 10 *ib.*, 3; Obhoychunder Dutt *v.* Erskine, 3 *ib.*, Mis., 11.

A written statement is not like a pleading; it must be taken as a whole, and, like any other statement made by a defendant or plaintiff, may be used in evidence *against* him, and should be dealt with by the Judge as any other such evidence (*a*). The opinion of the Full Bench in *Pulin Behari Sen* v. *Watson* (*b*) was, that if a party makes a qualified statement, that statement cannot be used against him apart from the qualification; not that if a man makes a series of independent unqualified statements, those statements cannot be used against him. That case goes no further than to lay down that an unfair use is not to be made of a man's written statement by trying to convert into an admission by him that which he never intended to be an admission.

In a suit by A. against B. for recovery of ancestral jummai lands, of which he alleged that he had been dispossessed by B., B. stated in his written statement that A.'s ancestor having relinquished the land, the zemindar had leased the same to him (B.), and he had been in possession since this lease. He also stated how A.'s ancestor relinquished, and that he (B.) had thereupon obtained a pottah. He denied that he had dispossessed A. Held, that B. having admitted the possession of A.'s ancestor, it lay upon B. to prove his title (*c*).

A. sued B. on a bond, in which it was recited that B. had received the amount. B. in his written statement admitted execution; but stated that he had received the amount mentioned therein, not under the bond, but on the pledge of certain jewellery. Held, that on the admission of the execution of the bond which contained the recital of payment, the onus was upon B. to prove that payment had not been under the bond (*d*).

A defendant is not precluded from setting up a defence which does not appear on his written statement, where the plaint does not

(*a*) Shaikh Sultan Ali *v.* Musst. Chand Bebee, 5 Wym. Rep., Civil Rul., 150, Peacock, C. J., and Mitter, J.; S. C., 9 Suth. W. R., 130; see also Radha Churn Chowdhry *v.* Chunder Monee Shikdar, 9 *ib.*, 290, Bayley and Phear, JJ.; Narappabin Appa Hedgi *v.* Gapayabin Kapaya, 2 Bom. H. C. Rep., 341, Forbes and Tucker, JJ.; and Poolin Behary Sein *v.* Watson, 9 *ib.*, 190. But see the case of Mooktakeshee Dossee *v.* Koylash Chunder Mitter, 7 Suth. W. R., 493, Bayley and Markby, JJ., cited in the note to s. 114, *post*, and to s. 51, *ante*.

(*b*) 9 Suth. W. R, 190.

(*c*) Baikanthanath Kumar *v.* Chandra Mohan Chowdry, 1 B. L. R., A. C., 133, Bayley and Macpherson, JJ.

(*d*) Maniklal Baboo *v.* Ramdas Mazumdar, 1 B. L. R., A. C., 92, Bayley and Macpherson, JJ.

set forth the true facts (*a*). Written statements should be full enough to enable the Court to dispense with witnesses at the settlement of issues; see note to s. 112, *post*.

Particulars of set-off to be given in written statement.

111. (S.) If in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, and if in such claim of the defendant against the plaintiff both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards, unless permitted by the Court, tender a written statement containing the particulars of the debt sought to be set off.

Inquiry.

The Court shall thereupon inquire into the same, and if it find that the case fulfils the requirements of the former part of this section, and that the amount claimed to be set off does not exceed the pecuniary limits of its jurisdiction, the Court shall set off the one debt against the other.

Effect of set-off.

Such set-off shall have the same effect as a plaint in a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but it shall not affect the lien upon the amount decreed of any pleader in respect of the costs payable to him under the decree.

Illustrations.

(*a*.) A. bequeaths Rs. 2,000 to B., and appoints C. his executor and residuary legatee. B. dies and D. takes out administration to B.'s effects. C. pays Rs. 1,000 as surety for D. Then D. sues C. for the legacy. C. cannot set off the debt of Rs. 1,000 against the legacy, for neither C. nor D. fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(*b*.) A. dies intestate and in debt to B. C. takes out administration to A.'s effects, and B. buys part of the effects from C. In a suit for the purchase-money by C. against B., the latter cannot set off the debt against

(*a*) Sonder Narain Pundah *v.* Shaikh Namdar, 21 Suth. W. R., 407.

the price, for C. fills two different characters, one as the vendor to B., in which he sues B., and the other as representative to A.

(*c.*) A. sues B. on a bill of exchange. B. alleges that A. has wrongfully neglected to insure B.'s goods, and is liable to him in compensation, which he claims to set off. The amount not being ascertained cannot be set off.

(*d*) A. sues B. on a bill of exchange for Rs. 500. B. holds a judgment against A. for Rs. 1,000. The two claims being both definite pecuniary demands, may be set off.

(*e.*) A. sues B. for compensation on account of a trespass. B. holds a promissory note for Rs. 1,000 from A., and claims to set off that amount against any sum that A. may recover in the suit. B. may do so, for as soon as A. recovers, both sums are definite pecuniary demands.

(*f.*) A. and B. sue C. for Rs. 1,000. C. cannot set off a debt due to him by A. alone.

(*g.*) A. sues B. and C. for Rs. 1,000. B. cannot set off a debt due to him alone by A.

(*h.*) A. owes the partnership firm of B. and C. Rs. 1,000. B. dies leaving C. surviving. A. sues C. for a debt of Rs. 1,500 due in his separate character. C. may set off the debt of Rs. 1,000.

Although s. 45, *ante*, enables the plaintiff to unite in one suit any number of claims against the same defendant, this section does not adopt the extended rules as to set-off which have been now established in England under the Judicature Act (1875), Order xix, Rule 3; but declares the law as to set-off as it was established before that change took place. Sections 111 and 216 have not the effect of enlarging the right of set-off. In a suit (*a*) against the acceptor to recover the amount due upon several bills of exchange, the defendant sought to set off a claim for unliquidated damages unconnected with the bills of exchange. It was held that the defendant had no right to set off his claim against the debt due to the plaintiffs (*b*). In the above case the question as to the right of set-off was fully discussed. It will be useful to give the judgment delivered by Scotland, C. J., which was as follows:—

"The question which we have been called upon to determine "in this case is, whether the defendant, being confessedly indebted "to the plaintiffs upon the bills of exchange mentioned in the "plaint, is entitled in this suit to insist that a claim made by

(*a*) See Ramgopal *v.* Majeti Mallikar Janudu, 1 Mad. H. C. Rep., 397.
(*b*) Clark *v.* Ruthanavaloo Chetti, 2 Mad. H. C. Rep., 296; see s. 216.

"him for damages sustained by reason of the neglect of Palmer "and Co. to insure certain goods according to the instructions of the "defendant, should be investigated, and that the amount, if any, found "due to him on account of that claim should be set off against "the plaintiffs' demand. We must assume, for the purpose of pre-"liminary question, that the plaintiffs and Palmer and Co. are iden-"tical, and that there is a *bonâ fide* claim by the defendant "against Palmer and Co. But it is conceded, and could not be denied, "that that claim being one for unliquidated damages, would not be "the subject of a set-off in an English Court of law; and if this had "been an action on the Plea Side of the late Supreme Court, the "defendant's claim certainly could not have been pleaded either "by way of set-off, or by way of avoiding circuity of action. "In a case (*a*), which was an action for repayment of one-third "of the freight paid in advance, after the loss of ship and "cargo, the defendant pleaded, *in avoidance of circuity of ac-"tion*, that the one-third freight was a loss to be insured against "by the plaintiff, but that he insured so negligently, that the in-"surance was useless, and that by such negligence the plaintiff "became liable to the defendant for the same amount which he "claimed in the action. But the Court held the plea bad, for the "jury, in assessing damages for negligence, might give more or less "than the one-third freight; and the rule of law as to avoiding "circuity of action, which requires such a plea to show that the "sum to which the defendant is entitled is the same as the plaintiff "claims, was not complied with, Maule, J., observing that the "amount of damages could not be treated as liquidated. We refer to "that case, because the claim made by the defendant in the present "suit is of the same kind,—*viz.*, a claim for damages on account of "insufficient insurance, and for the purpose of meeting the passage "in *Sedgwick on Damages*, p. 340, from which an inference might "be drawn that such a claim did not sound in damages merely.

"The present suit, however, cannot be determined as if it "were an action on the Plea Side of the late Supreme Court. It is "a suit instituted in this Court according to the provisions of the "Civil Procedure Code; and we are directed by the Letters Patent "establishing this Court (cl. 18) to apply to each case coming before "it in the exercise of its ordinary original civil jurisdiction such "law or equity as would have been applied to the same by the

(*a*) Charles *v.* Alton, 23 L. J., C. P., 197.

"late Supreme Court. We must see, therefore, whether in the late "Supreme Court, on its Equity Side, the defendant could have "insisted upon a right to set off his claim for damages against the "debt due to the plaintiff on the bills of exchange. This could "only have been done by filing a bill setting up the cross-claim, "and praying that the proceedings at law upon the bills might be "stayed, and the debt decreed; or to pay only the balance after "ascertaining and deducting the amount of the cross-claim. But "this prayer, we are of opinion, could not have been granted. We "find no authority for the interference of a Court of Equity in such "a case, but much against it.

"In an early case (*a*) on the subject, Sir Thomas Clarke, "Master of the Rolls, after referring to the Roman Law of Compen-"sation, says:—'Equity took it up, but with limitation and restric-"tions, and required that there should be a connexion between the "demands.' Again it was held (*b*) that where both debts "are legal, no set-off can be allowed in equity without special "circumstances; and there are no special circumstances in this case "beyond the mere existence of cross-demands. Now, the mere "existence of cross-demands has never been deemed a sufficient "ground for the allowance of a set-off in equity. If it had, the "many instances in which a set-off has been disallowed could not "have occurred. In a bankruptcy case (*c*) it was held that a "debt from a bankrupt to a married woman, *dum sola*, could not "be set off against a debt from her husband to the bankrupt; and "also that the claim of the bankrupt's assignees, upon a policy made "before the bankruptcy, but on account of a loss after the bankrupt-"cy, could not be set off against a debt from the bankrupt. And "the Lord Chancellor said:—'There is a difference between set-off "at equity and at law. In equity, it prevailed long before the "Statute. It must be a strict set-off at law, or a case of mutual debt "or credit.' So in another case (*d*) the set-off was allowed on the "ground that there was a clear mutual credit between the parties, "and it was stated by the Lord Chancellor, and not contested by the "counsel, that either mutual debts or mutual credits would sustain "a set-off in equity. In an action (*e*) brought by the defendant "against the plaintiff for damages for refusing to accept bills, and

(*a*) Whitaker *v.* Rush, Ambler, 407.
(*b*) Harvey *v.* Wood, 5 Mad, 459.
(*c*) *Ex parte* Blagden, 1 Ves., 465.
(*d*) James *v.* Kynnier, 5 Ves., 110.
(*e*) Rawson *v.* Samuel, Cr. and Phil., 161.

"it being made to appear that there was a complicated account "between the parties, the Vice-Chancellor had refused to restrain "the trial of the action, but had restrained the execution, if a verdict "should be found for the plaintiff, in order that the account might "be taken in equity. But the Lord Chancellor, upon appeal, held "the existence of a long and complicated account was not a ground "for staying the execution, and in the course of his judgment he "made the following observations of the doctrine of equitable set-"off.—'It will be found that this equitable set-off exists in cases "where the party seeking the benefit of it can show some equitable "ground for being protected against his adversary's demand. The "mere existence of cross-demands is not sufficient.' In the present "case, there are not even cross-demands, as it cannot be assumed the "balance of the account will be found to be in favour of the defend-"ants at law. Is there, then, any equity in preventing a party who "has recovered damages at law from receiving them, because he may "be found to be indebted upon the balance of an unsettled account "to the party against whom the damages have been recovered? We "may add to this that, as regards the case of *ex parte Stephens* (*a*), "Lord Eldon himself rested that judgment on the ground of fraud "in his judgment in *ex parte Blagden*. Again, in *Freeman* v. "*Lomas* (*b*), the suit being by assignees of a bankrupt for payment "of a legacy, the defendant, who was the executor and residuary "legatee, claimed to set off moneys which he had paid as surety for "the legatee; and Turner, V. C, disallowed the claim. He points "out (as the Lord Chancellor does in *ex parte Blagden*) that cases "of equitable set-off had arisen before the Statutes, and that the "origin of the equitable rule was to be traced to the Roman Law "of Compensation; and he adds:—'I believe, upon examining the "authorities, it will be found that, except upon special circumstances, "Courts of Equity have never allowed cross-demands existing in "different rights to be set the one against the other'—in which "respect the English follows the Roman law. Lastly, there is "another case (*c*), in which the Court of Exchequer expressly decided "that, even by way of equitable defence, such a claim as is made by "the defendant in this case would not be set off, and that distinctly on "the ground that, according to the ascertained rules of the Court of "Chancery, a perpetual injunction would not have been granted in

(*a*) 11 Ves., 27.
(*b*) 20 L J, Ch, 564.
(*c*) Stimson *v.* Hall, 26 L J, Exch, 212.

"such a case. We may also refer to Mr. Justice Story's Chapter on "Equitable Set-off, where he says:—'It is true that equity generally "follows the law as to set-off, but it is with limitations and restric- "tions. If there is no connection between the demands, then the "rule is as at law. But if there is a connection between the "demands, equity acts upon it, and allows a set-off under "particular circumstances' (*a*). He then refers to the cases of mu- "tual credit, saying that, independently of the Statutes, Courts of "Equity give relief in all cases where, though there are mutual and "independent debts, yet there is a mutual credit founded at the time "on the existence of some debts due by the crediting party to the "other. By mutual credit, in the sense in which the terms are here "used, we are to understand a knowledge on both sides of an exist- "ing debt due to one party, and a credit by the other party founded "on, and trusting to, such debt as a means of discharging it. See "as to mutual credit the observations of the Privy Council in "*Young* v. *The Bank of Bengal* (*b*).

"But the present is clearly not a case of mutual credit, and "unless it can be shown that the defendant's claim of set-off rests "upon some equity which impeaches the plaintiff's legal rights to "recover his demand, there is no ground for allowing the set-off. "Now the claims here are wholly unconnected, and the case is in "that respect, therefore, distinguishable from *Beasley* v. *Darcy* (*c*) "and the other cases commented upon by the Lord Chancellor in "*Rawson* v. *Samuel*, before referred to. The two most recent "cases (*d*) in equity, in which a set-off has been allowed, rest upon "distinct equitable grounds. In the former, bankers had assigned "securities given by a customer indebted to them, without giving "him any notice of the assignment. The bankers having become "bankrupt, and the assignees of the securities having brought actions "in the name of the bankers against the customer, the latter filed "his bill against the assignees of the securities; and in that suit it "was held that the plaintiff was entitled to set off the moneys due "to him on his running account against the debts secured, the "assignees being in no better position than the bankers would have "been, and clearly, as between the banker and the customer, there "would have been a set-off at law as well as in equity. So it was

(*a*) Eq. Jur, Section 1434.
(*b*) 1 Moore I. A., 87.
(*c*) 2 Sch. & Lef., 403 n.
(*d*) Cavendish *v.* Geaves, 27 L. J., Ch, 314; and Jenner *v.* Morris, 30 L. J., Ch., 361.

"held (*a*) that a debtor who had advanced moneys for necessaries "supplied to the deserted wife of the creditor, was entitled in equity "to set off such moneys against the creditor's legal demand. The "ground of the decision was, that the debtor making the advance "stood in the same position in equity as the tradespeople who "furnished the necessaries, and was entitled to the same remedies. "The two cases, we think, fall within the rule expressed by Lord "Chancellor Cottenham in *Clark* v. *Court* (*b*). It was further "argued before us that, upon general principles of convenience, and "also upon the language of the Civil Procedure Code, we ought, in "this and in every suit, to investigate and dispose of every matter "in dispute between the same parties brought to the notice of the "Court. But we cannot agree that convenience requires, or is even "consistent with any such general rule as that; nor has any such "rule been adopted, so far as we are aware, into any system of "jurisprudence. We may here quote the language of Sir J. Jeykel, "to be found in a note by Mr. Blunt at page 408 of the 1st volume "of Ambler's Reports. He says:—'The rule of doing equity and "having equity is to be understood of particular equities, and where "they relate to one and the same thing; and a special or particular "equity cannot be barred by a general equity, as if to a demand of "debt the defendant should say the other has injured him in a "trespass, or on other accounts foreign to the thing in demand, for "those would breed great confusion.' Certainly the Roman Law "of Compensation was restricted within narrower limits than is "here contended for. Referring to the *Code*, Lib. IV., Tit. 31, it will "be found that the Judges are cautioned not to be too ready to "admit claims by way of set-off, and not only the inconvenience, "but the injustice, is pointed out of subjecting a party having a "clear debt to a lengthened investigation in the suit upon a knotty "and doubtful claim; and the passage points out that the *causa ex* "*qua compensatur liquida sit et non multis ambagibus innodata.* "So it is said by Mr. Chancellor Kent referring to the general rules "in the allowance of compensation or set-off by the civil law:—'To "authorize a set-off, the debts must be between the parties in their "own right, and must be of the same kind or quality, and be clearly "ascertained or liquidated; they must be certain and determinate "debts' (*c*). And Mr. Justice Story uses similar language.

(*a*) Jenner *v.* Morris, 30 L. J., Ch., 361. (*b*) Cr. & Phil., 154.
(*c*) Duncan *v.* Lyon, 3 John's Ch. Rep., 359.

"Then, is there any provision of the Indian Civil Procedure "Code (Act VIII of 1859) which shows the intention of the Legis- "lature to enlarge in any way the right of set-off? The only "sections directly bearing upon the point are ss. 121 and 195. (See "ss. 111 and 216 of this Code.) The former section provides that, "if in a suit for debt the defendant desire to set off against the "claim of the plaintiff the amount of any debt due to him from the "plaintiff, he shall tender a written statement containing the parti- "culars of his demand, and the Court shall thereupon inquire into "the same. This enactment, in strictness, applies only to cross-debts, "the language not being more comprehensive than the English "Statutes of Set-off, 2 Geo. II, c. 22; and 8 Geo. II, c. 24; and "it is to be observed, in considering to what cases the section was "intended to apply, that whilst s. 9 provides for the separate trial of "several causes of action joined to one suit, if the Court consider that "they cannot be conveniently tried together, yet neither in s. 121, "nor elsewhere in the Code, is there any provision for any separate "trial of the questions that may be raised upon a claim of set-off, "and those questions may (as in this case) be numerous. As to "s. 195, we do not think that any additional effect can be "given to the word 'demand.' It appears to be used in the sense "of debt, in which sense it is also used in s. 121. These, however, "are provisions of a Code regulating procedure only, and whilst we "think that the language used has not the effect of enlarging the "right of set-off, we ought at the same time to say that, according "to our present opinion, the Procedure Code was not intended to "take away any right of set-off, whether legal or equitable, which "parties would have had independently of its provisions. It seems "to us that the right of set-off will be found to exist not only in "cases of mutual debts and credits, but also where the cross-demands "arise out of one and the same transaction, or are so connected in "their nature and circumstances as to make it inequitable that the "plaintiff should recover, and the defendant be driven to a cross- "suit. In the present case, the defendant's claim appears to us not "to come within the rule by which this Court is governed, and he "must be left to seek in a cross-suit any damages to which he may "think himself entitled. The result is, that there must be a "decree for the plaintiff for the full amount due upon the bills of "exchange."

Wasilat (mesne profits) is in the nature of damages, and is not a

debt so as to form a subject of set-off (*a*). In a suit by a carrier for the price of the carriage of goods, the defendant cannot set off the amount of damages claimed against the plaintiff for injury to the goods, but must sue to recover the damage in a separate suit (*b*). But where the contract provides for damages for its breach, it has been held that, in a suit upon the contract, damages consequent upon breaches can be set off (*c*). A. had dealings with a firm consisting of a father and two sons, who carried on business jointly. Shortly after the father's death the two brothers separated, and A. dealt with each separately, having notice of the separation. A. cannot set off against a claim made by one of the brothers in respect of the separate dealings between himself and A. a debt due to himself from the former joint firm (*d*). A vakeel who was sued on a bond was not allowed to set off an amount he alleged to be due to him in respect of fees (*e*).

Although the person, who has dealt with an agent believing him to be a principal, may elect to treat the after-discovered principal as having contracted with him, still, if the principal, following the ordinary course of business, have, after his liability to the contractor is complete, altered the state of his accounts with the agent, this right of the contractor exists subject to the state of those accounts (*f*). A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought. If he lets the day of payment go by, he may lead the principal into the supposition that he relies solely on the broker, and if in this case the price of the goods has been paid to the broker on account of the deception the principal shall be discharged (*g*).

A plaintiff purchased a debt due from the defendant to R., and the defendant had a decree against R. for a certain sum arising out of the same transaction. In a suit by the plaintiff against

(*a*) Rottee Rumun Oopadhya *v.* Greejanund Oopadhya, 5 Suth. W. R., 160; S. C., 1 Wym. Rep., 218, Phear and Glover, JJ.

(*b*) Scanlan *v.* Herrold, 10 Suth. W. R., 295, Peacock and Mitter, JJ.

(*c*) Kistnasamy Pillay *v.* Municipal Commissioners of Madras, 4 Mad. H. C. Rep., 120, Scotland, C. J., and Collett, J.; Radha Ram Deb *v* James, 20 Suth. W. R., 410, Kemp and Glover, JJ.

(*d*) Baboo Dhunput Sing *v.* Forbes, 1 In Jur, N. S., 354.

(*e*) Moonshee Thakoor Pershad *v.* Maharajah Hetnarain Sing, S. D. A. Rep, 1860, p. 16.

(*f*) Thompson *v.* Davenport, 2 Smith's L. C., 347 n.

(*g*) *Ibid*, 348 n.

the defendant for the debt so purchased, held that the defendant might set off the amount of his decree (*a*).

The Court cannot go into a question of trust on a benami transaction, so as to set off a decree alleged to be A.'s (though in favour of B) against C. against a decree of C. against A. (*b*). When a defendant raises a question of set-off, he assumes the position of a plaintiff on that issue (*c*).

No written statement to be received after first hearing unless called for by Court.

112. Except as provided in the last preceding section, no written statement shall be received after the first hearing of the suit:

Court may at any time call for written statement

Provided that the Court may at any time require a written statement, or additional written statement, from any of the parties, and fix a time for presenting the same:

Provided also that a written statement, or an a additional written statement, may, with the permission of the Court, be received at any time for the purpose of answering written statements so required and presented.

This corresponds with Act VIII of 1859, s. 122, omitting the words "before final judgment," which seem to show an intention that written statements should be called for by a Court of Appeal. The proviso is new.

If one of the parties ask for written statements, the Court will always order them, unless it appear that the application is to harass or delay the other side (*d*). If one party to a suit neglect to put in a written statement when ordered so to do, the Court will examine him as to the grounds of his defence. He will be confined to his statement in the witness-box, and if, on examination, it appear that a written statement is desirable, the case will be adjourned at his expense (*e*). But where a defendant, having been ordered to put in a written statement, omitted to

(*a*) Bhagawani Kunwar *v.* Lala Baijnath Prasad, 2 B. L. R., Appeals, 84, Peacock, C. J., and Mitter, J.

(*b*) Tarachand Ghose *v.* Anand Chandra Chowdhry, 2 B L R., App., 110, Bayley and Macpherson, JJ.

(*c*) S. M. Jagadamba Dasi *v.* Grob, 5 B L. R, 639, Norman, J.

(*d*) Mitchell *v* Khan Mahomed Durromsee, MSS, June 27th, 1865, Phear, J.

(*e*) Ramrutton *v* The Oriental Steam Co., 2 Hyde, 89, Peterson, J.

do so, and on the day of trial instructed counsel to appear for him, the Court refused to hear him (*a*). In this case the order appears (so it was contended in argument in the case about to be noticed) to have been made on a separate application. For where an order was made for written statements on the summons in the ordinary way on application of the plaintiff at the filing of the plaint, it was held by Markby, J., that this was not an "order of Court" so as to subject the party to the penalties of contempt for non-compliance (*b*). These cases were decided in the High Court, on its Original Side, with reference to rules 32 and 33 (*c*) applicable to that Court. The next section gives the Court a discretion, which includes a discretion as to costs. The written statement must be a full and true narrative, and the party has no discretion as to the giving or withholding an important fact (*d*); and although under s. 148 the Court may call witnesses, it should be full enough to dispense with witnesses at the time of the settlement of issues (*e*), otherwise there would be an opportunity of fabricating evidence for the purpose of the trial. Written statements can only be called for by a Court of original jurisdiction (*f*).

Where a written statement, put in by the plaintiff subsequent to his plaint, was more in explanation of the plaint than for the purpose of starting a new case, and the defendants were not in any way prejudiced, the Court held that there was no objection to its admission (*g*).

The Court will allow an additional written statement to be put in by a defendant more generally than by a plaintiff (*h*). The particulars of that case are not given in the report. It appears that

(*a*) Shamasoondery Dossee *v.* Brindabadub Mitter, MSS., August 10th, 1865, Macpherson, J.; and Sreenauth Doss *v.* Ranee Dossee, MSS., November 27th, 1865.

(*b*) Moran and Co. *v.* Gladstone and others, 14th May, 1868.

(*c*) These rules will be found in the Appendix to the third edition of the notes on Act VIII, &c., p. 79, and as rules 39 and 40 of the fourth edition by Mr. Wilkinson, p. 727. They refer to costs.

(*d*) Sreenath Mullick *v.* Brijolall Pyne, 1 Hyde, 30, Wells, J.

(*e*) Anund Chunder Banerjee *v.* Woomes Chunder Roy, 1 Hyde, 147, Wells, J.; Hurkun Doss *v.* Hazaree Mull, reported in the *Englishman* newspaper, September 3rd, 1862.

(*f*) Joykishen Mookerjee *v.* Gopi Kishen Sein, 1 Wym, Rep., 93, Seton-Karr and Macpherson, JJ.

(*g*) Lall Mahomed *v.* Dhoolee Ram Doss, 22 Suth. W. R., 377, Kemp and McDonell, JJ.

(*h*) S. M. Dasimani Dasi *v.* Sreenauth Ghose, 3 B. L. R., Apx., 11, Phear, J.

the Judge must be guided by circumstances. In that instance the defendant was put upon terms, and ordered to furnish the plaintiff with a copy of the additional written statement.

Procedure when party fails to present written statement called for by Court.

113. If any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pass a decree against him, or make such other order in relation to the suit as it thinks fit

This clause is new.

Frame of written statements.

114. Written statements shall be as brief as the nature of the case admits, and shall not be argumentative, but shall be confined as much as possible to a simple narrative of the facts which the party by whom or on whose behalf the written statement is made believes to be material to the case, and which he either admits or believes he will be able to prove.

Every such statement shall be divided into paragraphs, numbered consecutively, and each paragraph containing as nearly as may be a separate allegation.

This corresponds with Act VIII of 1859, s. 123. The written statement must now also contain a statement of the facts which the person who makes it *admits*.

The party making the written statement may, without incurring the penalties of perjury, insert in his written statement, in the form of direct allegation, any fact whatever which he hopes to be able to prove at the trial, and which upon the merest rumour he believes to be true (*a*); but he must of course not state in his verification more than that he believes such facts to be true, see section 52, *ante*.

The defendant, equally with the plaintiff, should be held to the case he sets up in his written statement. Thus where, in a suit for land, the defendant in the written statement relied upon a purchase, he was not allowed at the trial to set up a case of continuous user (*b*); but it has been held that an equitable

(*a*) Mooktakeshee Dossee *v* Koylash Chunder Mitter, 7 Suth. W R, 493, Bayley and Markby, JJ.

(*b*) Chova Kmâ *v* Isa bin Khalifa, I. L R, 1 Bom, 209, August 31st, 1875, Marriott, J.

defence may be set up at the trial although not put forward in the written statement (*a*).

Written statements to be subscribed and verified.

115. Written statements shall be subscribed and verified in the manner hereinbefore provided for subscribing and verifying plaints, and no written statement shall be received unless it be so subscribed and verified.

The provisions of section 52 as to examining witnesses as to the fact of signature, shall apply in the case of written statements.

This corresponds with Act VIII of 1859, s. 123, second para.

Where an application is made that a written statement be verified by a person other than a plaintiff or defendant, it is desirable, though not absolutely necessary, that notice should be given to the other side (*b*); and in order to the Court acting without such notice, very good cause should be shown why it was not given (*c*). Persons exempt from attendance in Court are not exempt thereby from subscribing and verifying their written statements (*d*).

Rejection of argumentative, prolix or irrelevant written statements.

116. If it appear to the Court that any written statement, whether called for by the Court or spontaneously tendered, is argumentative or prolix, or contains matter irrelevant to the suit, the Court may amend it then and there, or may, by an order to be endorsed thereon, reject the same, or return it to the party by whom it was made for amendment within a time to be fixed by the Court, imposing such terms as to costs or otherwise as the Court thinks fit.

Attestation of amendments.

When any amendment is made under this section, the Judge shall attest it by his signature.

(*a*) Gour Chunder Biswas *v.* Greesh Chunder Biswas, 7 Suth. W. R., 120, Kemp and Markby, JJ.

(*b*) Campbell *v.* Steele, 1 In. Jur., N. S., 39, Phear, J.

(*c*) Koonjeelall *v.* E. I. R. Co., MSS., Phear, J., June 7th, 1866.

(*d*) Kinoo Sing Roy *v.* Eshan Chunder Roy, 2 Wym. Rep., 253, Kemp and Markby, JJ.

Effect of rejection.

When a statement has been rejected under this section, the party making it shall not present another written statement, unless it be expressly called for or allowed by the Court.

This corresponds with Act VIII of 1859, s. 124.

Objections to the written statement, on the ground that it is argumentative, prolix, or irrelevant, cannot be taken when the case is ripe for hearing (*a*). In one case a Principal Sudder Ameen *fined a vakeel one rupee* (which he had no right to do) for filing a written statement which was, in his opinion, too lengthy; and ran his pen through a great portion of it, including a statement setting up a plea of limitation. The Judge, on appeal, went into the question of limitation, and it was held that he was right in doing so (*b*).

A written statement may be ordered to be taken off the file for irrelevancy (*c*). In a case (*d*) where the plaintiff's written statement contained certain letters of the defendants, parts of which were written without prejudice offering to compromise the suit, the Court ordered these passages to be struck out, and the costs of the application to be paid by the plaintiff.

CHAPTER IX.

OF THE EXAMINATION OF THE PARTIES BY THE COURT.

Ascertainment from each party whether allegations in written statements are admitted or denied.

117. (S.) At the first hearing of the suit, the Court shall ascertain from the defendant or his pleader whether he admits or denies the allegations of fact made in the plaint, and shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the written statement (if any) of the opposite party, and as are not expressly or by necessary

(*a*) Smallwood *v* Parry, 1 Coryton, 39.

(*b*) Boolee Singh *v.* Hurobuns Narain Singh, 7 Suth W. R, 212, L S Jackson and Markby, JJ

(*c*) Kasublal Day *v* Tremearne, 3 B. L R, Apx., 12, Phear, J.

(*d*) Halford *v* The East Indian Ry. Co, 12 B L R, Apx, 19, Macpherson, J., 6th Feb., 1874.

implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

This section is new. It would seem to make it the duty of the Court in all cases to examine orally on these points, although where a written statement has been received whether before or at the first hearing, such written statement will, if properly framed, inform the Court as to what facts are admitted and what denied.

Oral examination of party, or companion of himself or his pleader.

118. (S.) At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

This section corresponds with the first part of Act VIII of 1859, s. 125; and in addition the parties may suggest questions to be put by the Court.

It has been held, under the corresponding section (125) of Act VIII of 1859, that the Judge should ascertain the matters in issue by an examination of the defendant where he appears by pleader or in person; the fact that he is not prepared to put in a written statement does not warrant the trial of a suit *ex parte* (*a*). To deal with the case *ex parte*, as in this instance, would not now necessarily be wrong, see s. 113, *ante*; but in using the discretion given to it this case shows that the Court ought not, unless in extreme cases, to shut out the defendant from his defence, but that wherever the defence can fairly be raised, the Court should try the case.

Substance of examination to be written.

119. The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Same as s. 125 of Act VIII of 1859, last paragraph.

(*a*) Sivarajadhni Nilakantham Pillay v. Kuppagantulu Ramiah Pantielu, 2 Mad. H. C. Rep., 311, Frere and Innes, JJ.

Consequence of refusal or inability of pleader to answer.

120. (S.) If the pleader of any party who appears by a pleader refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day, and direct that such party shall appear in person on such day.

If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pass a decree against him, or make such order in relation to the suit as it thinks fit.

This corresponds with Act VIII of 1859, s. 127.

The Court is not justified in imposing penal consequences upon a party who fails to appear by passing a decree against him, unless it is clearly made manifest that he had been ordered or directed to attend, and wilfully refused to obey the order or direction; and secondly, that the evidence as was required to give, was material to the matter of the suit. *Quære.*—Whether the party must be proved by other evidence to have personally received notice of the order before the penal provisions are applied? (*a*).

CHAPTER X.

OF DISCOVERY AND OF THE ADMISSION, INSPECTION, PRODUCTION, IMPOUNDING, AND RETURN OF DOCUMENTS.

Power to deliver interrogatories.

121. (S.) Any party may, at any time by leave of the Court, deliver through the Court interrogatories in writing for the examination of the opposite party, or where there are more opposite parties than one, any one or more of such parties, with a note at the foot thereof stating which of such interrogatories each of such persons is required to answer.

(*a*) Raj Chookun Duswandi *v.* Busjeet Tewaree, 20 Suth. W. R., 165. And see further Obhoy Churn Mookerjee *v.* Musst Pearee Dossia, 22 Suth. W. R., 270, Ainslie, J.

Provided that no party shall deliver more than one set of interrogatories to the same person without the permission of the Court, and that no defendant shall deliver interrogatories for the examination of the plaintiff unless such defendant has previously tendered a written statement and such statement has been received and placed on the record.

This section is taken from Order xxxi, Rule 1, under 38 and 39 Vict., c. 77, which follows the 51st section of the Common Law Procedure Act, 1854; and the general principles upon which the Courts have acted under the last named enactment, may be usefully applied in dealing with the provisions of this Code.

The Court has a general discretion (*a*), but should not allow interrogatories merely because they are applied for; it ought to see that the use of them will be a step in the furtherance of justice, and for the promotion of truth (*b*).

The rule adopted by the Common Law Courts at Westminster in administering interrogatories under the Common Law Procedure Act, 1854, s. 51, appears to be, that they will be allowed where a Court of Equity would allow a discovery (*c*), if the questions are *ad rem* with reference to the issue raised in the suit (*d*).

A question should not be allowed by way of interrogatory which would be objectionable if it were asked orally in Court (*e*); and it has been held that any question that might be asked of the party were he examined as a witness, might be asked in the interrogatories (*f*). But that rule has been thought too wide, and it was considered (*g*) that either party might inquire by interrogatories only into matters that are common to both the cases of the plaintiff and defendant; although the answers sought might disclose the case relied on by the party interrogated, but that one party

(*a*) Tupling *v.* Ward, 30 L. J., N., S., Ex., 222; Phillips *v.* Lewin, 34 L.J., N. S., Ex., 37; Edmunds *v.* Greenwood, 38 L. J., N. S., C. P., 115; Villesboisnet *v.* Tobin, 38 L. J., N. S., C. P., 146.

(*b*) Stern *v* Sevastopulo, 32 L. J., N. S., C. P., 268, *per* Erle, C. J.

(*c*) Hawkins *v.* Parsons, 35 L. J., N. S., Q. B., 81.

(*d*) Jourdain *v.* Palmer, 35 L. J., N. S., Ex, 69.

(*e*) *Per* Jervis, C. J., in Chester *v.* Wortley, 25 L. J., N. S., C. P., 117—120.

(*f*) Osborn *v.* The London Dock Company, 10 Ex., 702; S. C., 24 L. J., Ex., 140.

(*g*) Whately *v.* Crawford, and Carew *v.* Davies, 25 L. J., N. S., Q. B., 163.

cannot interrogate as to matters that relate exclusively to the case of his opponent. It was further held that where the case is brought within the Statute, the Court is bound to grant an application for leave to exhibit interrogatories (*a*).

Interrogatories should be confined closely to the matter in controversy between the parties, and if altogether too large and travelling into irrelevant matter, they ought to be disallowed (*b*). Where they are so confined, and are proper to be allowed, the person interrogated is bound to answer them although they may discover his own case (*c*).

Where A. leased a dock to B. for twenty years, with a proviso that, if A. should *bonâ fide* desire to close the dock, and use the site for building purposes, he might determine the lease by notice and payment of £500. A. did give notice and tendered the £500, and then sued to eject B. It was held that B. might interrogate A. as to his *bona fides* (*d*).

The person interrogated cannot excuse himself from answering by swearing to some fact which involves the existence of the right to sue (*e*).

Interrogatories are not objectionable on the ground that they tend to charge the person to whom they are administered with a criminal offence. See Act I of 1872 (Indian Evidence Act), s. 132. But the proviso at the end of that section would protect him from arrest or prosecution, or from having his answer proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer.

A person in possession of property, whom the plaintiff seeks to eject, may interrogate the plaintiff as to the right by which he claims to do so (*f*); but it has been held in England that this does not extend to other cases (*g*) and that the plaintiff ought not to be allowed to ask the defendant in possession by what title he holds (*h*),

(*a*) See also Zarifi *v.* Thornton, 26 L. J., Ex., 214; Moor *v.* Roberts, *ib.*, C. P., 246.

(*b*) Robson *v.* Cooke, 27 L. J., N. S., Ex., 151; Peppiatt *v.* Smith, 33 L. J., N. S., Ex., 239.

(*c*) Bayley *v.* Griffiths, 31 L. J., N. S., Ex., 477.

(*d*) Winn *v.* Rose, 36 L. J., N. S., C. P., 306.

(*e*) Geary *v.* Buxton, 29 L. J., N. S., Ex., 280.

(*f*) Flitcroft *v.* Fletcher, 11 Ex., 549; Bellwood *v.* Wetherell, 1 You. & Coll., 211, 218; Edwards *v.* Wakefield, 6 E. & B., 469.

(*g*) Finney *v.* Forward, 35 L. J., N. S., Ex., 42.

(*h*) Horton *v.* Bott, 2 H. & N., 249; Ivy *v.* Kekewich, 2 Ves., jr., 679; Wigram on Discovery, 81, 264; May *v.* Hawkins, 24 L. J., N. S., Ex., 309.

or to answer interrogatories where his answers may expose him to a forfeiture (*a*). And where title to land is of a complicated nature—and perhaps on that ground (*b*)—it has been considered in England that a party ought not to be allowed to interrogate his opponent as to his title-deeds (*c*). He ought to show special circumstances to justify the application (*d*). Thus, in a suit for ejectment, the defendant should not be allowed to deliver interrogatories inquiring into the title on which the plaintiff relies, unless it be made to appear that the defendant is ignorant of the nature of the claim which the plaintiff intends to set up, and is unable to prepare his defence otherwise (*e*); but if that appear, he may put them (*f*); and Pollock, C. B., in 27 L. J., N. S., Ex., 505, limits the protection to a case in which the deeds prove only the case of the persons interrogated; if they prove the case of the interrogator, they may be the subject of interrogatories (*g*). This protection applies in India only to a witness who is not a party to the suit: Act I of 1872 (Indian Evidence Act), s. 130; and see the whole of chap. ix of that Act, in which various cases are enumerated where the person testifying may be excused from answering.

Nor ought the interrogator to be allowed to obtain information which he might obtain from his own agents (*h*), or to contradict a written instrument (*i*). Interrogatories may be put to a plaintiff to ascertain the true measure of the damages he has sustained, and so guide the defendant as to the amount he may fairly pay into Court (*j*). Thus, in an action for damages for the infringement of a copyright, the question put related to the number of copies the plaintiff had sold. Channel, B., quoting Ld. Tenterden, said (allowing the interrogatories), that a *bonâ fide* desire to meet the plaintiff's claim by paying money into Court showed an honest intention on the part of the defendant. In another case (*k*) this principle was not adhered to, there the action was for damages for

(*a*) Pye *v* Butterfield, 34 L. J., N. S., Q. B., 17.

(*b*) Taylor's Ev., § 1318.

(*c*) Adams *v.* Lloyd, 27 L. J., N. S., Ex., 499.

(*d*) Pearson *v.* Turner, 33 L. J., C. P., 224.

(*e*) Stoate *v.* Rew, 32 L. J., N. S., C. P., 160.

(*f*) Flitcroft *v.* Fletcher, 25 *ib.*, Ex., 94.

(*g*) See also Doe d. Avery *v.* Langford, 21 L. J., N. S., Q. B., 217.

(*h*) Bird *v.* Malzy, 1 C. B., N. S., 308.

(*i*) Moor *v.* Roberts, 26 L. J., N. S., C. P., 246.

(*j*) Wright *v.* Goodlake, 34 L. J., N. S., Ex., 82.

(*k*) Jourdain *v.* Palmer, 35 L. J., N. S., Ex., 69.

breach of a contract to pay a stamp duty on a patent, whereby the plaintiff lost the benefit of his invention, and the defendant sought to interrogate the plaintiff as to his use of, and profit on, the patent, his books of account, &c. The application was refused on the ground that the questions solely related to the plaintiff's case. *Wright* v. *Goodlake* was relied upon, but was held to be distinguishable. Martin, B., held that a defendant ought not to be allowed to call upon the plaintiff to limit his own damages. His Lordship stated that he had refused to allow a railway company, sued for compensation for damages occasioned by an accident, to interrogate the plaintiff as to his age, profession, income, movements after the accident, the doctors he had consulted, and the places to which he had gone. But in an action for breach of contract to hand over certain bills of exchange, the defendant having paid a shilling into Court, was allowed to interrogate the plaintiff as to whether he had sustained any and what damage by the breach of contract (*a*).

Interrogatories should not be allowed to be delivered to the defendant merely to fish out a case for the plaintiff; it would only increase the expense and make the proceedings vexatious (*b*). Nor will they be allowed where the application is not *bonâ fide*, but with some ulterior object (*c*), as explained by Pollock, C. B., in *Bickford* v. *D'Arcy* (*d*). In an action by an indorsee against an acceptor of a bill of exchange, the defence was that the acceptance was a forgery; the plaintiff was allowed to interrogate the defendant as to whether the acceptance was his or authorized by him; whether he had authorized B. to accept bills for him, or at the instance of B. had put his name on a blank bill stamp. But he was not allowed to interrogate him as to whether, on a particular occasion, he had not paid another forged acceptance under similar circumstances. The latter interrogatories, even if answered in the affirmative, would not have been evidence in the case (*e*). Where the action was for damages for slander, the Court disallowed interrogatories asking the defendant as to whether he had spoken the words laid in the declaration or any and what words

(*a*) Dobson *v.* Richardson, 37 L. J., N. S., Q. B., 261.

(*b*) Moor *v.* Roberts, 26 L. J., N. S., C. P., 246; Zarifi *v.* Thornton, *ib.*, Ex., 214; Zychlinski *v.* Maltby, 10 C. B., N. S., 838; Rew *v.* Hutchins, *ib.*, 829; Macaulay *v.* Shakell, 1 Bligh, N. S., 96; Edwards *v.* Wakefield, 6 E. & B, 462.

(*c*) Baker *v.* Lane, 34 L. J., N. S., Ex., 57.

(*d*) 35 *ib.*, Ex., 202.

(*e*) Morris *v.* Bethell, 38 L. J., N. S., C. P., 377.

conveying similar imputations, and when, where, and to whom he had spoken them: and it seems that interrogatories should not be allowed in an action for damages for slander, unless, from the peculiar circumstances of the case, the party would be without redress (*a*); but they were allowed where it did appear that the party could not otherwise obtain redress, as where it was shown that the defendant had stated publicly that the plaintiff had committed forgery, and the plaintiff was unable to discover from any of the persons who heard the statement what were the exact words used (*b*).

Where interrogatories appear to a Judge to be framed carelessly, and with too much latitude, so as in reality to throw upon him the trouble of settling them, he is not bound to select the one or two which he may think proper and to reject the others only, but may send them all back to be reformed (*c*). The Judge should not be asked to settle the interrogatories himself; he is not bound to do that for the parties; he should determine the principle on which they are to be allowed, but the parties should settle their form (*d*). A plaintiff in an interpleader suit may interrogate a defendant (*e*). The delivery of interrogatories may be ordered at any time, but this would not empower a plaintiff to frame his plaint upon the answers to the interrogatories. It must be after the plaint is filed (*f*). This principle is recognized by the proviso in the case of the defendant, who must first file his written statement. Interrogatories delivered before may be struck out (*g*).

Service of Interrogatories.

122 (S.) Interrogatories delivered under section 121 shall be served on the pleader (if any) of the party interrogated or in the manner hereinbefore provided for the service of summons, and the provisions of sections 79, 80, 81, and 82 shall, in the latter case, apply so far as may be practicable.

This is new, following on s. 121.

(*a*) Stern *v.* Sevastopulo, 32 L. J., N. S., C. P., 268.

(*b*) Atkinson *v* Fosbroke, 35 L. J., N. S., Q. B., 182.

(*c*) Phillips *v.* Lewin, 34 L. J., N. S., Ex., 37.

(*d*) Zarifi *v.* Thornton, 26 L. J., Ex., 214.

(*e*) White *v.* Watts, 30 L. J., N. S. C. P., 381.

(*f*) James *v.* Barnes, 25 L. J., N. S., C. P., 182; Jones *v.* Platt, 30 L. J., N. S., Ex., 365; Anonymous *v.* Parr, 34 *ib.*, Q. B., 95: Disney *v.* Longbourne, L. R., 2 Ch. Div., 704.

(*g*) Mercier *v* Cotton, L. R., 1 Q. B. Div., 442.

Inquiry into propriety of exhibiting interrogatories.

123. (S.) The Court, in adjusting the costs of the suit, shall, at the instance of any party, inquire or cause inquiry to be made into the propriety of delivering such interrogatories; and if it thinks that such interrogatories have been delivered unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault.

This corresponds to Order xxxi, Rule 2, under the English Judicature Act, 1875.

Service of interrogatories on officer of corporation or company.

124. (S.) If any party to a suit be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply to the Court for an order allowing him to deliver interrogatories to any member or officer of such corporation, company or body, and an order may be made accordingly.

This corresponds with Rule iv of the same Order, and applies whether the public officer be a shareholder or member of the corporation or not (*a*). The officer does not cease to be an officer of the company when there has been an order to wind it up, and may be interrogated as to facts which occurred before the winding up (*b*). In an action against a municipal corporation, for malicious arrest, false imprisonment, and malicious prosecution, the plaintiff was allowed to interrogate the town clerk as to whether he caused the plaintiff to be arrested, and, if so, under what authority he acted (*c*).

(*a*) McKewen *v.* Rolt, 28 L J., N. S., Ex., 380.

(*b*) Madrid Bank *v.* Bayley, 36 L. J., N. S, Q B, 15; see ss. 74—169 of 25 and 26 Vict, c. 89 (Co's Act, 1862), but the decision does not depend on the section, but on broad principle. The corresponding sections of the Indian Companies' Act (Act X of 1866), are ss 97—188.

(*c*) M'Fadzen *v.* Mayor and Corporation of Liverpool, 37 L. J., N. S., Ex, 193.

Power to refuse to answer interrogatories as irrelevant, &c.

125. (S.) Any party called upon to answer interrogatories, whether by himself or by any such member or officer, may refuse to answer any interrogatory on the ground that it is irrelevant, or is not put *bonâ fide* for the purposes of the suit, or that the matter inquired after is not sufficiently material at that stage of the suit, or on any other like ground.

Taken from Order xxxi, Rule 5, under the same Act, which, however, provides that the person interrogated may (not refuse to answer, but) apply to have the interrogatories struck out.

Time for filing affidavit in answer.

126. (S.) Interrogatories shall be answered by affidavit to be filed in Court within ten days from the service thereof or within such further time as the Judge may allow.

This corresponds with Rule vi of the same Order.

Procedure where a party omits to answer sufficiently.

127. (S.) If any person interrogated omits or refuses to answer, or answers insufficiently, any interrogatory, the party interrogating may apply to the Court for an order requiring him to answer or to answer further, as the case may be. And an order may be made requiring him to answer or to answer further either by affidavit or by *vivâ voce* examination as the Judge may direct: Provided that the Judge shall not require an answer to any interrogatory which in his opinion need not have been answered under section 125.

This corresponds with Rule x of the same Order.

The proper time for a person, who is to be interrogated, to take an objection to the interrogatories, on the ground that, by the rules of evidence, he ought not to be compelled to answer, is when he is called upon to answer them (*a*),—*i.e.*, when he is sworn and making

(*a*) Chester *v.* Wortley, 25 L. J., C. P., 117; see also Osborn *v.* The London Dock Co., 24 *ib*, Exch, 140; S. C., 10 Exch., 702.

his answer to the interrogatories (*a*). See Act I of 1872, s. 121 *et seq.*, as to when the party is protected from answering.

Power to demand admission of genuineness of documents.

128. (S.) Either party may, by a notice through the Court, within a reasonable time not less than ten days before the hearing, require the other party to admit (saving all just exceptions to the admissibility of such document in evidence) the genuineness of any document material to the suit.

The admission shall also be made in writing, signed by the other party or his pleader and filed in Court.

If such notice be not given, no costs of proving such document shall be allowed, unless the Judge otherwise orders.

If such notice is not complied with within four days after its being served, and the Judge thinks it reasonable that the admission should have been made, the party refusing shall bear the expense of proving such document, whatever may be the result of the suit.

This corresponds with Order xxxii, Rules 1—4.

Application for order for discovery of document.

129. (S.) The Court may, at any time during the pendency therein of any suit, order any party to the suit to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the suit, and any party to the suit may, at any time before the first hearing, apply to the Court for a like order.

Affidavit in answer to such order.

Every affidavit made under this section shall specify which, if any, of the documents therein mentioned the declarant objects to produce, together with the grounds of such objection.

This corresponds with Order xxxi, Rules 12 and 13.

Power to order production of documents during suit.

130. (S.) The Court may, at any time during the pendency therein of any suit, order the production by any party thereto of such of the documents in his possession or power relating to any matter in question in such suit or

(*a*) Bartlett *v.* Lewis, 31 L. J., N. S., C. P., 230.

proceeding as the Court thinks right; and the Court may deal with such documents when produced in such manner as appears just.

This corresponds with Rule xii of the same Order. The principle on which this production is ordered is this—

1. A man is not bound to disclose confidential communications between himself and his solicitor directly or through an agent who is to communicate them to the solicitor.

2. He is not bound to communicate evidence which he has obtained for the purpose of the litigation, collected by or under directions of his legal adviser, or by himself if he have no legal adviser (*a*).

Notice to produce for inspection documents referred to in plaint, &c.

131. (S.) Every party to a suit may, at any time before or at the hearing thereof, give notice through the Court to any other party in whose plaint, written statement or affidavits reference is made to any document, to produce such document in the presence of such officer as the Court appoints in this behalf, for the inspection of the party giving such notice or of his pleader, and to permit such party or pleader to take copies thereof.

Consequence of non-compliance with such notice

No party failing to comply with such notice shall afterwards be at liberty to put any such document in evidence on his behalf in such suit, unless he satisfies the Court that such document relates only to his own title, or that he had some other and sufficient cause for not complying with such notice.

This corresponds with Rule xiv of the same Order.

Party receiving such notice to deliver notice when and where inspection may be had

132. (S.) The party to whom such notice is given shall, within ten days from the receipt thereof, deliver through the Court to the party giving the same a notice stating a time within three days from such delivery at which the documents or such of them as he does not object to produce, may be inspected at his pleader's

(*a*) Anderson *v.* Bank of Brit Columbia, L. R., 2 Ch. Div., 659. Act I of 1872, s. 129

office or some other convenient place, and stating which, if any, of the documents he objects to produce, and on what grounds.

This corresponds with Rule xvi of the same Order

Application for order of inspection.

133. (S.) If any party served with notice under section 131 omits to give notice under section 132 of the time for inspection, or objects to give inspection, or names an inconvenient place for inspection, the party desiring it may apply to the Court for an order of inspection.

This corresponds with Order xxxi, Rules 17 and 18.

Application to be founded on affidavit.

134. (S.) Except in the case of documents referred to in the plaint, written statement, or affidavit of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing (a) of what documents inspection is sought, (b) that the party applying is entitled to inspect them, and (c) that they are in the possession or power of the party against whom the application is made.

This corresponds with Order xxxi, Rule 18.

Power to order issue or question on which right to discovery depends to be first determined.

135. (S.) If the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, and if the Court is satisfied that the right to such discovery or inspection depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any such issue or question should be determined before deciding upon the right to the discovery or inspection, the Court may order that the issue or question be determined first and reserve the question as to the discovery or inspection.

This corresponds with Order xxxi, Rule 19.

Consequences of failure to answer or give inspection.

136. (S.) If any party fail to comply with any order under this chapter to answer interrogatories or for discovery or inspection, which has been duly served, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as as if he had not appeared and answered;

and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and the Court may make such order accordingly.

Any party failing to comply with any order under this chapter to answer interrogatories or for discovery or inspection which has been served personally upon him, shall also be deemed guilty of an offence under section 188 of the Indian Penal Code.

This corresponds with Order xxxi, Rule 20. The Indian Penal Code, s. 188, provided a punishment for disobedience to an order duly promulgated by a public servant, of imprisonment, which may extend to one month or fine to 200 rupees, or both.

Where it is doubtful whether the person interrogated is wilfully refusing to answer, he should not be so deemed guilty (*a*).

Thus where an application was made to punish the defendant for not answering interrogatories, and the Court considered that the answers were on the whole sufficient, and there was no reason to believe (but the contrary) that the omission was intentional or designed to mislead or embarrass, and that verbal amendments might be made, they refused the application (*b*); and where the interrogatories had not been answered in due time, and the Court could not see (although there was in strictness no sufficient excuse) that there had been a wilful disregard of their authority, they refused to punish the defaulter, on the understanding that the answers were to be given at once (*c*).

(*a*) Von Hoff *v.* Hoerster, 27 L. J., N. S., Ex., 299; Turk *v.* Syne, *ib.*, 54; Windle *v.* Lane, 29 *ib.*, Ex., 245.

(*b*) Bender *v.* Zimmerman, 29 L J., N. S., Ex., 244.

(*c*) Windle *v.* Lane, *ib.*, 245.

137. (S.) The Court may, of its own accord, and may, in its discretion, upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

Court may send for papers from its own records or from other Courts

Every application made under this section shall (unless the Court otherwise directs) be supported by an affidavit of the applicant or his pleader, showing how the record is material to the suit in which the application is made, and that the applicant cannot, without unreasonable delay or expense, obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

Nothing contained in this section shall be deemed to enable the Court to use in evidence any document which under the Indian Evidence Act would be inadmissible in the suit.

This section corresponds with Act VIII of 1859, s. 138, and the interpretations put upon that section (*a*); for a Court is not bound to send for documentary evidence which is with the record of another case, and which a party alleges to be necessary to prove his case, on the ground that he was unable to procure the originals and that copies would be useless, as he could not get them attested; but a party requiring documents should proceed under s. 144, and this section (*b*). The second paragraph is taken from the judgment in the case of *Mollow March* v. *Rajah Pertab Chunder Sing* (*c*). The third is founded on the case of *Narappa bin Appa Hegdi* v. *Gapaya bin Kapaya* (*d*), where it was held that the

(*a*) Heeramun Roy *v.* Kazee Jahoour Enam, 7 Suth. W. R., 109, Seton-Karr and Markby, JJ.; Coraah *v* Gooroo Churn Ghose, 18 Suth. W. R, 13, Kemp and Glover, JJ.; *contra* Rugoonath Bose *v.* Oomed Ali, 1 Suth. W R, F B, 177

(*b*) Coraah *v.* Gooroo Churn Ghose, 18 Suth. W. R., 13, Kemp and Glover, JJ.

(*c*) 1 In Jur., N. S., 283.

(*d*) 2 Bom. H. C. Rep., 341, Forbes and Tucker, JJ.

plaint or written statement in another suit being verified might be used as evidence against the persons who verified them. See *ante*, note to s. 110.

Documentary evidence to be in readiness at first hearing.

138. (S.) The parties or their pleaders shall bring with them and have in readiness at the first hearing of the suit, to be produced when called for by the Court, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court at any time before such hearing has ordered to be produced.

This corresponds with s. 128 of Act VIII of 1859; and see ss. 58, 62, 63, and 70, *ante*. The parties are required to have the documents with them; but they need not file them at the first hearing (*a*). Sections 138, 139, 140, 141, corresponding with 128, 129, and 132 of Act VIII, must be read together; and documents produced and filed, if admissible in evidence, become thereby exhibits (*b*). The "first hearing" may here mean the first hearing at which evidence is taken, so that the parties must then also have their evidence ready (*c*).

Effect of non-production of documents.

139. (S.) No documentary evidence in the possession or power of any party the production of which has been called for under section 138, and which has not been produced, shall be received at any subsequent stage of the proceedings unless good cause be shown to the satisfaction of the Court for the non-production thereof. And the Judge receiving any such evidence shall record his reasons for so doing.

This corresponds with the second part of Act VIII of 1859 s. 128. The object of this section is to oblige the parties to produce

(*a*) Mahub Hossein *v.* Patasu Kumari, 1 B. L. R., A. C., 120, Loch and Glover, JJ.; S. C., 10 Suth. W. R., 179.

(*b*) Sreemut Raojee Gunesh *v.* Rao Jalee Pershad Bahadoor, 8 Suth. W. R., 91, L. S. Jackson, J.

(*c*) Gour Hurree Chowdhry *v.* Pran Hurree Laha, 21 Suth. W. R., 42, Kemp and Ainslie, JJ.

their documents at the earliest stage—the first hearing—and to avoid giving them an opportunity of forging documents to suit the case disclosed upon the settlement of the issues, or when the case has been partly heard; consequently, the parties are not, as of right, entitled to adduce fresh documentary evidence after the issues in the case are settled; but should they tender such evidence as they desire to adduce at a later stage of the case, they should state the grounds upon which it was not tendered at an earlier stage (*a*).

Documents to be received by Court.

140. (S.) The Court shall receive the documents respectively produced by the parties at the first hearing, provided that the documents produced by each party be accompanied by an accurate list thereof prepared in such form as the High Court may from time to time direct.

Rejection of irrelevant or inadmissible documents.

The Court may, at any stage of the suit, reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

This corresponds with Act VIII of 1859, s. 129. The documents must be received at the first hearing if accompanied by an accurate list. "After inspection," the phrase used in the old Code, is omitted; but the Judge must examine the documents, as he is to record his grounds for rejecting them should he do so. Thus an improperly stamped document should be refused admittance, or stamped with a penalty where this can be done (*b*).

No documents to be placed on record unless proved

141. (S.) No document shall be placed on the record unless it has been proved or admitted in accordance with the law of evidence for the time being in force. Every document so proved or admitted shall be endorsed with the number and title of the suit, the name of the person producing it, and the date on which it was produced. The Judge shall then endorse

Proved documents to be marked and filed.

(*a*) Watson *v.* Kunhye Bahadoor, 9 Suth. W. R., 294, Kemp and E Jackson, JJ.; Gopee Nath Mookerjee *v.* Boddhumunt Mal, 25 Suth. W. R., 26, L. S. Jackson and McDonell, JJ.

(*b*) Mantappa Nadgowda *v.* Baswuntrao Nadgowda, 14 Moo. I. A., 24.

with his own hand a statement that it was proved against or admitted by (as the case may be) the person against whom it is used. The document shall then be filed as part of the record:

Entries in shop-books.

Provided that, if the document be an entry in a shop-book or other book, the party on whose behalf such book is produced may furnish a copy of the entry, which may be endorsed as aforesaid, and shall be filed as part of the record, and the Court shall mark the entry and shall then return the book to the person producing it.

All documents produced at the first hearing, and not so proved or admitted, shall be returned to the parties respectively producing them.

This clause corresponds with Act VIII of 1859, s. 132; but declares, in addition, that the documents must be properly proved and admitted in evidence. This is nothing more than a declaration of what was the law; but it is a very necessary declaration. The general law in force as to the proof of documents is to be found in the Indian Evidence Act, I of 1872, chap. v. The endorsement in his own hand by the Judge of a statement that the document was proved or admitted, was not required by Act VIII of 1859.

Rejected documents to be marked,

142. (S.) When a document so proved or admitted is relied on as evidence by either party, but the Court considers it inadmissible, it shall be further endorsed with the addition of the word "rejected," and the endorsement shall be signed by the Judge.

and returned, unless detained by Court.

The document shall then be returned to the party who produced it.

This corresponds with Act VIII of 1859, s. 134, omitting the last part of the last clause of that section, which is, however, embodied in the next section.

Court may order any document to be impounded.

143. (S.) Notwithstanding anything contained in sections 62, 141, and 142, the Court may, if it see sufficient cause, direct any document or book produced before it in

any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

Corresponding with Act VIII of 1859, s. 39, last paragraph but one, and s. 134, last paragraph.

After lapse of time for appeal, document admitted in evidence may be returned.

144. (S.) In suits in which an appeal is not allowed, when the suit has been disposed of, and in suits in which an appeal is allowed, when the time for preferring an appeal from the decree has elapsed, or, if an appeal has been preferred, then after the appeal has been disposed of, any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit, and placed on the record, shall, unless the document is impounded under section 143, be entitled to receive back the same:

When document may be returned before time limited.

Provided that a document may be returned at any time before either of such events, if the person applying for such return delivers to the proper officer a certified copy of such document to be substituted for the original:

Document not to be returned in certain cases.

Provided also that no document shall be returned which, by force of the decree, has become void or useless.

Receipt to be given for returned document.

On the return of a document which has been admitted in evidence, a receipt shall be given by the party receiving it, in a receipt-book to be kept for the purpose.

Paragraphs 1 and 3 of this section correspond with Act VIII of 1859, s. 135. The second paragraph corresponds with s. 136; the last but one is new; and the last corresponds with s. 137.

Copies are only required to be furnished to the Court when the return of the originals is required in pending cases (*a*).

(*a*) Parbutty Churn Roy Chowdhry, 8 Sev., 199.

145. (S.) The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

Provisions as to documents applied to material objects.

This is a new provision. See s. 3 of the Indian Evidence Act, I of 1872, the definitions of the words 'document' and 'evidence.'

CHAPTER XI.

OF THE SETTLEMENT OF ISSUES.

146. Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

Framing of issues.

Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue.

Each material proposition affirmed by one party and denied by the other must form the subject of a distinct issue.

Issues are of two kinds : (a) issues of fact, (b) issues of law.

At the first hearing of the suit, the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to the Court to depend.

When issues both of law and of fact arise in the same suit, and the Court is of opinion that the case may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

Nothing in this section requires the Court to frame and record issues when the defendant at the first hearing of the suit makes no defence.

This section corresponds with Act VIII of 1859, s. 139; but includes an explanation of the term 'issue.'

It has been held that the fixing of issues is imperative (*a*), except when the defendant does not make a defence, or when it is plainly unnecessary. But where the Court of original jurisdiction decided a case (*b*) without settling issues, and the plaintiff, who was the loser, appealed and took no objection to the omission in his grounds of appeal, but objected to the decision on the ground that the case was decided on the day on which the defendants had filed their written statements, and that he had consequently no opportunity of adducing evidence to disprove their allegations, the High Court, in giving judgment on the appeal, observed upon the fact that the issues had not been fixed, and stated that it would have been more regular to have fixed them. But, from the nature of the case, there could only be one issue, and the plaintiff could not have been misled by the omission. On the merits of the case the decision of the lower Court was upheld. The plaintiff appealed to the Queen in Council, and contended that as no issues had been fixed, there had been a mis-trial; that the law (s. 139 of Act VIII of 1859) was imperative as to the fixing of issues. The case of *Baboo Rewan Pershad* was relied on, as well as some cases under the earlier Indian Regulations relating to procedure. The Judicial Committee, while concurring with the High Court in its opinion that the Judge below ought to have settled the issues, held, that it was not a case for a remand to India for that purpose. The counsel for the appellant had admitted that he had no case on the merits. The case of *Baboo Rewan Pershad* was distinguished, as in that case the questions to be tried were of a complicated nature. In a suit against a zemindar by a member of his family for maintenance out of the zemindary, no issues (as directed by this section) were fixed. It was held by the Judicial Committee, (1) that the omission was not fatal, as the Court did direct an enquiry on the points raised between the parties, and could proceed to decision in the manner indicated by s. 351 of Act VIII, corresponding with s. 562, *post*; and that (2) as

(*a*) Baboo Rewan Pershad *v.* Jankee Pershad, 11 Moo. I. A., 25.

(*b*) Musst. Mitna *v.* Syad Fuzlrub, 6 B. L. R, 148; S. C., 13 Moo. I. A., 573.

the Court had directed an enquiry as to maintenance, that was to be deemed equivalent to an issue (*a*). The principle of these decisions is embodied in s. 578, *post*, which provides that no decree shall be reversed, &c., for any irregularity not affecting the merits of the case.

A plaintiff will not, however, be allowed to set up one case, and, having proved another, to ask for issues to be raised to suit the proof; but when a plaint and its proof necessarily lead to one or more particular issues, it is the duty of the Court, if these issues do not come by surprise on the defendant, to raise such issues (*b*). A statement was prefixed to the issues settled in the Court below to the effect that, "the vakeels of the parties accept the following issues;" it was held, that it was not competent, after such a consent, to object that a material issue was omitted (*c*). An admission by a vakeel, however, does not stand upon the same footing as an admission by counsel (*d*) and it is doubtful whether the objection would now be shut out. The plaint and the written statements constitute the pleadings in a suit under this Code, and issues may be framed upon them (*e*). But this section also allows issues to be framed from the oral examination of the parties (*f*). At the settlement of issues, the defendant paid money into Court, which the plaintiff took out in part satisfaction of his claim, and raised an issue as to damages. The plaintiff subsequently accepted the sum paid in full satisfaction, and withdrew the suit: it was held that the plaintiff was entitled to payment of his costs up to and including those of settlement of issues (*g*).

(*a*) Katchekaleyana Rungappa Kalakka Tola Oodier *v.* Kachivijaya Rungappa Kalakka Tola Oodier, 12 Moo. I. A., 495. But see Srimut Moottoo *v.* Rany Anga Moottoo, 3 *ib*, 278.

(*b*) Obhoy Churn Mullick *v.* Woomeschunder Paul, 2 Hyde, 263, Peterson, J.

(*c*) Musst. Sabitra Monee *v.* Mudhoo Soodun Singh, Marsh., 519, Bayley and Campbell, JJ.

(*d*) Abdul Sabhan Chowdhry *v.* Shibkisto Daw, 3 B. L. R., Apx., 15; Munshi Amir Ali *v.* Maharani Inderjit Koer, 9 B. L. R., 462.

(*e*) Kissenloll *v.* Lalljeemull, 1 In. Jur., N. S., 364, Phear, J.

(*f*) See as to this Reid *v.* Mahomed Zamakhan, S. D. A, N. W. P., 1863, p. 622; Koberooddeen Ahmed *v.* Nyan Bibee, 8 Suth. W. R, 354, Hobhouse and Mitter, JJ.; Mackintosh *v.* Temple, 2 In. Jur., N. S., 333 Markby, J.; Nilkant Chatterjee *v.* Peari Mohan Das, 3 B. L. R., O. C. J, 78, Peacock, C. J., and Macpherson, J.; Musst. Kowsullya Dossee *v.* Ram Juggernath Dey Sircar, 8 Suth. W. R., 162, L. S. Jackson and Hobhouse, JJ.

(*g*) Ardaseer Limjee *v.* Sorabjee Pestonjee and others, 1 Bom. H. C. Rep., 70, 1st ed., Couch, J.

A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings (*a*).

Allegations from which issues may be framed.

147. The Court may frame the issues from all or any of the following materials:—

(*a*) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties or persons;

(*b*) allegations made in the plaint or in the written statements (if any) tendered in the suit, or in answer to interrogatories delivered in the suit;

(*c*) the contents of documents produced by either party.

See also Act VIII of 1859, s. 139.

Although the Court may refer to all these sources to fix issues, the plaint and written statement ought to be sufficient of themselves (*b*).

The Court should not add an issue or amend the plaint so as to raise a wholly different question to that on which the parties have come into Court (*c*).

Court may examine witnesses or documents before framing issues.

148. If the Court be of opinion that the issues cannot be correctly framed without the examination of some person not before the Court, or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day to be fixed by the Court, and may (subject to the rules contained in the Indian Evidence Act) compel the attendance of any person or the production of any document by the person in whose hands it may be, by summons or other process.

This corresponds with Act VIII of 1859, s. 140.

(*a*) Mohummud Zahoor Ali Khan v. Musst. Thakooranee Rutta Koer, 11 Moo. I A, 468.

(*b*) Anund Chunder Bonnerjee v. Woomes Chunder Roy, 1 Hyde, 147.

(*c*) Bizie Bibee v. Monohur Doss, 2 In. Jur., N. S, 118, Markby, J.

Power to amend, add and strike out issues.

149. The Court may, at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the controversy between the parties shall be so made or framed.

The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

This corresponds with Act VIII of 1859, s. 141.

The proviso is in accordance with the decision on s. 141 in a case (*a*) decided by Loch and Glover, JJ. It has been held by Markby, J., that fresh issues cannot be added unless some new matter turns up in the course of the trial (*b*). But every matter fairly within the scope of the plaint should, when the evidence causes it to appear, be framed into an issue, if it is important for the decision of the substantive difference between the parties. This is a duty cast upon the Court in order to render substantial justice, and to prevent a party being remitted to a new suit, when, by a suitable order as to the terms upon which amendment shall be made, the Court, by framing additional issues, can determine, in the existing suit, the real question in controversy between the parties (*c*). Where the Court of first instance sees reason to doubt whether the real nature of the transaction between the parties is raised by the pleadings, it is incumbent on it to amend or frame such issues as it may think fit according to the provisions of this section (*d*).

The Judge is not bound to try the suit merely on the case made out in the plaint; he should determine the real question between the parties, amending the issues under this clause if necessary (*e*). In amending the issues the Judge ought not, in all cases, to strike out the names of parties to the suit who appear to have been improperly joined; thus, where there were four plaintiffs named in the suit, but it appeared that only two were actually

(*a*) Tarucknath Mookerjee *v.* Gouree Churn Mookerjee, 3 Suth. W. R., 147.

(*b*) Aga Syud Saduk *v.* Hajee Jackariah Mahomed, 2 In. Jur., N. S., 308.

(*c*) Kishen Pershad *v.* Bhawaneè Deen, 1 H. C., N. W. P., F. B. R., 46, citing Jankee Dass *v.* Dwarka Doss, 7 S. D. A., N. W. P., 147.

(*d*) Nundo Lall Mitter *v.* Prosunno Moyee Debia, 19 Suth. W. R., 333, L. S. Jackson and Mitter, JJ.

(*e*) Abuthnot *v.* Betts, 6 B. L. R., 273, Couch, C. J., Jackson and Glover, JJ.

interested, it was held to be erroneous to strike out the names of the other two, for if the suit failed, the defendants would be injured, they would have only two persons to look to for their costs instead of four (*a*); although the Court has power to strike them out. See s. 53, *ante*, and chap. iii, *ante*, as to the amendment of the plaint. The same objection would not, of course, apply to the addition of parties, which can be done at the hearing under chap. iii.

Questions of fact or law may by agreement be stated in the form of an issue.

150. When the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing

(*a*) that upon the finding of the Court in the affirmative or the negative of such issue, a sum of money specified in the agreement, or to be ascertained by the Court or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement,

(*b*) that upon such finding some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct, or

(*c*) that upon such finding one or more of the parties shall do or abstain from doing some particular act, specified in the agreement, and relating to the matter in dispute.

This corresponds with Act VIII of 1859, s. 142, and is partly copied from 15 and 16 Vict., c. 76, s. 47.

It is to be observed that the Special Case Act (Sir G. Turner's), which was applied to the High Courts in the Presidency Towns in this country (see Act XVII of 1852), is now repealed by this Act (see sched. i).

Court, if satisfied that the agreement was executed in good faith, may pronounce judgment.

151. If the Court be satisfied after making such inquiry as it deems proper,

(*a*) E. I. Ry. Co *v* Jordan, 4 B. L R, O. C., 97.

(*a*) that the agreement was duly executed by the parties,

(*b*) that they have a substantial interest in the decision of such question as aforesaid, and

(*c*) that the same is fit to be tried and decided,

it may proceed to record and try the issue, and state its finding or opinion thereon in the same manner as if the issue had been framed by the Court;

and may, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement;

and upon the judgment so given, decree shall follow and may be executed in the same way as if the judgment had been pronounced in a contested suit.

This corresponds with Act VIII of 1859, s. 143.

CHAPTER XII.

DISPOSAL OF THE SUIT AT THE FIRST HEARING.

If parties are not at issue on any question of law or fact.

152. If at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

This corresponds with Act VIII of 1859, s. 144.

If one of several defendants be not at issue with the plaintiff.

153. Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or fact, the Court may at once pronounce judgment for or against such defendant, and the suit shall proceed only against the other defendants.

This section is new.

If parties are at issue on questions of law or fact.

154. When the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court be satisfied that

no further argument or evidence than the parties can at once supply is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forth. with, the Court may proceed to determine such issues,

Court may determine issue and pronounce judgment.

and if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit:

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them object.

If the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument, as the case requires.

This corresponds with Act VIII of 1859, s. 145, except the last proviso of that section, which is omitted here but placed in the next section.

In the first proviso, at the end, the words "after hearing such argument or evidence" after the word "may" in the old Act, are omitted; but the hearing such argument and evidence is presupposed.

The third paragraph, "provided that, &c.," and the following paragraphs, are new.

Where the issues were framed, and the plaintiff and defendant were ready and willing to proceed, it was held that the sitting Judge at Chambers had power under s. 145 (of the old Act) to proceed to the hearing and final disposal of the case (*a*). The point in this decision cannot arise in the mofussil, where the Court is composed of a single Judge, who presides throughout the trial. Although a case may be set down for final disposal, yet, if it be clear that further evidence is required, the Judge is bound, under this section, to adjourn it, unless he be satisfied that the plaintiff has, without sufficient cause, failed to produce his evidence (*b*).

(*a*) Anon., In. Jur., O. S., 14.

(*b*) Moonshee Syud Ameer Ali *v* Baboo Run Bahadoor Singh, 7 Suth. W. R., 84, Kemp and Markby, JJ.

155. (S.) If the summons has been issued for the final disposal of the suit, and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment,

If either party fails to produce his evidence, Court may pronounce judgment.

or may, if it thinks fit, after framing and recording issues under section 146, adjourn the suit for the production of such evidence as may be necessary to its decision upon such issues.

Procedure where Court cannot pronounce judgment at first hearing.

The first part of this section corresponds with the last paragraph of the proviso in s. 145 of Act VIII of 1859. The second paragraph is new, and does not apply to Small Cause Courts in the mofussil.

CHAPTER XIII.

OF ADJOURNMENTS.

156. (S.) The Court may, if sufficient cause be shown at any stage of the suit, grant time to the parties, or to any of them, and may, from time to time, adjourn the hearing of the suit.

Court may grant time, or adjourn hearing.

In all such cases the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment.

Costs of adjournment.

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing to be necessary for reasons to be recorded by the Judge with his own hand.

The first two paragraphs of this section correspond with Act VIII of 1859, s. 146; but the second paragraph gives the Court a wider discretion as to costs. The last paragraph is new, and seems

to have been enacted in order the more emphatically to condemn the old practice which prevailed in the mofussil, of hearing a part of a case and then taking up another as the witnesses happened to be in attendance, which practice, however, appears to have been the result of the rule which obliges the Court to fix a particular day for the hearing of the suit, instead of making a list of cases and allowing them to be heard in their turn, as has been hitherto done on the Original Side of the High Courts; but this method of proceeding is not provided for by this Code. See note to s. 69.

Procedure if parties fail to appear on day fixed.

157. (S.) If, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Chapter VII, or make such other order as it thinks fit

This corresponds with Act VIII of 1859, s. 147. Chap. vii of this Act, ss. 96 to 109 inclusive, relate to the appearance of the parties and the consequence of non-appearance. No orders made under the provisions of that chapter are appealable, except orders rejecting applications under s. 103 (in cases open to appeal); for an order to set aside the dismissal of a suit in cases where the defendant appears and the plaintiff does not do so, see s. 588 (f), *post*. Where the parties to a suit appeared on the day fixed for the first hearing, and on the application of the defendants the hearing was adjourned in order to enable them to obtain certain documents and put in written statements, and they failed to do this or to appear at the adjourned hearing, and a decree was given against them, it was held that this decree was not *ex parte*, but a decree under s. 148 of Act VIII, corresponding with section 158 of this Code, and was therefore appealable (*a*). This section does not apply to a case where no day has been fixed for the hearing (*b*).

Court may proceed notwithstanding either party fails to produce his evidence.

158. (S.) If any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act

(*a*) Rangasamy Mudelliar *v.* Sirangan, 4 Mad. H. C. Rep., 254, Scotland, C. J., and Collett, J.

(*b*) Baboo Seetaram Sahoo *v.* Roy Baboo Sheo Gollam Sahoo Bahadoor, 18 Suth. W. R., 325, Couch, C. J., and Ainslie, J.

necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

This corresponds with s. 148 of Act VIII of 1859.

The first hearing of a suit took place on the 16th of November, when issues were settled, and the final hearing of the suit was fixed for the 22nd of January following. On the 22nd of January the plaintiff changed her vakeel, and applied by a new vakeel for a summons to a witness; and on the 23rd, the new vakeel stated that, owing to the absence of his witnesses, he was not prepared to go on with the case. The Judge dismissed the suit, and it was held that he was right in so doing, but that his decision was a decree and was open to appeal (*a*). Where adjournments are made by a Court in order to give effect to its processes for compelling the attendance of the witnesses, being thus made as much on its own motion at the instance of the defendant as at the instance of the plaintiff, the case cannot be said to come under this section, which contemplates a case where a party has obtained time to produce his witnesses and has failed to do so (*b*).

Where the suit had been dismissed for non-appearance under s. 114, corresponding with s. 102 of this Act, and ultimately the Appellate Court sent it back to the Judge for his determination in the manner provided by s. 148, corresponding with this section, it was held that the Judge had no power to take new evidence. Nor, if he did so, could the Court of appeal act upon it (*c*). Section 148, however, directed the Court to decide the suit "on the record," which was the ground on which new evidence was in that case excluded. These words are omitted in this section; but it seems to be intended, nevertheless, that the suit shall be decided on the evidence as it stands when the party is in default as is here described, and therefore that no new evidence ought to be admitted in such a case.

(*a*) Comalammal *v.* Rungaswamy Iyengar, 4 Mad., 56, Bittleston and Ellis, JJ.

(*b*) Pearee Mohun Bera *v.* Shama Churn Mytee, 19 Suth W. R, 35, Couch, C. J., and Glover and Mitter, JJ.

(*c*) Padma Lochan *v.* Sirdar Khan, 3 B. L. R., Apx, 91, Bayley and Hobhouse, JJ.

CHAPTER XIV.

OF THE SUMMONING AND ATTENDANCE OF WITNESSES.

Summons to attend to give evidence or produce documents.

159. (S.) The parties may, after the summons has been delivered for service on the defendant, whether it be for the settlement of issues only, or for the final disposal of the suit, obtain, on application to the Court or to such officer as it appoints in this behalf, before the day fixed for such settlement or disposal, as the case may be, summonses to persons whose attendance is required either to give evidence or to produce documents.

This corresponds with Act VIII of 1859, s. 149; the words "or to such officer as it appoints in this behalf" are added; and the words "and in any such summons the names of any number of persons may be inserted" are here left out; but that section allowed of the issue of a summons to witnesses only after issues had been recorded, where the summons was for settlement of issues. Now the summons may issue to witnesses at any time after the issue of the summons for service on the defendant. Any number of applications may be made for summonses to witnesses before the hearing (*a*); and a party is entitled to obtain summonses for witnesses at any time before the case is tried (*b*). As to witnesses' privilege from arrest, see s. 642, *post*.

Expenses of witnesses to be paid into Court on applying for summons.

160. (S.) The party applying for a summons shall, before the summons is granted and within a period to be fixed by the Court, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned, in passing to and from the Court in which he is required to attend, and for one day's attendance.

(*a*) Anurup Chandra Mukhopadhya *v.* Hiramani Dasi, 3 B. L. R., Apx., 38, Markby and Jackson, JJ.

(*b*) Gora Chand Ghose *v.* Raj Kumar Dass, 5 Suth. W. R., 111; Indro Chunder Baboo *v.* Dunlop and others, 9 Suth. W. R., 530.

Scale of expenses.

If the Court be subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to the rules (if any) laid down by competent authority.

This corresponds with the first two clauses of Act VIII of 1859, s. 151. The words "before the summons is granted and within a time to be fixed by the Court" are added; and the words "subordinate to a High Court" are substituted for "a subordinate Court;" as to this, see the definition of "District Court" in s. 2, *ante*.

A witness is not entitled to any compensation for mere loss of time (*a*). The party is not bound to pay into Court the expenses of witnesses until the Court has fixed what is reasonable (*b*).

Tender of expenses to witness.

161. (S.) The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

This corresponds with the third paragraph of Act VIII of 1859, s. 151.

Procedure where insufficient sum paid in.

162. (S.) If it appear to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account; and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned without requiring him to give evidence, or may both order such levy and discharge such person as aforesaid.

(*a*) Nawab Nazim of Bengal *v.* Rajah Prosonnonarain Deb, 2 Hyde, 236, Levinge, J.

(*b*) Mohun Mundur *v.* Brij Bhookun Singh, 9 Suth. W. R., 128, Peacock, C. J., and Mitter, J.

Expenses if witness detained more than one day.

If it be necessary to detain the person summoned for a longer period than one day, the Court may from time to time order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of the party at whose instance he was summoned; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

This corresponds with the fourth and succeeding paragraphs of s. 151 of Act VIII of 1859, adding in the first paragraph of this section "or to such officer as it appoints," which seems to give the officer of the Court power to review the decision of the Court itself arrived at under s. 162; but if he represents to the Judge that the money is not sufficient, the Judge, and not the officer, passes the order for the payment of a further sum. The last words of this paragraph "or may both order such levy and discharge such person as aforesaid" are also added; and in the second paragraph the words "order such sum to be levied by attachment and sale of the moveable property of the party at whose instance he was summoned, or the Court may" and "or may both order such levy and discharge such person as aforesaid," are also added.

Time, place, and purpose of attendance to be specified in summons.

163. (S.) Every summons for the attendance of a person to give evidence or produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document which the person summoned is called on to produce shall be described in the summons with reasonable accuracy.

This corresponds with Act VIII of 1859, s. 152.

Summons to produce document.

164. (S.) Any person may be summoned to produce a document without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons, if he cause such document to be produced instead of attending personally to produce the same.

This corresponds with Act VIII of 1859, s. 153. The words "whether a party to a suit or not" after "any persons" are here omitted; but the section is general, and includes a party as well as a witness.

Power to require person present in Court to give evidence.

165. (S.) Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his actual possession or power.

This is new; it is a declaration of what was the law and practice. The issue of a summons was with the object of enforcing attendance; when the witness is present, the summons is of course unnecessary.

Summons how served.

166. (S.) Every summons to a person to give evidence or produce a document shall be served as nearly as may be in manner hereinbefore prescribed for the service of summons on the defendant; and the rules contained in Chapter VI as to proof of service shall apply in the case of all summonses served under this section.

This section combines in one clause the provisions of ss. 154 to 158 inclusive, and renders the service of process uniform, whether for the purpose of summoning a defendant or a witness.

Time for serving summons.

167. (S.) The service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for pre-

paration and for travelling to the place at which his attendance is required.

This corresponds with the second part of s. 154 of Act VIII of 1859.

Attachment of property of absconding witness.

168. (S.) If the serving-officer certify to the Court that the summons for the attendance of a person, either to give evidence or to produce a document, cannot be served, the Court shall examine the serving-officer on oath touching the non-service:

and upon being satisfied that such evidence or production is material, and that the person for whose attendance the summons has been issued is absconding or keeping out of the way for the purpose of avoiding the service of the summons, may issue a proclamation requiring him to attend to give evidence, or produce the document, at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door of the house in which he ordinarily resides.

If he does not attend at the time and place named in such proclamation, the Court may, in its discretion, at the instance of the party on whose application the summons was issued, make an order for the attachment of the property of the person whose attendance is required, to such amount as the Court thinks fit, not exceeding the amount of the costs of attachment and of the fine which may be imposed under section 170.

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

This corresponds with Act VIII of 1859, s. 159. The Court is, however, to examine the serving-officer on oath touching the non-service. This is in accordance with the decisions already referred to in s. 81, *ante*, to the effect that the return of the nazir is no evidence (*a*). Under the Act of 1859, the proclamation was to be fixed upon "some conspicuous place upon his house or place of abode."

(*a*) Obhoy Chunder Dutt *v.* Erskine, 3 Suth. W. R., Mis., 11; Sreenath Thakoor *v.* Watson, 4 *ib.*, Mis., 4; Koordunlall *v.* Noor Ali, 10 *ib.*, 3.

The proviso as to Small Cause Courts is new.

The discretion vested in the Court as to the attachment of the property must be, as in all cases where discretion is given, exercised in a reasonable manner, not arbitrarily (*a*); and the Court, on an application for an attachment, should enquire into the matter, and not summarily dismiss the application and decide the case against the applicant (*b*).

If witness appears, attachment may be withdrawn.

169. (S.) If, on the attachment of his property, such person appears and satisfies the Court that he did not abscond or keep out of the way to avoid service of the summons, and that he had not notice of the proclamation in time to attend at the time and place named therein, the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

This corresponds with the first paragraph of Act VIII of 1859, s. 160.

Procedure if witness fails to appear.

170. (S.) If such person does not appear, or appearing fails to satisfy the Court that he did not abscond or keep out of the way to avoid service of the summons, and that he had not notice of the proclamation in time to attend at the time and place named therein, the Court may impose upon him such fine not exceeding five hundred rupees as the Court thinks fit, having regard to his condition in life and all the circumstances of the case, and may order the property attached, or any part thereof, to be sold for the purpose of satisfying all costs incurred in consequence of such attachment, together with the amount of the said fine, if any:

Provided that if the person whose attendance is required pays into Court the costs and fine as aforesaid, the Court shall order the property to be released from attachment.

This corresponds with the second and last paragraphs of the 160th section of Act VIII of 1859, and re-establishes the power of

(*a*) Poran Chunder Ghose *v.* Gopeenath Singh, 8 Suth. W. R., 505.

(*b*) Sheik Jafur *v.* Gooroo Pershad Doss Potedar, 3 *ib.*, 97.

the Court to inflict a fine; although the word 'fine' was used, it had been considered that the Court had no power under that Act to inflict one. It was to impose such fine as could be imposed by any law in force for that purpose. Section 160 gave directions as to the application of the fine, but the older Act, which enabled the Court to levy the fine, had been repealed. The Court has now a discretion to impose a fine up to five hundred rupees.

Court may, of its own accord, summon as witnesses strangers to suit.

171. (S.) Subject to the rules of this Code as to attendance and appearance and to the provisions of the Indian Evidence Act, if the Court at any time thinks it necessary to examine any person other than a party to the suit, and not named as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

The first part of this clause, down to the words "Evidence Act," is new; the rest corresponds with Act XXIII of 1861, s. 9, which section, however, contained an additional provision giving priority to the costs of summoning the witness by the Court of its own motion.

Persons summoned to give evidence must attend.

172. (S.) Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit must attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document must either attend to produce it, or cause it to be produced, at such time and place.

This corresponds with Act VIII of 1859, s. 167; the clause relating to documents being added.

Persons who may be exempted from attendance in Court, and rely on the testimony of others, must take the consequences if their witnesses are not believed (*a*). They may, however, be examined themselves by commission; see ss. 383, 384, and 385, *post*.

(*a*) See the remarks of Peacock, C. J., in Rajah Nursing Deb *v.* Rammohun Mookerjee, Marsh. 176; S. C., Suth. W. R., F. B., 54.

When they may depart.

173. (S.) No person so summoned and attending shall depart unless and until (a) he has been examined or has produced the document and the Court has risen, or (b) he has obtained the Court's leave to depart.

This is new.

Consequences of non-attendance.

174. (S.) If any person on whom a summons to give evidence or produce a document has been served fails to comply with the summons, or if any person so summoned and attending departs in contravention of section 173, the Court may order him to be arrested and brought before the Court:

Provided that no such order shall be made when the Court has reason to believe that the person so failing had a lawful excuse for such failure.

When any person so brought before the Court fails to satisfy it that he had a lawful excuse for not complying with the summons, the Court may sentence him to fine not exceeding five hundred rupees.

Explanation.—Non-payment or non-tender of a sum sufficient to defray the expenses mentioned in section 160 shall be deemed a lawful excuse within the meaning of this section.

Consequences of refusal to give evidence or produce documents.

If any person so apprehended and brought before the Court cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and on such bail or security being given, may release him.

The first part of this section corresponds with the first part of Act VIII of 1859, s. 168, but includes a person who attending departs in contravention of the last section. The rest of the section is new.

Procedure when witness absconds.

175. (S.) If any person so failing to comply with a summons absconds or keeps out of the way, so that he cannot be apprehended and brought before the Court, the provisions of sections 168, 169, and 170 shall, *mutatis mutandis*, apply.

This corresponds with the second part of Act VIII of 1859, s. 168.

Person summoned to attend in person if so required.

176. (S.) No one shall be bound to attend in person to give evidence or to be examined in Court unless he resides—

(*a*) within the local limits of its ordinary original jurisdiction, or

(*b*) without such limits and at a place less than fifty or (where there is railway communication for five-sixths of the distance between the place where he resides and the place where the Court is situate) two hundred miles distant from the Court-house.

This is a new provision. Facilities are given by this Code for the examination of witnesses by affidavit under chap. xvi, and of the parties by interrogatories under chap. x.

Consequence of refusal of party to give evidence when called on by the Court.

177. (S.) If any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence, or to produce any document then and there in his actual possession or power, the Court may in its discretion either pass a decree against him, or make such other order in relation to the suit as the Court thinks fit.

This corresponds with Act VIII of 1859, s. 126, omitting the materiality of the evidence which was essential under Act VIII (*a*).

Rules as to witnesses to apply to parties summoned.

178. (S.) Whenever any party to a suit is required to give evidence or to produce a document, the rules as to witnesses contained in this Code shall apply to him so far as they are applicable.

This is new. The party giving evidence becomes in fact a witness.

(*a*) Krishnaji A. Nimkar *v.* Vishnu A. Nimkar, 2 Bom. H. C. Rep., 360.

CHAPTER XV.

Of the Hearing of the Suit and Examination of Witnesses.

Statement and production of evidence by party having right to begin.

179. (S.) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

Rule as to right to begin.

Explanation.—The plaintiff has the right to begin unless where the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

This section is new, and for the first time in the Code of Procedure alludes to the "right to begin"—a right of less importance where the case is conducted before a single Judge than when it is tried by a jury, with whom it has always been considered advantageous to have the last word.

It seems from the Explanation that, in order to claim the right to begin, the defendant must admit the facts alleged by the plaintiff,—that is to say, all the facts which would otherwise require to be proved; in fact, it expresses in other words the old rule (see Taylor on Evidence, § 350 *et seq*) that the party on whom the burden of proof (see Act I of 1872, Part III) lies, must begin; consequently, the omission to admit facts which need not be proved (*ib.*, Part II) is immaterial; if the rest are admitted, and the defendant intends to rebut them as described herein, he must begin. The admission may apparently be made either in the written statement or in Court.

Statement and production of evidence by other party.

180. (S.) The other party shall then state his case and produce his evidence (if any).

Reply by party beginning.

The party beginning is then entitled to reply.

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party. In the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

This section, which is new, seems to give the party who begins a right to reply although the other side call no evidence.

Witnesses to be examined in open Court.

181. (S.) The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

This section and the following sections (to s. 190 inclusive) correspond with s. 172 of Act VIII of 1859, and point out the manner in which the witnesses are to be examined; as to which see further, chap. x of the Indian Evidence Act, I of 1872; and as to the oath or affirmation to be administered to the witness, see Act X of 1873 (Indian Oaths Act). The High Courts may take evidence according to their own rules, chap. xlviii, *post*.

The present section corresponds with the first part of s. 172, and it relates chiefly to the evidence of witnesses tendered and examined by the parties to the cause; but it applies also generally, including the taking of evidence by the Judge when the witness is in attendance, although he may not have been called by the party; it does not, however, render this examination by the Judge imperative, merely because the witness has been summoned or is in attendance (*a*).

How evidence shall be taken in appealable cases.

182. In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under

(*a*) Sreemutty Ranee Doorga Soonduree *v.* Ranee Hurree Monee, 2 Suth. W. R., 166, Bayley and Macpherson, JJ.

the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and also in the presence of the parties or their pleaders, and the Judge shall, if necessary, correct the same and shall sign it.

This corresponds with the second clause of s. 172 of Act VIII of 1859.

When witness may require his deposition to be interpreted.

183. If the evidence is taken down under section 182 in a language different from that in which it was given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it was given.

This corresponds with paragraph 3 of s. 172 of Act VIII of 1859, but that Act only required the evidence to be interpreted to the witness if he required it; it must now always be interpreted to him.

Memorandum when evidence is not taken down by Judge.

184. In cases in which the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall form part of the record.

This corresponds with paragraph 8 of s. 172 of Act VIII of 1859. The memorandum was under that Act to "accompany" the record.

When evidence may be taken in English.

185. Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down with his own hand.

This corresponds with paragraph 4 of s. 172 of Act VIII of 1859, adding "where English is not the language of the Court."

Any particular question and answer may be taken down.

186. The Court may, of its own motion or on the application of any party or his pleader, take down, or cause to be taken down, any particular question and answer, or any objection to any question, if there appear any special reason for so doing.

This corresponds with paragraph 5 of s. 172 of Act VIII of 1859, but that clause rendered it incumbent upon the Court to take down the question and answer only, not the objection, and always when the party or his pleader required it. There must now be a special reason for so doing, and the Court is to take down the objection if there be one, as well as the question and answer.

Questions objected to.

187. If any question put to a witness be objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection, and the name of the person making it, together with the decision of the Court thereon.

This corresponds with paragraph 6 of s. 172 of Act VIII of 1859, and obliges the Court to take down the question, answer, and objection, &c., when the question is allowed. When it is disallowed, the Court should, under the last section, see a special reason for taking these down.

Remarks on demeanour of witnesses.

188. The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

This corresponds with paragraph 7 of s. 172 of Act VIII of 1859.

Memorandum of evidence in unappealable cases.

189. (S.) In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall form part of the record.

This corresponds with the 9th paragraph of s. 172 of Act VIII of 1859.

190. (S.) If the Judge be rendered unable to make a memorandum as above required by this chapter, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

Judge unable to make such memorandum to record reason of his inability.

Every memorandum so made shall form part of the record.

This corresponds with the 10th and last paragraph of s. 172 of Act VIII of 1859; but applies apparently to all cases in which the Judge is unable to make the memorandum, not, as in Act VIII, to those cases only which were not appealable.

If the evidence is not properly taken down under the above sections, the case will be remanded (*a*). When a witness has been examined on behalf of the plaintiff, and the defendant has not cross-examined him, he cannot be recalled as a witness for the defendant without leave obtained at the end of the first examination (*b*).

The meaning of s. 198, *post* (corresponding with s. 183 of Act VIII) taken in conjunction with these sections, is, that judgment must be given on the examination of the witnesses by the Judge himself in the Court of first instance, and not upon any perusal of depositions except those depositions which are taken under s. 192 (corresponding with Act VIII, s. 172) and of course of the affidavits, if any, taken under chap. xvi, *post*, the plaint, written statements, and interrogatories, and care should be taken in the transfer of suits to prevent the necessity of re-summoning witnesses (*c*).

191. (S.) Where the Judge taking down any evidence, or causing any memorandum to be made under this chapter, dies or is removed from the Court before the conclusion of the suit, his successor may, if he thinks fit, deal with such evidence or memorandum as if he himself had taken it down or caused it to be made.

Power to deal with evidence taken down by Judge removed before conclusion of suit.

(*a*) Musst. Fusl-oon-nissa *v* Mohun Lal, S. D. A., N. W. P., 1862, p. 180.

(*b*) Mackintosh *v.* Nobinmoney Dossee, 2 In. Jur., N. S, 160, Phear, J., and see s. 193, *post*.

(*c*) Naranbhai Vrijbuhkhandas *v.* Naroshankar Chandroshankar, 4 Bom. H. C. Rep., App., F. B., 98.

This (s. 191) is a new provision. The Judge under such circumstances is at a disadvantage, as he has not had an opportunity of observing the demeanour of the witnesses; but it is a necessary provision owing to the frequent changes that unavoidably take place. In the case of a change of Judges, it is convenient, but not necessary, for the Judge leaving the Bench to obtain the consent of the parties to his successor's acting upon the evidence taken by him.

Power to examine witness immediately.

192. (S.) If a witness be about to leave the jurisdiction of the Court, or if other sufficient cause be shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of either party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient of the day fixed for the examination shall be given to the parties.

The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and may then be read at any hearing of the suit.

This corresponds with Act VIII of 1859, s. 173, adding that the evidence is to be taken in manner hereinbefore provided; and the last paragraph, which is new, applies to all cases in which evidence is taken under this section. Evidence taken in this way is said to be taken *de bene esse;* it must be taken by the Court itself, unless the parties consent to its being taken under commission (*a*), or the examination by commission be ordered under s. 386, *post.* In the High Court at Calcutta the examination can only be conducted by counsel (*b*).

Court may recall and examine witness.

193. (S.) The Court may, at any stage of the suit, recall any witness who has been examined and who has not departed in accordance with section 173, and may (subject to the

(*a*) Edwards *v.* Muller, 5 B L R., O. C, 252.

(*b*) Hoffman *v.* Framjee, 1 Coryton, 7.

provisions of the Indian Evidence Act) put such questions. to him as the Court thinks fit.

This is new; the Judge has a discretion in the matter. Some rules which should guide the Judge as to when he should allow the witness to be recalled, and when he should not do so, are to be found in Taylor on Evidence, § 1331.

CHAPTER XVI.

OF AFFIDAVITS.

Power to order any point to be proved by affidavit.

194. Any Court of first instance and any appellate Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Provided that where it appears to the Court that either party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

This chapter is new. The practice of examining witnesses by affidavit is borrowed from the practice of the English Courts of Equity; this section being taken from Order xxxvii, Rule 1 of the new Judicature Act.

When evidence may be given by affidavit.

195. Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the declarant.

Such attendance shall be in Court unless the declarant is exempted under this Code from personal appearance in Court, or the Court otherwise directs.

This corresponds with Order xxxvii, Rule 2.

Matters to which affidavits shall be confined.

196. Affidavits shall be confined to such facts as the declarant is able of his own knowledge to prove, except on interlocutory applications, on which statements of his

belief may be admitted, provided that reasonable grounds thereof be set forth.

The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party producing the same.

This corresponds with Order xxxvii, Rule 3.

Oath of declarant by whom to be administered.

197. In the case of any affidavit under this Code—

(*a*) any Court or Magistrate, or

(*b*) any officer whom a High Court may appoint in this behalf, or

(*c*) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf,

may administer the oath of the declarant.

This is new.

CHAPTER XVII.

OF JUDGMENT AND DECREE.

Judgment when pronounced.

198. (S.) The Court, after the evidence has been duly taken and the parties have been heard either in person or by their respective pleaders or recognized agents, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

This corresponds with Act VIII of 1859, s. 183; see *ante*, note to s. 190, and the Bombay case there quoted. If the practice has been irregular in this respect, there is still no ground for reversing or altering the judgment unless the merits of the case, or the jurisdiction of the Court, have been affected by the irregularity, see s. 578, *post*, which is much more emphatic as to this than the corresponding section (350) of Act VIII, under

which, for instance, where in a suit for possession of land, the Judge, after hearing the evidence and admitting the documents on both sides, intimated that he would examine the place to satisfy himself as to the boundaries; and on his doing so, the defendant attended, but the plaintiff was absent, and the Judge afterwards gave judgment out of Court, it was held by Sir Barnes Peacock and Mr Justice Levinge that the mere circumstance that the judgment was delivered out of Court did not constitute error, and was no ground of appeal (*a*). A judgment passed on a *dies non* is void (*b*)

Power to pronounce judgment written by Judge's predecessor

199. (S.) A Judge may pronounce a judgment written by his predecessor but not pronounced, and in such case he shall not be bound by section 198, except as to giving notice.

This is a new provision Formerly this could not be, and now need not be, done; the Judge has a discretion in the matter

Language of judgment.

200. (S.) The judgment shall be written in the language of the Court, or in English, or in the Judge's mother-tongue.

This corresponds with Act VIII of 1859, s 184. This section and the following sections relating to the recording of judgments and decrees do not apply to the High Courts, see chap xlviii, *post* They are empowered to record judgments and orders according to their own rules.

Translation of judgment.

201. (S) Whenever the judgment is written in any language other than that of the Court, the judgment shall, if any of the parties so require, be translated into the language of the Court, and the translation shall also be signed by the Judge or such officer as he appoints in this behalf.

This corresponds with the second paragraph of Act VIII of 1859, s 185.

Judgment to be dated and signed.

202. (S.) The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it, and shall not be alter-

(*a*) Sree Sree Nilmony Sing Deo *v* Bhobany Churn Pandi, Marsh, 327

(*b*) Hoolasee *v.* Dal Chund, S D A, N W P, 1864, p 589

ed or added to, save to correct verbal errors or to supply some accidental defect not affecting a material part of the case, or on review.

This section corresponds with a part of the first paragraph of s. 185 of Act VIII of 1859; the last part as to alteration is new. See the case of *Snadden* v. *Todd Findlay* (*a*). See, as to altering *decrees*, ss. 206 and 210, *post*.

Judgments of Small Cause Courts.

203. (S.) The judgments of the Courts of Small Causes need not contain more than the points for determination and the decision thereupon.

Judgments of other Courts.

The judgments of all other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

The first paragraph of this section is the exception, the second is the rule, taken from the first paragraph of Act VIII of 1859, s. 185; but it is now necessary that the judgment should contain a concise statement of the case. Under the old Act, if the judgment of the Court below did not contain the required particulars, the Appellate Court would remand the case for the purpose of the defect being supplied; but where a case was so remanded for the Court below to record the reasons for its judgment, if the Judge who passed the decree was absent, it was held that the superior Court should be informed of it by his successor. Under such circumstances, his successor had no jurisdiction, and application was to be made to the Bench which granted the order of remand for an order to the present Judge to try the case again (*b*); and now, although (s. 199) a Judge may pronounce a judgment written by his successor, he could not apparently alter a defect in his predecessor's judgment on the case being remanded. Section 191 would not help him, unless the defect were owing to the judgment having omitted to deal with evidence, and perhaps not even then, the suit being, so far as the original Court is concerned, concluded when the judgment is passed.

Though the judgment may not be as clear and intelligible as required by this section, yet, if there are sufficient materials in

(*a*) 7 Suth W R, 286, L S. Jackson and Glover, JJ.

(*b*) Manick Sett *v.* Ketter Mohun Gossamee, 1 In. Jur., N. S., 101.

it for the Appellate Court to act upon, it may do so without sending the case back (*a*). See the case of *Eshanchunder Singh* v. *Shama Churn Bhutto* (*b*)—a case decided by the Judicial Committee of the Privy Council, where it is remarked that "the determination in a cause should be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case made thereby." But where the parties allow a suit to be conducted in the lower Courts as if a certain fact were admitted, they cannot afterwards recede from the tacit admission (*c*).

Court to state its decision on each issue.

204. In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons thereof, upon each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit.

Exception.

This corresponds with Act VIII of 1859, s. 186, and does not apply to the High Court, see chap. xlviii, *post*; but it was held that the reasons of their decisions must, in cases appealed to England, be recorded by the Judges of the High Courts (*d*), on the ground that the Charters of the High Courts expressly require that the reasons of their decisions should be recorded by the Judges, and transmitted for the information of the Privy Council. Acts XX of 1862, s. 5, and XXIV of 1866, s. 18, also stated that the Judges shall *record* their decisions, merely providing that they shall do so according to rules to be laid down by themselves. These two Acts are now repealed, see sched. i, *post*, and s 3, *ante*; but chap xlviii, s. 633, appears to leave the rule as laid down in the Charters untouched.

Date of decree.

205. (S.) The decree shall bear date the day on which the judgment was pronounced; and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

(*a*) Sheikh Muksood Ali *v.* Shah Waris Ali, 6 Suth. W R, 97.

(*b*) 2 In Jur, N. S., 87.

(*c*) Mohima Chunder Roy Chowdhry *v.* Ramkishore Acharjee Chowdhry, 15 B L R, 142; see *per* Couch, C. J, p. 155, referring to Devaji Goyaji *v.* Godadbhai Godebhai, 2 Bom. H. C. Rep, 28; Stracy *v* Blake, 1 M. & W., 168; Doe d. Child *v.* Roe, 1 E. & B, 279.

(*d*) Kachekalyana R K T Udiar *v.* Kachivigajaya R K T Udiar, 2 B. L. R, P. C., 72.

This section (205) corresponds with the first and last sentences of Act VIII of 1859, s. 189; but does not require the decree to be sealed. The Judge should declare what the decree is to be, and it is the duty of the advocates or vakeels of the parties to see that it is drawn up properly (*a*), of which the Judge must be satisfied.

Contents of decree.

206. (S.) The decree must agree with the judgment: it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim as stated in the register, and shall specify clearly the relief granted or other determination of the suit.

The decree shall also state the amount of costs incurred in the suit, and by what parties and in what proportions such costs are to be paid.

Power to amend decree.

If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment or to correct such error: provided that reasonable notice have been given to the parties or their pleaders of the proposed amendment.

This section does not apply to the High Courts, see chap. xlviii, *post*.

The first two paragraphs correspond with the second paragraph of Act VIII of 1859, s. 189, and with the decision in the case of *Musst. Toona* v. *Musst. Kurreemun* (*b*). See also the cases of *Bussirun* v. *Musst. Woolfun* (*c*) and *Bisheshur Roy Chowdhry* v. *Bisheshur Bose* (*d*). Where the decree of the lower Court is confirmed in appeal by the Appellate Court, it becomes a decree of the Appellate Court, which Court alone can alter it (*e*). In one case (*f*) a clerical error in the decree was amended at the

(*a*) Ramlochun Doss *v.* Munsur Ali, 1 B. L. R., A. C., 65; S. C., 10 Suth. W.R., 96, Peacock, C.J., and Mitter, J.

(*b*) 2 Wym., 100.

(*c*) 2 Wym., 363; S. C., 6 Suth. W. R., Mis., 123.

(*d*) 8 Suth. W. R., 277.

(*e*) Bhanushankar Gopalram *v.* Raghunathram Mungalram, 2 Bom. H. C. R., 106, Couch, J.

(*f*) Hirji Jina *v.* Naran Mulji, I. L. R., 1 Bom., 1.

hearing of the appeal. The Court executing a decree cannot alter it (*a*); it cannot, for instance, allow interest on costs if the decree has not given them. The proper course is to apply to the Court which passed the decree to amend it (*b*).

In a suit for the recovery of possession of land, the decree (for the plaintiff) should be for possession simply, without any declaration as to ownership (*c*).

A decree for restitution of conjugal rights was settled thus: "That the plaintiff is entitled to his conjugal rights, and that his "lawful wife (B) be ordered to return to him" (*d*).

In a suit for contribution, a decree cannot pass jointly against all the defaulters. It must specify the particular sums to be paid by each (*e*). And where plaintiffs with separate interests sue for and obtain damages, the decree should apportion the damages between them (*f*).

In a suit by a member of an undivided Hindu family to have his right declared to a portion of the joint estate with another member of the family or a person deriving title from another member of the family, the plaintiff having succeeded is entitled to a decree declaring that he is entitled to joint possession with the execution-purchaser. If he desire a division, he should institute a suit for the purpose (*g*), if he cannot arrange for a division with the other joint owners.

Where a suit is against the owner (Hindu) of the estate for arrears of rent, and is continued after his death against his widow, the decree should be made a charge upon the estate, and not the widow's interest only (*h*). But where the debt was not due by the

(*a*) Krishna Kamal Sing *v.* Hiru Sirdar, 4 B. L. R, F. B., 101.

(*b*) Ulfutunnissa *v.* Mohan Lal Sukal, 6 B. L. R., Apx., 33, Kemp and Ainslie, JJ.

(*c*) Radhakrishna Sett *v.* Harakrishna Doss, 1 B. L. R, O. O. C. J, 1, Peacock, C. J., and Macpherson, J.

(*d*) Koobur Khansama *v* Jan Khansama, 8 Suth. W. R, 467, Loch and Mitter, JJ.

(*e*) Bama Soonduree Debia *v.* Anund Moyee Debia, 3 Suth W. R, 170; Shaikh Otioollah *v.* Musst. Aseerun, 7 Suth W. R, 194, Loch and Seton-Karr, JJ.; Tavasi Telavar *v.* Palani, 3 Mad. H. C. Rep., 187, Scotland, C. J., and Collett, J.

(*f*) Trilokenauth Jha *v.* Hur Dutt Khurhuree, 9 Suth. W. R, 299, Kemp, and E. Jackson, JJ.

(*g*) Babaji Lakshman *v.* Vasudev Vinayak, I. L. R., 1 Bom, 95, West, J, Feb. 1, 1876.

(*h*) The General Manager of the Raj of Durbungah *v.* Maharaja Coomar Ramaput Sing, 10 B. L. R., 294; S. C., 14 Moore's I. A., 605; Nugendro Chunder Ghose *v.* Sreemutty Kaminee Dossee, 11 Moo. I. A, 241; see also Ishan Chunder Mitter *v.* Buksh Ali Soudagur, Marsh., 614.

husband, and the estate of the husband is to be charged either for the arrears of rent becoming due after his death, or for a debt contracted by the widow, it can only be upon the ground that the liabilities were necessarily contracted by the widow, or under such circumstances as to make the whole estate liable, and not merely the interest in it of the person who contracted them, that the decree can properly be made to charge the estate (*a*), except where the proceeding is one which authorizes the sale of the tenure under Beng. Act VIII of 1869.

Where the suit is for damages, the Court should assess them if it decrees for the plaintiff, and should state the amount in the decree, not leave it to be ascertained in execution. There is no power given to the Court to do this as there is in the case of mesne profits (*b*).

If the Judge who made the decree subsequently put an erroneous construction upon it, the Court of appeal will not adopt that construction (*c*).

As to the altering of the *judgment*, see *ante*, s. 202: and further, as to altering decrees, s. 210, *post*.

Decree for recovery of portion of immoveable property.

207. When the subject-matter of the suit is immoveable property, and such property is identified by boundaries or numbers in a record of settlement or survey, if the decree be for the recovery of a portion only of such property, it shall specify the boundaries or number of such portion.

This corresponds with Act VIII of 1859, s. 190; the words "and such . . . . , or survey" being substituted for "with specified boundaries."

In suits concerning land in the Punjab, it is provided by Act IV of 1872 (Punjab Laws), s. 21, that every Judge of a Civil Court in which a decree affecting the proprietary right or possession of land is passed, shall cause a certified copy of such decree to be forwarded to the Deputy Commissioner of the District within a month from the making of such decree.

(*a*) Mohima Chunder Roy Chowdhry *v.* Ram Kishore Acharjee Chowdhry, 15 B. L. R., 143, Couch, C. J., and Ainslie, J., Jan. 8th, 1875.

(*b*) Musst. Benda Bibi *v.* Lala Ramsaran Sing, 1 B. L. R. (short notes) xxiii; Musst. Bibi Maniran *v.* Musst. Bibi Mashihan, 4 *ib.*, Apx., 66.

(*c*) Hirji Jina *v.* Naran Mulji, I. L. R., 1 Bom., 1, Westropp, C. J., and Sargent, J., Oct. 1, 1875.

208. (S.) When the suit is for moveable property, if the decree be for the delivery of such property, it shall also state the amount of money to be paid as an alternative if delivery cannot be had.

Decree for delivery of moveable property.

This corresponds with Act VIII of 1859, s. 191.

209. (S.) When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

In suits for money, decree may order certain interest to be paid on principal sum adjudged.

This section corresponds, and is the same in terms, with s. 10 of Act XXIII of 1861, except that the concluding words "or to such earlier date, &c." are added, which repealed and re-enacted, with alterations, Act VIII of 1859, s. 193; and see also a Circular of the Punjab Chief Court adopted by the High Court of Calcutta (*a*).

The discretion given to the Court in dealing with interest and the rate at which it is to be given, is not to be exercised arbitrarily, but in accordance with law, and it is to be exercised subject to the controlling power of a Court of appeal (*b*).

According to the English rule of common law, in order to entitle a creditor to recover interest, it was necessary to show (where the action was not on a bill of exchange or promissory note) that there was a promise to pay interest, either express or implied, from the usage of trade or other circumstances; for the general rule at common law is, that the law does not imply a contract on the part of a debtor to pay interest on the sum he

(*a*) Punjab Gazette, 30th Jan., 1873; Calcutta Gazette, July 19th, 1873, p. 837.

(*b*) Greedharee Lall Roy *v.* Soonder Bibi, 6 Suth. W. R, 187; S. C., 2 Wym, 185, F. B., and B. L. R., F. B., 496.

owes, though the debt may be of a fixed amount, and may have been frequently demanded (*a*). Nor is interest due as a matter of right (independently of the Act) in the absence of an express stipulation, even in the case of written instruments, unless they be commercial instruments of a negotiable character, such as bills of exchange and promissory notes (*b*). Interest cannot be recovered in an action simply for money had and received, where there is no contract to pay it (*c*); even where it is paid into the defendant's hand by a third person expressly for the plaintiff's use (*d*); and the circumstance of the money having been obtained fraudulently will not vary the rule (*e*), though interest, it is said, is at common law always payable on a written contract to pay money on a day certain (*f*); and that may be the reason of the rule with reference to bills of exchange noticed hereafter. It is recoverable on an account stated for money lent (*g*). But the mere striking of a balance of an account for goods sold does not entitle the party in whose favour the balance is found to interest from that time, unless the money then was to be paid (*h*).

By the usage of trade, interest is allowed on bills of exchange or promissory notes from due date. A bill or note, therefore, payable on a certain day, carries interest from that day, unless the non-payment at the appointed time was occasioned by the negligence of the holder (*i*). In an action (*j*) against the drawer of a bill for 200*l.* with 10 per cent. interest, it was held that the holder might recover interest at 10 per cent. from the time when the bill became due, as well as for the time when it was running. Cockburn, C. J., said—"interest is given as damages for the detention of "the debt, and here the parties have fixed what the rate of damage "shall be." The rest of the Court (Williams, Crowder, and Wills, JJ.) concurred. County bankers' notes, payable on demand, did not in general carry interest (*k*). If made payable by the bill itself, interest

(*a*) Calton *v.* Bragg. 15 East, 223; Shaw *v.* Picton, 7 D. and R., 201.

(*b*) Chitty on Contracts, 5th ed., 563; see Fruhling *v.* Schoder, 2 Scott, 135.

(*c*) Noble *v.* The National Discount and Banking Co., 29 L. J., N. S., Exch., 210; Walker *v.* Constable, 1 B. and P., 306.

(*d*) De Bernales *v.* Fuller, 2 Camp., 426.

(*e*) Crockford *v.* Winter, 1 Camp., 124.

(*f*) De Haviland *v.* Bowerbank, 1 Camp., 50.

(*g* Blaney *v.* Hendricks, 2 W. Blackstone, 761.

(*h*) Chalie *v.* York, 6 Esp., 45.

(*i*) Laying *v.* Stone, 2 M. and R., 561.

(*j*) Keene *v.* Keene, 27 L. J., N. S., C. P., 88.

(*k*) Parker *v.* Hutchinson, 3 Ves., 133.

is recoverable as a debt (*a*). In the other cases it is recoverable as damages for breach of contract (*b*). It will not be allowed after tender of payment of the bill (*c*). As against the acceptor of a bill, and the maker of a note payable at a certain time after date or sight, interest is recoverable from the day on which the bill or note becomes due, without proof of any demand (*d*). The drawer or indorser of a bill, or indorser of a note, is only liable to pay interest from the time he receives notice of dishonour (*e*). The bill or note may, by its terms, be payable with interest from the day of its date (*f*). Interest payable on a bill or note cannot, in a legal sense, be separated from the principal (*g*).

An agreement between the parties, that interest should be paid, may be inferred from the course of dealing between them, *e. g.*:—if it had been frequently charged and paid without objection in former and similar accounts (*h*); and if it appear to be the invariable custom or usage in any particular trade or business to charge interest, this may amount to evidence of a contract to allow it between parties having transactions therein (*i*); or where it can be inferred from the terms and nature of a contract (*j*). To recover interest on advances of money, a contract must be proved (*k*). A contract on a loan of money, to add the interest to the principal at the end of each year, and pay interest on the whole sum as principal, is valid in law, and may be inferred from accounts stated by the debtor on that footing (*l*). But where there was a deposit under an agreement, no interest to be payable until after a demand of the principal, it was held that a demand by the assignee in bankruptcy was not such a demand as would impose upon the debtor the obligation to pay interest (*m*). Where a surety has been compelled to pay money for his principal, he is entitled, in

(*a*) Florence *v.* Jennings, 2 C. B., 454

(*b*) Cameron *v.* Smith, 2 B. and A., 305; Du Belloix *v.* Lord Waterpark, 1 D and R., 16.

(*c*) Dent *v.* Dunn, 3 Camp., 296.

(*d*) Upton *v.* Lord Ferrers, 5 Ves., 801; Farquhar *v.* Morris, 7 T. R., 124.

(*e*) Walker *v.* Barnes, 5 Taunt., 240.

(*f*) Kennerly *v.* Nash, 1 Stark., 452; Doman *v.* Dibden, R. and M., 381; Roffey *v.* Greenwell, 10 Ad. and E., 222.

(*g*) Hollis *v.* Palmer, 2 Bing., N. S., 713.

(*h*) Calton *v.* Bragg, 15 East, 223; Eaton *v.* Bell, 5 B. and A., 34; Gwyer *v.* Godby, 4 Taunt., 346.

(*i*) *Ib.* See Ilkin *v.* Bradley, 2 Moore, 206.

(*j*) Ashwell *v.* Staunton, 30 Beav., 52.

(*k*) Carr *v.* Edwards, 3 Stark., 132.

(*l*) Newell *v.* Jones, 4 C. & P., 124.

(*m*) Edwards *v.* Vere, 2 Nev. and M., 120.

an action, to recover against the principal on the implied contract of indemnity, and to recover interest from the time of payment (*a*). Where, after action brought on an attorney's bill, it is referred for taxation, the plaintiff cannot proceed with the action to have the interest assessed (*b*). Agents, in account with their principal, may charge interest and make annual amounts without any express contract to that effect (*c*). It seems doubtful whether interest necessarily accrues on a deposit which is recovered back (*d*). Interest is not payable on the price of goods sold, although a day be fixed for the payment of the amount (*e*). But it is recoverable where goods are sold under a contract for bills or notes to be given on a specified day (*f*). Interest is not recoverable after a tender (*g*).

Where a decree is made by consent, the stipulated rate of interest is usually allowed up to the date of the forbearance; afterwards, the rate is to be fixed by the Courts. The Court will not, however, confine itself, in dealing with this question, to any particular rate (*h*). Where a decree does not provide for the payment of interest, it is not competent to the Court executing the decree to give interest (*i*).

When the Court orders further interest it is to be from the date of the decree to the date of payment of the principal sum adjudged, and not for a limited period (*j*). In a case (*k*) Peterson, J., allowed interest at the rate of 8 per cent., being the rate in the bazar, down to the date of the decree, there being no evidence of the Bank rate of interest at the time, and no contract rate. After the decree he allowed 6 per cent., which is the rate of interest allowed in the Calcutta High Court, Original Side. Where there was a rate of interest fixed by the contract, Levinge, J. (*l*) allowed the debt to bear that rate of interest down to the date of

(*a*) Petre *v.* Duncombe, 20 L. J., Q B., 242; Smith *v.* Howell, 6 Ex., 737.

(*b*) Berrington *v.* Phillips, 1 Mee. and W., 48.

(*c*) Bruce *v.* Hunter, 3 Camp., 467.

(*d*) Maberly *v.* Robins, 5 Taunt, 625.

(*e*) Gordon *v* Swan, 12 East, 419; Calton *v.* Bragg, 15 East, 223.

(*f*) Marshall *v.* Poole, 13 East, 98; Slack *v.* Lowell, 3 Taunt., 157; Boyce *v.* Warburton, 2 Camp., 480.

(*g*) Dent *v.* Dunn, 3 Camp., 296.

(*h*) MSS., Phear, J., June 5th, 1866.

(*i*) Kuppa Ayyar *v.* Venkataramana Ayyar, 3 Mad. H. C. Rep., 421, Bittleston and Collett, JJ.

(*j*) Ramasvami Ayyan *v.* Appavaiyan, 1 Mad. H. C. Rep., 211, Scotland, C. J., and Frere, J.

(*k*) Gregory *v.* Dulsook Roy, 1 Coryton, 9.

(*l*) Dhunput Singh Dogaree *v.* Shaikh Golam Hadee, 2 Hyde, 106.

the decree; after that, the Court rate of 6 per cent. But he held that if the contract rate was not above 12 per cent., that rate ought to be allowed till realization, 12 per cent. being the rate allowed on the Appellate Side of the High Court and throughout the Courts in the mofussil. This decision was followed by Phear, J., in case No. 494½ of 1865 (*a*). But in some cases the contract rate has only been allowed down to the date of the filing of the plaint, and after that 6 per cent. (*b*). Where a decree does not specify a rate of interest, the usual Court rate is understood (*c*).

Where interest is given, but the rate is not specified, the omission can afterwards be supplied (*d*). The proper course would be for the decree-holder to apply to the Court to amend the decree, which could be done on notice to the other side. When the Court below decreed the sum claimed by plaintiff with interest, *minus* certain payments alleged to have been made by the defendant, against which deduction the plaintiff appealed, and the Sudder Court affirmed his suit, it was held that the effect of the Sudder Court's decree was to substitute the larger for the smaller sum, and that interest, therefore, ran on the larger as on the smaller sum (*e*).

Where payment was made on a bond, the amount paid being less than the interest due,—it was held that the payment ought to go to reduce the amount of interest due; and the creditor in a suit upon the bond was entitled to a decree for the principal and balance of interest due up to the date of the decree (*f*).

The Interest Act (XXXII of 1839), which is the same as 3 and 4 Wm. IV., c. 42, s. 28, enacts that "upon all debts or sums "certain, payable at a certain time or otherwise, the Court before "which such debts or sums certain may be recovered, may, if it "shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts "or sums certain were payable; if such debts or sums be payable "by virtue of some written instrument at a certain time, or if

(*a*) Annuncooly Setty *v* Sind Futter Mahondan, 26th June, 1865.

(*b*) See Anderson *v.* Sreemunto, 1 Coryton, 3.

(*c*) Musst. Soabudra Bebee *v.* Sheo Chun Lall, 7 Suth. W. R., 375, Loch and Macpherson, JJ.

(*d*) Rani Lalun Mani *v.* Behari Lal Mookerjee, 7 B. L R, Apx., 31

(*e*) Rossool Mahomed *v.* Bassoo Bewah, 8 Suth. W. R., 163.

(*f*) Luchmeswar Sing Bahadur *v.* Syad Lutf Ali Khan, 8 B. L. R., 110, P. C

"payable otherwise, then from the time when demand of payment "shall have been made in writing, so as such demand shall give "notice to the debtor that interest will be claimed from the date of "such demand until the time of payment; provided that interest "shall be payable in all cases in which it is now payable by "law."

This Act, which is an extension of an English Statute to India, with reference to the English law established in the country, does not apply with a restraining effect upon the general law relating to the award of interest, but rather extends the power of the Court in awarding it. In a case between natives it was held that the Court could allow interest on payments of revenue made by one co-sharer on behalf of others, although no demand was made before the suit was brought, as such was the law before the Act of 1839 was operative (*a*). A letter of application for a loan until a day named therein, which does not show an obligation to pay on the face of it, is not "an instrument by virtue of which the debt is payable at a certain time" (*b*). An instrument, in the nature of, though not strictly, a bond, was executed in 1833. It provided for the liquidation of the amount therein specified by instalments, but no provision was made for the allowance of interest. It was held by the Judicial Committee of the Privy Council, in an action upon the bond, that the Act of 1839 was retrospective in its operation, and authorized the allowance of interest although it was not provided for in the bond (*c*). Where a note is payable on demand, Act XXXII of 1839 does not apply, unless the demand be made in writing (*d*). It was considered that the 10th section of Act XXIII of 1861, which corresponds with the present section (209), did not interfere with Act XXXII of 1839, which precludes an award of interest before the debt was payable (*e*).

Act XXVIII of 1855, s. 1, repealed the Usury Laws, but not Act XXXII of 1839. By s. 2—"In any suit in which in-

(*a*) Golam Ahmed Shah *v.* Beharry Loll, Marsh., 239, Trevor and Jackson, JJ., citing Bebee Nusseeb Cowar, appellant, S. D. A., 1857, p. 854; see also Bistoo Chunder Banerjee *v.* Nithore Monee Dabee, 10 B. L. R., 353, Glover and Mitter, JJ.; and Lulleet Biswas *v.* Prosonomoyee Dossee, before L. S. Jackson and Glover, JJ., in a note to the same case.

(*b*) Taylor *v.* Holt, 34 L. J., Ex. 1.

(*c*) Rajah Bommarauze Bahadur *v.* Rangasamy Mudalay, 6 Moo. I. A., 232.

(*d*) The Bank of Hindustan *v.* Wilson, 1 B. L. R., O. J., 41, Markby, J.

(*e*) Abdool Kureem Khan *v.* Shiekh Meah Jan, 6 Suth. W. R., 288.

"terest is recoverable, the amount shall be adjudged or decreed "by the Court at the rate (if any) agreed upon by the parties; and "if no rate shall have been agreed upon, at such rate as the Court "shall deem reasonable." By s. 3—"Whenever a Court shall "direct that a judgment or decree shall bear interest, or shall "award interest upon judgment or decree, it may order the "interest to be calculated at the rate allowed in the judgment or "decree upon the principal sum adjudged, or such other rate as "the Court shall think fit." And see ss. 4, 5, and 6, as to the rate to be allowed by the Court on mortgages, &c., &c.

Where, however, a defendant executed a bond in favour of the plaintiff, by which he stipulated that he would pay interest at half per cent. per mensem, and the principal in three years, and it was agreed that should he fail to pay the principal and interest as agreed upon, he would pay interest at 4 per cent. per mensem from the date of the bond to the date of liquidation, it was held that this stipulation was in the nature of a penalty, notwithstanding the 2nd section of Act XXVIII of 1855; and on default the plaintiff was only entitled to recover interest at a reasonable rate, which the Court allowed him at 1 per cent. per mensem (*a*). In that case the creditor had very good collateral security, and the rate was excessive. The question whether the sum provided to be paid is to be treated as a penalty or not depends upon the circumstances of each case and the nature of the contract (*b*).

Where A. stipulated with B., in a mortgage for payment of Rs. 2,600 with interest at 18 per cent. per annum, from a certain date to another certain date, and B. made default, paying neither principal nor interest, the Court, in a suit by A. against B., for the recovery of principal and interest, allowed the plaintiff interest at 6 per cent. only after the due date of the mortgage bond, following

(*a*) Bichook Nath Panday *v.* Ram Lochun Singh, 11 B. L. R., 135, Kemp and Pontifex, JJ.

(*b*) Peetambur Chatterjee *v.* Kalee Churn Roy, 11 B. L. R., 137 note, Bayley and E. Jackson, JJ.; Rashessur Surmah *v.* Kaleekanath Surmah, *ib.*, 138 note, Norman and E. Jackson, JJ.; and Musst. Sohodea Bebee *v.* Baboo Deendyal Lall, *ib.*, 138 note, L. S. Jackson and Paul, JJ.; Boley Dobey *v.* Sideswar Rao Baboo Roy Kur, 4 *ib*, Apx., 92, Kemp and E. Jackson, JJ.; Sainter *v.* Ferguson, 18 L. J., C. P., 217; S. C., 7 C. B, 716; Dimech *v.* Cortlett, 12 Moo. P. C., 199; Kemble *v.* Farren, 3 M. and P., 425; S. C., 6 Bing., 141; Rasaji bin Dattaji *v.* Sayana bin Sagdu, 6 Bom. H. C. Rep., A. C., 7; Motoji bin Ratnaji *v.* Shekh Husen, *ib.*, 8.

a decision of the House of Lords (*a*), where Lord Selborne says, that "interest in such cases is given on the principle, not of an "implied contract, but damages for breach of contract" (*b*).

The construction of the Act has given rise to some difference of opinion in the Courts in India with reference to its effect on the Hindu and Mahomedan laws. Sir B. Peacock, C. J., held (*c*), that it "was never intended to repeal the Hindu or Mahomedan laws as to interest;" that "it did no more than repeal the various Regulations and Acts which the English Government of India had passed on the subject of usury (*d*). It was held by Phear, J., on the other hand, that by s. 1 it repealed "all laws in force" in these territories "relating to usury;" it did away with the Hindu and Mahomedan laws as to interest (*e*). Mr. Justice Phear treats the words "laws relating to usury" as "laws relating to the rate of interest" (*f*). His Lordship observed that the rate of interest is the sole subject of the Act from beginning to end, and pointed out that, although the Koran forbid Mahomedans to take interest for money, it was notorious that there were many Mussulman money-lenders who did so, and quoted Harrington's Analysis, Vol. I, p. 182, where, after remarking that the Mahomedan law forbids the taking of interest for the use of money upon loans from one Mussulman to another, and that the Hindu law permits interest to be taken at prescribed rates only, Mr. Harrington goes to say,—"The Hindu legislators have "expressly sanctioned, and the Mussulman Government of India "appear to have tolerated, directly or indirectly, the customary "interest of the country, which, in the plan for the administration "of justice proposed by the Committee of Circuit in 1772, is stated "to have amounted to the most exorbitant usury." Nor could he (Mr. Justice Phear) learn that our Courts have in any case, which is of authority, refused to decree interest to a Mahomedan on the ground that he was disentitled by Mahomedan law to recover. It

(*a*) Cook *v.* Fowler, L. R., 7 H. L., 27.

(*b*) Deen Doyal Lall *v.* Het Narain Singh, I. L. R., 2 Calc., 41, Kemp and Birch, JJ.

(*c*) Ramloll Mookerjee *v.* Haranchunder Dhar, 3 B. L. R, O. C., 130.

(*d*) See also Kalica Prosaud Misser *v.* Gobind Chunder Sein, Suth. S. C. C. Cases, 110, Bayley and E. Jackson, JJ.

(*e*) Miakhan *v.* Bibi Bibijan, 5 B. L. R, 503.

(*f*) See Coke's 3rd Inst. cap. lxx, Johnson's Dictionary; but see Jacob's Law Dictionary, tit. Money, and several Statutes there cited, in which it is treated as an *unreasonable rate.*

was merely a moral precept. And with regard to the law of Menu, s. 151, c. 8, which says,—"interest on money received at once, not "month by month, or day by day, as it ought, must never be more "than enough to double the debt,—that is, more than the amount of "the principal paid at the same time."—Mr. Justice Phear was of opinion that this was in substance a law for the limitation of suits, and did not, as such, fall within the scope of Act XXVIII of 1855, He referred with approval to three Bombay cases (*a*).

In the first of these cases the rule was stated to be simply this: "that no greater arrear of interest can be recovered at any "one time than what will amount to the principal sum; but if "the principal remain outstanding, and the interest be paid in "smaller sums than the amount of the principal money, there is "no limit to the amount of interest, which may thus be received "from time to time." And Strange, Vol. I, p. 299, was referred to, where creditors are warned against allowing interest to run in *arrear* to an amount exceeding the principal, as in such cases they could not recover more for interest than would equal the principal sum. In the second case (3 Bom. H. C. Rep., A. C, 23) this last decision was approved; and it was added that Act XXVIII of 1855 had not, in the opinion of the Court (Couch, C. J., and Newton, J.), by repealing s. 12 of Reg. V of 1827, or otherwise, altered the rule of Hindu law. This 12th section stated that "this Regulation "is not meant to interfere with the rule of Hindu law, which "limits the interest of money to the amount of the principal, and "which shall, accordingly, be maintained by the Courts in all appli-"cable cases." In the next case, reported in the same volume, but which had been heard three years before (*i.e.*, in 1863) by Sausse, C.J., Forbes and Newton, JJ., the rule was upheld. In a later case (*b*), it was held, on the authority of the case decided by Peacock, C. J., and of the cases in 3 Bom. H. C. Rep., that Act XXVIII of 1855 does not affect the Hindu law as to interest; and in another case (*c*), where the subject was very fully discussed by Westropp, C. J., these cases were followed, and it was stated that the question must be considered as so settled in the Bombay Presidency.

(*a*) Dhondu Jagannath *v.* Narayan Ramchandra, 1 Bom. H. C. Rep., 1st edn, 47; Khushalchand Lalchand *v.* Ibrahim Fakir, 3 *ib.*, A. C., 23; and Ramkrishnabhat *v.* Vithoba bin Mahharji, *ib.*, 25.

(*b*) Hakma Manji *v.* Meman Ayab Haji, 7 Bom. H. C, O. O. C. J., 19, before Couch, C. J., and Westropp, J.

(*c*) Narayan *v.* Satvaji, 9 Bom. H. C. Rep., 83.

In a case decided in Madras without argument by Holloway and Kindersley, JJ., the judgment was as follows: "A practice "long existed of never either asking or decreeing more than an "amount of interest equal to the principal. That practice, however, "was based upon a special provision of the law, which is repealed" (s. 4, Reg. XXXIV of 1802). That Regulation was repealed in 1855, but the former practice still continued. The Court was unable to say that, as a positive law, this limitation now exists. As to the Hindu law, it was held not to be binding as law upon such matters in the mofussil (*a*).

In a suit between Hindus in Bengal to recover Rs. 5,000 principal, and Rs. 9,320, compound interest upon a mortgage bond, it was argued that the interest was not allowable under the rule of Hindu law; for this proposition the authorities cited were Menu, c. viii, v. 151, and the cases mentioned below (*b*). It was argued on the contrary, that the law of Bombay differs from the law in Bengal, where matters of contract are not governed by Hindu law (Reg. IV of 1793, s. 15). Act VI of 1871, s. 24, limits its application to questions relating to succession, inheritance, marriage, caste, and religious usages and institutions; that the rule of Hindu law is not applicable to mortgage transactions (*c*). It was held, (1) that the rule does not apply to Courts in the mofussil in Bengal; (2) that the decision in 3 Bom. H. C. Rep., A. C., 23, was based on a special Act of the legislature; (3) that it has been considered in the Presidency town that the Hindu law in question has not been abrogated by Act XXVIII of 1855. But with regard to the mofussil, Act VI of 1871 applies (s. 24), and any interest equitably due may be allowed (*d*).

It had been held in early cases that the usury laws did not apply to natives (*e*). But where a Hindu lent money to an European British subject at an excessive rate, the latter could not avail himself

(*a*) Annaji Rau *v.* Ragubai, 6 Mad. H. C. Rep., 400.

(*b*) Khushalchand Lalchand *v.* Ibrahim Fakir, 3 Bom. H. C. Rep., A. C., 23; Ramkrishnabhat *v.* Vithobabin Malharji, *ib.*, 25; Ramlal Mookerjee *v.* Haran Chandra Dhar, 3 B. L. R., O. C., 130, Peacock, C. J., and Macpherson, J.; and Narayan *v.* Satvaji, 9 Bom. H. C. R., 83, Westropp, C. J., and West, J.

(*c*) Narayan bin Babaji *v.* Gangaram bin Krishnaji, 4 Bom. H. C. Rep., A. C., 157, Warden and Gibbs, JJ.

(*d*) Deen Doyal Poramanick *v.* Kylas Chunder Paul, I. L. R., 1 Calc., 92, L. S. Jackson and McDonnell, JJ., May 19th, 1875; S. C., 24 Suth. W. R., 106.

(*e*) Hullodhur Bose *v.* Connoyloll Tagore, Fulton, 411.

of those laws as a defence to the action, as they did not apply to a native lender (*a*).

Whichever may be the right view as to the effect of the Act of 1855 as to the repeal of the Usury Laws not enacted by Statute, it appears that the question cannot now arise, for the section (1) which was said to have that effect is now repealed (with ss. 7 and 8 and the schedule) by Act XIV of 1870. This repeal has not the effect of revival of any Statutes, Acts, or Regulations relative to usury, because by virtue of Act I of 1868, s. 3, cl. 1, it is necessary to expressly state that such repealed Statutes, Acts, or Regulations are to be revived; but this rule does not apply to the repeal of laws not enacted by Statute, Act, or Regulation. In such a case the repeal of the repealing Act revives the old law *ab initio* (*b*). Act I of 1868, s. 3, cl. 1, is taken from the English Act of Parliament, 13 and 14 Vict, c. 21, s. 5, Lord Brougham's Act; and this enactment does not apply in all cases to repealed Statutes. This point was the subject of discussion in the case of *Mount* v. *Taylor* (*c*), and it was held that where the earlier Act was only modified, on the repeal of the Act so modifying it the earlier Act is revived, and it was doubted whether Lord Brougham's Act applied where the earlier Act was repealed by implication only. In that case the question was whether the plaintiff was entitled to costs. The Statute of Gloucester gave costs, but certain subsequent Acts superadded conditions to the plaintiff's right to costs in certain cases. These Acts were afterwards repealed, and it was held that the Statute of Gloucester was revived notwithstanding Lord Brougham's Act (*d*). The majority of the Court held that the Statute of Gloucester was repealed absolutely with respect to the class of cases in point, a different class to those involved in the two other cases, and, consequently, that Lord Brougham's Act prevented its revival by the repeal of the repealing Act. Hannen, J., dissenting, thought that in this case also the Statute of Gloucester was not wholly repealed. "The Act has for its object to "prevent a revival of a Statute [Act or Regulation] contrary to

(*a*) Isserchunder Chatterjea *v.* Biddle, 2 Taylor and Bell, 138.

(*b*) 2 Inst, 686, case of Bishop, 12 Rep, 7; Phillips *v* Hopwood, 10 B. & C., 39; Tattle *v.* Grimwood, 3 Bing, 493, *per* Best, C. J.

(*c*) L. R., 3 C. P., 645, reported also in 37 L J., N. S., C. P, 325.

(*d*) See also Levi *v.* Sanderson, 38 L. J., N. S., Q B., 135; Mirfin *v.* Attwood, *ib*, 181.

" the intention of the legislature, but it cannot be supposed that " it is contrary to the intention of the legislature to restore to a " Statute its original force without condition, when all that it has " done has been to repeal the condition."

The rule of Hindu law which limits the amounts recoverable at one time by way of interest to the amount of principal, does not apply to interest that accrues upon a decree of Court before it is finally satisfied (*a*).

Payment by instalments.

210. (S.) In all decrees for the payment of money, the Court may for any sufficient reason order that the amount shall be paid by instalments, with or without interest.

When Court may order payment by instalments.

And after the passing of any such decree the Court may, on the application of the judgment-debtor, and with the consent of the decree-holder, order that the amount decreed be paid by instalments on such terms as to the payment of interest, the attachment of the property of the defendant, or the taking of security from him, or otherwise, as it thinks fit:

Save as provided in this section and section 206, no decree shall be altered at the request of parties.

The first clause of this section corresponds with Act VIII of 1859, s. 194. The rest of the section is new. As to altering the *judgment*, see s. 202, *ante*.

The section leaves it discretionary with the Court to order payment in the way indicated, and it is not unusual to state, in the order for payment of the amount of decree and costs by instalments, that, in default of payment of one instalment, the whole debt then due shall become payable. It was stated by Wells, J., that whenever a defendant showed *bona fides* by offering to pay anything like a fair proportion of his debt, he should always grant him a reasonable time to pay the residue (*b*). The decree of the lower Court for the gradual payment of a bond, the whole amount of which was due, was affirmed, where the inability to pay arose

(*a*) Balkrishna Bhalchandra *v* Gopal Raghunath, I. L. R., 1 Bom., 73, West, J., 15th December, 1875.

(*b*) Subatollah Sircar *v* Thompson, 1 Hyde, 98.

from loss incurred by the outbreak of the mutiny, and not by the ordinary vicissitudes of trade. This is a "sufficient reason" (*a*). Where the omission to order payment by instalments is accidental, the Court can correct it, not otherwise (*b*), except by consent of the decree-holder.

In suits for land, Court may decree payment of mesne profits with interest.

211. When the suit is for land or other property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs), with interest thereupon at such rate as the Court thinks fit.

Explanation.—'Mesne profits' of property mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received, therefrom.

This section corresponds with Act VIII of 1859, s. 196; the words "to the party in whose favour the decree is made" being substituted for "to the decree-holder," and the words "or until the expiration of three years from the date of the decree (whichever event first occurs)" being added; the explanation is also new (see also s. 244, which corresponds with Act XXIII of 1861, s. 11). It relates to the determination of questions regarding mesne profits which may have been reserved for adjustment in the execution of the decree. It places a limit of three years, which was not imposed by the Code of 1859 upon the time during which mesne profits may accrue. The Court should, if the person who succeeds in the suit be entitled to mesne profits, state so in its decree, so as to enable the Court executing the decree to assess them, for, where mesne profits from date of suit to decree are not decided, and the question is not reserved, a separate suit must be brought to recover them (*c*). The explanation is derived

(*a*) Khoda Buksh *v.* Abdool Ruhman, 3 S. D. A, N. W. P., 489.

(*b*) Ravichand Dalichand *v.* Motilal Narbheram, 4 Bom. H. C. Rep., 77, App., Couch, C. J., and Newton, J.

(*c*) See s. 244, *post*, and the case of Sadasiva Pillai *v.* Ramalinga Pillai, 15 B. L. R., P. C., 383; Baboo Gourkishen Sing *v.* Talay Fukeer Chand, 7 Suth. W. R., 364, Kemp and Glover, JJ.

from the decision in the case of *Dwarkanath Mitter* v. *Ramdhun Biswas* (*a*). For the purpose of the calculation the person who has been kept out of possession can show what he himself could have collected (*b*) at a fair and reasonable rate (*c*). Where a party is decreed entitled to mesne profits, the trespasser cannot be allowed to urge that the owner would not have realized as much from the *land* as he the trespasser did: but if he had obtained extraordinary profits by the expenditure of capital on the land, allowance should be made for such expenditure (*d*). The proper principle applicable to a case in which the person liable to mesne profits has not let the land to tenants, but has himself occupied and cultivated it, growing on it indigo and other crops, is not to assess wasilat according to the value of the manufactured indigo or other crops, but according to what would have been a fair and reasonable rent for the land if the same had been let to a tenant during the period of the unlawful occupation of the wrong-doer (*e*).

Court may determine amount of mesne profits prior to passing decree, or may reserve inquiry.

212. When the suit is for immoveable property and for mesne profits which have accrued on the property during a period prior to the institution of the suit, and the amount of such profits is disputed, the Court may either determine the amount by the decree itself, or may pass a decree for the property and direct an inquiry into the amount of mesne profits, and dispose of the same on further orders.

This section corresponds with Act VIII of 1859, s. 197. The wording is slightly altered, but the substance is the same.

This section applies only to mesne profits as defined in the last

(*a*) 8 Suth. W. R., 103. See also Jugger Nauth Sing *v.* Shaik Ahmudoolah, *ib.*, 132; DeSilva *v.* Syud Teheranee, 9 Suth. W. R., 374.

(*b*) Teluk Chand Baboo *v.* Soudaminee Dossee, 23 Suth. W. R., 108.

(*c*) Rani Asmut Kooer *v.* Maharani Indurjeet Kooer, B. L R., F. B., 1003; S. C., 9 Suth. W. R., 445, F.B.; Promothonath Roy *v.* Tripoora Soonduree Dabee, 10 *ib.*, 463, Loch and Glover, JJ.; Watson *v.* Pyari Lal Shaha, 7 B. L. R., 175, Loch and Ainslie, JJ.; Bibee Sohodwa *v.* Smith, 12 *ib.*, 82, Phear and Ainslie, JJ.

(*d*) Sreenath Bose *v.* Nobin Chunder Bose, 9 Suth. W. R., 473, Phear and Hobhouse, JJ.

(*e*) Rani Asmut Kooer *v.* Maharani Indurjeet Kooer, 9 W. R., 445, F. B. See also Erfoonissa Chowdrain *v.* Musst. Rukeeboonissa, 9 Suth. W. R., 457, L. S. Jackson and Hobhouse, JJ.

section, not to damages. Where the decree is for damages, the Court should assess such damages itself, and not direct the amount to be assessed in execution as in the case of mesne profits (*a*).

Administration-suit.

213. When the suit is for an account of any property and for its due administration under the decree of the Court, the Court, before making the decree, shall order such accounts and inquiries to be taken and made, and give such other directions as it thinks fit.

In the administration by the Court of the property of any person who dies after this Code comes into force, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being with respect to the estates of persons adjudged insolvent;

And all persons who in any such case would be entitled to be paid out of such property may come in under the decree for its administration, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

Applications under section 265 of the Indian Contract Act, 1872, shall be deemed to be suits within the meaning of this section.

This section is new. It provides a special rule, corresponding to the rule with respect to the estates of insolvent persons, where the distribution of the estate of a deceased person, being insufficient to pay the debts in full, is carried out by the Court in an administration suit.

Where the distribution is made by the representative without a suit, the estate being subject to the Indian Succession Act, the representative must resort to the rules laid down in that Act.

(*a*) Bhenuk Sing *v.* Tugger Sing, 10 Suth. W. R., 299, Peacock, C. J., and Mitter, J.

This section does not, for example, apparently alter any rules regarding preferential claims, as such claims come before all other debts; but only lays down a rule as to the rights of secured and unsecured creditors, debts and liabilities proveable, and valuations.

Section 265 of the Indian Contract Act, 1872, enacts that "in the absence of any contract to the contrary, after the termination of the partnership, each partner or his representatives may "apply to the Court to wind up the business of the firm, to provide "for the payment of its debts, and to distribute the surplus according to the shares of the partners respectively." The "Court" means a Court not inferior to the Court of the District Judge.

This section introduces for the first time in the Courts in the mofussil suits for the administration of the property of persons deceased. The first paragraph is merely a direction as to the mode in which the Court is to proceed in the first place before coming to a final decision on the case. The second is taken from the Judicature Act of 1875, 38 and 39 Vict, c. 77, s. 10, which is an amendment of the Judicature Act of 1873, 36 and 37 Vict., c. 66, s. 25. This latter section, after reciting that it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the said High Court of Justice, to amend and declare the law to be hereafter administered in England as to the matters next hereinafter mentioned: enacts, &c., using the word "bankrupt" where in this Code the word "insolvent" is used. Under the Act of 1873 the jurisdiction of the Courts of Equity, Common Law, &c., including Courts of Bankruptcy, were vested in the High Court of Justice. The Court of Bankruptcy dealt, and the High Court of Justice now deals, with the rights of secured and unsecured creditors and other matters alluded to in the present section according to the rules laid down in the existing Acts of Parliament relating to bankruptcy.

In India, however, the case is different. There are Insolvent Courts established in the Presidency Towns (see the 18th clause of the Charter of the High Court at Calcutta) with jurisdiction throughout Lower Bengal (*a*) and (see the corresponding clause of the Madras and Bombay Charters) administering the Insolvent law prescribed by Act of Parliament for India (11 and 12 Vict., c. 21); s. 48 of which enactment relates to the valuation of annuities, &c., debts not actually due, &c. (*b*). The Recorders of British Burma, by Act XVII of 1876, have the same jurisdiction.

(*a*) In re Tietkins, 1 B. L. R., O. O. C. J., 84. (*b*) M. and C., p. 63.

Such Courts in the Punjab as the Lieutenant-Governor may constitute Insolvent Courts (Act IV of 1872, ss. 22 to 33 inclusive) have certain powers with regard to insolvents; and similar powers are given to Courts constituted under chap. xx of this Code.

In the last two instances the insolvent jurisdiction is of a very limited character, and there are not any special rules of the nature described in this section.

This section will require judicial explanation before it can be applied. The rule which will, in all probability, be applied will be that laid down in s. 40 of the Bankruptcy Act, 1869, 32 and 33 Vict., c. 71, viz, that the secured creditor may give up his security and prove for the whole of his debt, or may realize or give credit for its value and prove for its balance.

Suit to enforce right of pre-emption.

214. When the suit is to enforce a right of pre-emption in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not so paid, the suit shall stand dismissed with costs.

This section is new. It follows a decision of the High Court in the North-West Provinces in the case of *Shaikh Ewaz* v. *Mokuna Bibi* (*a*), in accordance with the previous case of *Sheo Pershad Lall* v. *Thakoor Rai* (*b*). See also the Punjab Laws Act IV of 1872, ss. 9 to 19 inclusive.

Suit for dissolution of partnership.

215. When the suit is for the dissolution of a partnership, the Court, before making its decree, may pass an order fixing the day on which the partnership shall stand dissolved, and directing such accounts to be taken and other acts to be done as it thinks fit.

This section is new.

(*a*) I. L. R., 1 All., 132. (*b*) H. C. Rep, N. W. P., 1868, p. 254, F. B.

If set-off be allowed.

216. (S.) If the defendant has set off the amount of a debt against the claim of the plaintiff, and such set-off has been allowed, the decree shall state what amount is due to the plaintiff and what amount (if any) is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

Effect of decree.

The decree of the Court with respect to any sum awarded to the defendant shall have the same effect, and be subject to the same rules in respect of appeal or otherwise, as if such sum had been claimed by the defendant in a separate suit against the plaintiff.

This section corresponds with Act VIII of 1859, s. 195. A decree on a counter claim can only be given where the defendant has a right of set off (*a*).

Certified copies of decree and judgment to be furnished.

217. Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

This section corresponds with Act VIII of 1859, s. 198, omitting the provision as to stamp, now governed by the Court Fees Act, 1870.

CHAPTER XVIII.

OF COSTS.

Costs of applications.

218. When disposing of any application under this Code, the Court may give to either party the costs of such application, or may reserve the consideration of such costs for any future stage of the proceedings.

This provision is not in Act VIII.

(*a*) Tiluck Chand Baboo *v.* Sowdaminee Dossee, 25 Suth. W. R., 275.

219. The judgment shall direct by whom the costs of each party are to be paid, whether by himself or by any other party to the suit, and whether in whole or in what part or proportion.

Judgment to direct by whom costs are to be paid.

This section corresponds with Act VIII of 1859, s. 187; but the words "by any other party to the suit," are substituted for "by any other party."

The Court will, in the exercise of its discretion as to costs, order the plaintiff to pay all, if, for instance, in a suit for a partition of family property, he brings it solely for the purpose of inflicting injury upon his joint holders (*a*). The Court has not power to order costs to be paid by a party not a party to the suit, though in cases in the nature of ejectment, where a man of straw is put forward as the nominal plaintiff, it was considered before this Act was passed that the High Court had independently power to do so, in analogy to the cases in ejectment in the English Courts (*b*). Where the Court found a person, though not a party to the suit, setting in motion the process of the Court for improper motives, such person was, in a suit on the Original Side of the High Court, made to pay the costs of the proceedings (*c*). It is, however, questionable whether the High Court has now any such power. There is no difference now between the procedure to be observed in the High Courts and the procedure to be observed in other Courts, except so far as the High Court is excepted from the operation of this Code by chap. xlviii, *post*. It was also held that the guardian *ad litem* of a minor or lunatic may, under certain circumstances, be ordered to pay costs personally (*d*); but there must be some reason for fixing him with this personal liability (*e*), for the minor is *prima facie* liable (*f*).

(*a*) Bhoobun Mohun Dey *v.* Denonath Dey, 1 Hyde, 122; S. M. Soudamoney Dossee *v.* Juggomohun Sen, *ib*, 172, Wells, J.

(*b*) Sreemutty Bamasundery Dassee *v.* Anund Lall Dass, 1 Bourke, 44.

(*c*) Juggessur Coomar *v.* Prosonno Coomar Ghose, 1 In. Jur, N S, 282; S. M. Prankumari Dasi *v.* Abinash Chandra Mookerjee, 9 B. L R., 212, where the order was refused, and cases there cited.

(*d*) Omrao Sing *v.* Premnarain Sing, 24 Suth. W. R., 264.

(*e*) S. M. Tara Soondurce *v.* S. M. Rash Munjoree, 12 Suth. W. R., 78; Brojo Mohun Mojoomdar *v.* Roodronath Surma Mojoomdar, 15 *ib.*, 192; Sherafutoollah Chowdhry *v.* S. M. Abedonissa Bebee, 17 *ib.*, 374.

(*f*) Komul Chunder Sen *v.* Surbessur Doss Goopto, 21 *ib.*, 298.

One of several judgment-debtors jointly liable under a decree, having paid a larger amount than was due from him as between himself and his co-defendants, brought a suit to recover from them the excess paid by him; one of the defendants having paid more than his share, the claim against him was dismissed by the Principal Sudder Ameen, who, nevertheless, on the ground that it was necessary to make him a party, awarded him no costs. It was decided that it was not necessary to make this defendant a party, and that having been made a party, costs should not have been refused to him. It was held also, that the scale on which costs should be awarded to him depended on what the plaintiff claimed against him, and that he was entitled to costs on the usual scale on the amount for which the suit was brought (*a*).

Parties having no interest in the suit, who are made parties unnecessarily, ought to get their costs; the Court has a discretion under this section, and it was formerly held that there was no appeal (*b*). On this latter point, however, there was a different ruling in the Madras High Court, where it was held that if no appeal is made against the judgment given on the subject-matter of the suit, discretion allowed to the Courts in assessing costs should not be interfered with by the Appellate Court; but in a very exceptional case, where the exercise of this discretion has been manifestly in violation of usage, and has inflicted marked injustice, an appeal would lie (*c*). And it has been subsequently held by a Full Bench in Calcutta, that an appeal will lie upon a question of costs, though any interference with the order of the lower Court ought to be exercised with discretion (*d*). "The "power given to the Court to award and apportion costs in "such manner as it may deem proper is a power to be exercised "according to law, and not according to mere caprice; it is "a power to be exercised subject to all the provisions of "this Code; and a decree, so far as it relates to costs, is subject "to an appeal in the same manner as any other part of the "decree. Words similar to the words 'in any manner it may

(*a*) Kashee Nath Sein *v.* Chunder Monee Dabee, 9 Suth. W. R., 288, Markby *v.* Mitter, JJ.

(*b*) The Collector of Dacca *v.* Kumala Kant Mookerjee, 2 Suth. W. R., 33; Anundo Chunder Chowdry *v.* Roy Mothooranath Chowdry, 8 Sev., 15.

(*c*) Kuppusvamiayyan *v.* Nunnuvyyan, 1 Mad H. C. Rep., 74.

(*d*) Greedharee Lall Roy *v.* Soonder Bibee, 6 Suth. W. R., 187; S. C., 2 Wym., 185, F. B.; and B. L. R., F. B., 496.

"deem proper," in s. 187, are also used in s. 193, (repealed by Act XXIII of 1861, s. 10 of which was substituted for it, and coresponding with s. 209 of this Act, *ante*). "There it is said, "the Court may order interest as the Court may think proper to "be paid" (now 'as the Court deems reasonable to be paid'). That "does not mean any sum that the Court may think proper without "any appeal, otherwise the Court may award 100 per cent. instead "of the ordinary rate of 12 per cent;" (This was the ordinary rate in the mofussil; in Calcutta, the High Court, in the exercise of its ordinary original civil jurisdiction, usually gave 6 per cent.—*Ed.*) "or the rate, if any, expressly agreed to be paid by the contract "under which the principal became due. Similar words are used "with regard to interest in s. 196" (see s. 211 of this Code). "It "appears to me that the discretion vested in the Court in all these "sections is subject to the controlling power of appeal, whether "regular or special, according to the nature of the case" (*a*). Special appeals, or appeals from appellate decrees on points of law, &c., are the subject of chap. xlii of this Code; chap. xli deals with ordinary or, as they were termed, regular appeals. This distinction is shown in several instances besides that already noticed (*b*). An improper exercise of discretion in awarding costs is not a ground of appeal from an appellate decree, unless some particular law is infringed (*c*).

Act IX of 1850 (Small Cause Courts, Presidency Towns), s. 101, enacts that—"If any action shall be commenced after "the passing of this Act in the Supreme Court, for any cause other "than those lastly hereinbefore specified, for which a summons might "have been taken out from a Court holden under this Act, and a "verdict shall be found for a plaintiff for a sum less than 500 rupees "if the said action is founded on contract, or less than 100 rupees "if it is founded on wrong, the plaintiff shall have judgment to "recover such sum only, and no costs; and if a verdict shall not be

(*a*) Peacock, C. J., B. L. R., F. B., 497.

(*b*) Assa Ram *v.* Kashmuree Dass, 1 H. C. Rep., N. W. P., F. B., 90, 1867; see also Musst. Kunwar Ball *v* Luchmun Dass, Privy Council, 5th Dec., 1837; cited also 1 S. D. A., N. W. P., 1861, p. 235; see also Sree Dantuluri Narayana Ganjapati Razu Garu *v.* Surrappa Razu, 3 Mad. H. C. Rep., 113; Amirsaheb Hafizulla *v*, Jamshedji Rustamji, 4 Bom. H. C. Rep., Appeals, 41, Couch, C. J., and Newton, J.

(*c*) Amirsaheb Hafizulla *v.* Jamshedji Rustamji, 4 Bom. H. C. Rep., 41, Appeals, Couch, C. J., and Newton, J.

"found for the plaintiff, the defendant shall be entitled to his "costs as between attorney and client, unless in either case the "Judge, who shall try the cause, shall certify on the back of the "record that, by reason of the difficulty, novelty, or general import-"ance of the case, or of some erroneous course of decision on like cases "in the Court of Small Causes, the action was fit to be brought "in the Supreme Court." It has been held that this section is neither expressly nor impliedly repealed by the 24 and 25 Vict, c. 104, s. 11, together with cls. 12 and 37 of Letters Patent, establishing the High Court; and therefore the discretionary power conferred by the corresponding section (187) of Act VIII of 1859 should be considered as subject to, and regulated by, the above provision in suits with respect to which the High Court and Court of Small Causes have concurrent jurisdiction (*a*). See also Act XXVI of 1864, s. 10, which gives the Court, under certain circumstances, power to certify for costs. Where a suit was brought for the principal sum and interest due on a mortgage, Phear, J., gave costs, although the decree was for less than Rs. 1,000, as the suit was a suit for land, and the Small Cause Court had no jurisdiction (*b*). But in another case, where the plaintiff had obtained a decree in the Calcutta Small Cause Court, and execution had been issued, but the defendant had not moveable property sufficient to satisfy the decree, it was held by Macpherson, J., that a suit in the High Court on the decree in the Small Cause Court would lie for the balance to be executed on the land of the defendant, but the Judge declined to give costs to the successful plaintiff in the suit, or interest on the judgment obtained in the High Court (*c*). The jurisdiction of the Small Cause Courts in the Presidency towns is now extended to Rs. 1,000; see Act XXVI of 1864, s. 2.

Where, in a mortgage deed, the mortgagee covenanted to re-convey on being paid principal and interest, and "all costs and charges as between attorney and client," and the mortgagee, in default of repayment of the mortgage money, obtained an *ex parte* decree for sale, it was decided, in appeal on this point, that the Court ought to have awarded him costs as between attorney and client (*d*).

(*a*) Subapati Mudaliyar *v* Narayanswami Mudaliyar, 1 Mad. H C. Rep., 115, Scotland, C. J., and Bittleston, J.

(*b*) Mirtunjoy Dutt *v.* Kameenee Dassee, 1 In. Jur, N. S., 95.

(*c*) Mohendro Nath Ash *v.* Beedobodun Dutt, 1 In. Jur., N. S., 220.

(*d*) Chunder Cooma Chatterjee *v.* Essen Chunder Chatterjee, 1 In. Jur., N. S., 222.

The Court should not allow unnecessary costs. Thus, where members of the same family, living in the same place, are sued together on a cause of action common to all, they are entitled on succeeding only to one set of costs (*a*). But where in such a case the defences taken are distinct and different, two sets of costs can and ought to be given (*b*).

Power of Court as to costs.

220. (S.) The Court shall have full power to give and apportion costs of every application and suit in any manner it thinks fit, and the fact that the Court has no jurisdiction to try the case is no bar to the exercise of such power:

Provided if the Court directs that the costs of any application or suit shall not follow the event, the Court shall state its reasons in writing

When a suit is dismissed for want of jurisdiction, the Court has power to give costs. This is a new provision, but does not alter the law; it merely expresses in so many words what was decided in the case of *Punchanun Ghose* v. *Brojendro Narain Deb and another* (*c*). So also where, after notice served on the defendant, and appearance entered by him, it appeared that the case was a suit under Act X of 1859, exclusively cognizable by the Revenue Courts, and that the Civil Court had no jurisdiction to try it,—it was held, that the Civil Court had jurisdiction to order the defendant his costs, and ought to do so, as he had been brought unnecessarily before the Court (*d*). It has been held in a suit in Bombay High Court, Original Side, that the Court will not order, as a condition precedent to proceeding to the hearing of a suit, the payment of the costs of a summons adjourned from Chambers into Court and then dismissed (*e*).

Costs may be set off against sum admitted or found to be due.

221. (S.) The Court may direct that the costs payable to one party by another shall be set off against a sum which is admitted or is found in the suit to be due from the former to the latter,

(*a*) Kassee Nath Roy Chowdhry *v.* Hullodhur Roy, 2 Suth. W. R., 60; see also Kenny *v.* Administrator-General, 7 B. L. R, Apx., 50; Shah Mukhun Lall *v.* Baboo Sreekishen Singh, 12 Moo. I. A., 157.

(*b*) Ram Chunder Gossain *v.* Mutty Lall Bagchee, 11 Suth. W. R., 19, Peacock, C. J., and Mitter, J.

(*c*) 1 In. Jur, N. S., 38.

(*d*) Gopal Chunder Bose *v.* Dhurundhur Roy, Marsh., 311.

(*e*) Sokabai *v.* Laksmibai, 12 Bom. H. C. Rep., 9.

but such direction shall not affect the lien upon the amount decreed of any pleader in respect of the costs payable to him under the decree.

Saving of pleader's lien.

This is a new provision.

222. (S.) The Court may give interest on costs at any rate not exceeding six per cent. per annum, and may direct that costs, with or without interest, be paid out of or charged upon the subject-matter of the suit.

Interest on costs. Payment of costs out of subject-matter.

This also is a new provision. It had been held that costs carry interest, whether it is so stated in the decree or not (*a*). But this is contrary to the principle that a decree cannot be altered in any way by the Court executing it, and it has now been finally settled by the Judicial Committee that costs do not carry interest unless it be so stated in the decree (*b*).

CHAPTER XIX.

OF THE EXECUTION OF DECREES.

A.—Of the Court by which Decrees may be executed.

223. A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution under the provisions hereinafter contained.

Court by which decree may be executed.

The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,

(*a*) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(*b*) if such person has not property within the local limits of the jurisdiction of the Court which passed the

(*a*) Haradhun Sandyal *v.* Rashmonee Dassia, 2 Suth. W. R., Mis., 21.

(*b*) Forester *v.* The Secretary of State, I. L. R., 3 Cal., 161, P. C.

decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(*c*) if the decree direct the sale of immoveable property situate outside the district within which the Court which passed it is situate, or

(*d*) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

The Court which passed a decree may of its own motion send it for execution to any Court subordinate thereto.

The Court to which a decree is sent under this section for execution shall certify to the Court which passed it, the fact of such execution, or where the former Court fails to execute the same, the circumstances attending such failure.

If the decree has been passed in a case cognizable by a Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay, or Rangoon, such Court may send to the local Court of Small Causes the copies and certificate respectively mentioned in clauses (*a*), (*b*), and (*c*) of section 224; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

If the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But if the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

The first portion of this chapter, down to s. 229, repeats in a more expanded form the provisions of ss. 284 to 287 inclusive, and a part of s. 294 of Act VIII of 1859. This section (223), like

s. 285 of that Act, requires the decree-holder to apply for execution. The decree must be executed as it was passed; no alteration can be made in it by the Court which is to execute it (*a*).

The Court by which the decree was passed should endeavour to execute it first, and it is only when it cannot do so that it should send it to another Court for execution (*b*). So it was held under Act VIII of 1859, s. 286, where the directions are, that "the Court, unless there be any sufficient reason for the contrary" shall cause, &c. Here the words are "may on the application," &c, and "may of its own motion," &c. In both cases the same discretion is given to the Court passing the decree. It would appear that there was no particular form prescribed for the certificate to be sent to the other Court under the Act of 1859 (*c*). See, however, form 134, *post*, which would seem to imply that an endeavour had been made to execute the decree within the jurisdiction before it is sent to the other Court. The certificate is, however, not a nullity, nor is the sale in execution void, by reason of the non-observance of this rule (*d*); and it would seem that it is not necessary to attempt to execute the decree by the *arrest* of the debtor before sending it for execution by sale of his property in another district (*e*). A decree may be sent to several Courts concurrently for execution (*f*). Where the transfer is made without the knowledge of the judgment-debtor, and he objects to it, he should apply to the Court to which the decree has been transferred to stay proceedings until be can go to the original Court for his full remedy (*g*).

Procedure when Court desires that its own decree shall be executed by another Court.

224. The Court sending a decree for execution under section 223 shall send therewith

(*a*) Mosoodun Lall *v.* Bekarce Singh, B. L. R, F. B., 602; Forester *v.* The Secy. of State, I. L. R., 3 Cal., 161, P. C.

(*b*) Ramdoss *v.* Lallah Nundcoomar, 1 In. Jur., N. S., 189; Maharaja of Burdwan *v.* Sree Narain Mitter, 9 Suth. W. R., 346, Phear and Hobhouse, JJ.

(*c*) Mookta Keshee Debia *v.* Luchmeeput Singh Doogur, 10 Suth. W. R., 137, Kemp and E. Jackson, JJ.

(*d*) Kally Prosonno Bose *v.* Dinonath Mullick, 11 B. L. R., F. B., 56; S C., 19 Suth. W. R., 44, Couch, C. J., L. S. Jackson, and Mitter, JJ.; Kalee Doss Ghose *v.* Lall Mohun Ghose, 19 Suth. W. R., 307, L. S. Jackson and Mitter, JJ.

(*e*) *Ibid.*

(*f*) Saroda Prosand Mullick *v.* Luchmeeput Sing Doogur, 14 Moo. I. A., 529; S. C., 10 B. L. R., P. C., 214, see p. 225.

(*g*) Lootfoolah *v.* Keerut Chund, 21 Suth. W. R., 330, Phear and Morris, JJ.

(*a*) a copy of the decree;

(*b*) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unexecuted; and

(*c*) a copy of any order for the execution of the decree, and if no such order has been made, a certificate to that effect.

This section corresponds with Act VIII of 1859, s 285; but clause (b) supplies an omission, and requires the Court to state the extent to which a decree in part executed has been satisfied; and clause (c) requires in addition a certificate when no order for execution has been made. No documents other than those specified should be sent (*a*).

It has been held more than once that where a Court other than the Court passing the decree purports to execute it by sale without proper proceedings being taken to transfer the decree for execution the sale is void (*b*).

But where a decree was obtained by A. against B. in the Court at Nuddea, B. being a resident within that jurisdiction, and in execution of that decree A. attached and sold by the Court at Nuddea a decree obtained by B. against C. in another Court at Beerbhoom, and bought that decree himself at the sale in execution,—it was held that A. having thus become the assignee of B.'s decree in Beerbhoom could execute it as B. might have done, and it was not necessary for him to have his own decree transferred to Beerbhoom for execution in order to sell the right, title, and interest of B. in the Beerbhoom decree (*c*).

A fresh certificate is not necessary where the execution of the decree has been delayed in consequence of proceedings in appeal,

(*a*) Soomut Doss *v.* Bhoobun Lall, 21 Suth. W. R., 292, Phear and Morris, JJ.

(*b*) Luchmeeput Singh Doogur *v.* Mooktakashee Debia, 9 Suth. W. R., 388, Kemp and E. Jackson, JJ.; Suriatoollah Mirdha *v.* Gooro Churn Doss, 4 Wym, 170; S. C., 8 Suth. W. R., 310, Bayley and Phear, JJ; following Mooktakashee Debia *v.* Kumula Monee Debee, 7 *ib.*, 267, Loch and Macpherson, JJ.

(*c*) Rambaksh Chetlangi *v.* Maharaja Banwari Gobind Bahadur, 2 B L. R., Appeals, 65, Peacock, C. J., and Mitter, J.

pending which the judgment-creditor thought it prudent to refrain from proceeding with his execution (*a*).

Court receiving copies of decree, &c., to file same without proof.

225. The Court to which a decree is so sent shall cause such copies and certificate to be filed, without any further proof of the decree or order for execution, or of the copies thereof, or of the jurisdiction of the Court which passed it, unless the former Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

This section corresponds with the latter half of s. 286 of Act VIII of 1859; the first part of that section is embodied in s. 223.

The certificate takes effect in the Court to which it is sent from the date when it is filed. For example, where a decree was passed in the Court of A., where a company had its head office, and directed the winding up of the company, and the copy and certificate were transmitted to the Court at B., the effect being, under the Companies' Act then in force (Act XIX of 1857, s. 72), to stay all suits and actions against the company, it was held that a suit was not thereby stayed in which a decree had been made by the Court in B. and executed by the attachment of property, although the property had not been sold before the certificate and copy were filed (*b*).

Execution of decree or order by Court to which it is sent.

226. When such copies are so filed, the decree or order may, if the Court to which it is sent be the District Court, be executed by such Court or by any subordinate Court which it directs to execute the same.

This section corresponds with the latter half of Act VIII of 1859, s. 287.

When a copy of a decree or an order for execution is transmitted by the Judge of one district (A.) to the Judge of another (B.) for the purpose here specified, the Judge of the latter district has no authority to transfer it to a third *district*. If complete

(*a*) Buboria Ahun Bassee Kooer *v.* Joobraj Singh, 23 Suth. W. R., 225.

(*b*) Narayan Shamji *v.* The Gujarat Trading Co., 3 Bom. H. C. Rep., O. C., 20, Couch, C. J.

execution cannot be had in district B., it is the business of the decree-holder to have his decree transmitted "to the proper "Court whose duty it is to execute it, *viz.*, (in most cases) "to the Court where the decree was made, and there to obtain "a fresh certificate for transmission to any other district where "execution may be practicable" (*a*).

Execution by High Court of decree transmitted by other Court.

227. If the Court to which the decree is sent for execution be a High Court, the decree shall be executed by such Court in the same manner as if it had been made by such Court in the exercise of its ordinary original civil jurisdiction.

This section is new.

Appeal from orders for execution of decrees of other Courts.

228. The Court executing a decree sent to it under this chapter shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its orders in executing such decree shall be subject to the same rules in respect of appeal, as if the decree had been passed by itself.

The last clause of this section corresponds with Act VIII of 1859, s. 294; the first two clauses are new, but are to the same effect as the first clause of s. 287 of the same Act.

The Court which originally passed the decree is the proper Court to apply to for the purpose of the decision of any question relating to execution, not apparent on the face of the proceedings transmitted to the Court which is executing it, if it has been so transferred (*b*). The Court of a district other than that in which a decree is passed has no jurisdiction in the matter of its execution, excepting such as it may obtain in pursuance of these sections, which do not give the Judge, nor does s 244, *post*, any jurisdiction to entertain or determine any question as to the right of the person seeking execu-

(*a*) Dhunput Singh Bahadoor *v.* W. R., 337, L. S. Jackson and Ainslie, Wooma Sunkuree Gupto, 21 Suth. JJ.

(*b*) Sheonarain Sing *v.* Harbans Lal, 5 B. L. R., 497.

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tion (*a*). But a Court to which a decree is referred for execution has jurisdiction to decide whether the decree-holder's right to execute his decree has lapsed by reason of the law of limitation (see Act XV of 1877, s. 4) (*b*); it can only do so however where the facts are before it on the face of the proceedings in execution,—*i. e.*, on the documents sent to it under s. 224, *ante*; and cannot go behind those documents or enquire into antecedent facts (*c*). It has been held by a Full Bench (*d*) that where the law of limitation differs in the two Courts, the law prevailing in the Court to which the decree is sent for execution ought to prevail.

But a Judge having transmitted a decree in his Court to another Court to be executed, has no jurisdiction to recall it on the application of a person claiming property attached in execution in another district. The objection to the attachment must be dealt with by the Court which issues it (*e*). Thus where a decree of the Court at M. was sent to the Court at R. for execution, and certain property was attached in the district of R., A., who claimed the property, applied to the Court at M., and that Court ordered the Court at R. to send back the record,—it was held that the Court at M. had no jurisdiction to do this, and the record should be returned to R. for execution. A. had no *locus standi* in the Court at M.

The Court executing the decree had jurisdiction over its own order striking off the case, whatever that amounts to; the order for striking off the application for execution of the decree does not strike the copy of the decree off the records of the Court to which it is sent for execution; and as long as it remains there, the Court to which it was sent may deal with it and any application for execution of it as if it were its own decree (*f*).

(*a*) Musst. Dhunesh Koeree *v.* Oolfut Hossein, 21 Suth. W. R., 219, Phear and Morris, JJ.; Jadu Roy *v.* Farrell, 6 B. L. R., Apx., 66.

(*b*) Leake *v.* Daniel, B. L. R., F. B., 970; Buzur Bibee *v.* Jackson, 5 Suth. W. R., Mis., 14, Kemp and L. S. Jackson, JJ.; Luchmun Suhoy *v.* Bhugwan Chunder Dutt, 6 *ib.*, Mis., 118; Bykuntnath Mullick *v.* Joygopal Chatterjee, 7 *ib.*, 19, Loch and Macpherson, JJ.; Ramdoss *v.* Lalla Nundcoomar, 1 In. Jur., N. S., 189; Sheo Narain Sing *v.* Harbans Lal, 5 B. L. R., 497-499.

(*c*) Soomut Doss *v.* Bhoobun Lall, 21 Suth. W. R., 292, Phear and Morris, JJ.; Lootfoollah *v.* Keerut Chund, *ib*, 330, same Judges.

(*d*) Leake *v.* Daniel, B. L. R., F. B., 971.

(*e*) Indra Chand Dugar *v.* Gopal Chandra Shettia, 3 B. L. R., 181, Peacock, C. J., and Mitter, J.

(*f*) Bagram *v.* Wise, 10 Suth. W. R., F. B., 46; S C., 1 B. L. R., F. B., 91; and see also Syud Nadir Hossein *v.* Pearoo Thovildarinee, 14 B. L. R., 425 note, Kemp and Pontifex, JJ.; Gour Mohun Bandopadhya *v.* Tarachand Bandopadhya, 3 B. L. R., Apx., 17, but see the note to s. 266, *post*.

Decrees of Courts established by Government of India in Native States.

229. A decree of any Court established by the authority of the Governor General in Council in the territories of any Native Prince or State in India, which cannot be executed within the jurisdiction of the Court by which it was made, may be executed in manner herein provided within the jurisdiction of any Court in British India.

This section corresponds with Act VIII of 1859, s. 284, so far as it relates to these Courts. It puts them on the same footing with British Courts in this respect. The establishment of Courts by the authority of the Governor General in Council within native territories is notified in the Gazette of India, for example, the following Civil Courts, established within the limits of the political agencies of Kolhapoor and the Southern Mahratta country, are recognized by the Viceroy and the Governor General in Council for the purposes of Act VIII of 1859, s. 284, corresponding with this section of the new Code.

1.—Court of Sudder Ameen at Kolhapoor.

2.—Moonsiffs at Sherol, Kudzaon, Echulkurunjee, Kagul, Bowra, Moodhole, Meeraj, Modlind, Luckmedhwur (*a*).

But the Court of the Dewan Ahilkar of Cooch Behar not being shown to be a Court within British territories, or established by the Governor General in a foreign State, it was held that the Judge of a British Indian Court has no jurisdiction to execute its decree (*b*).

B.—Of Application for Execution.

Application for execution.

230. (S.) When the holder of a decree desires to enforce it, he shall apply to the Court which passed the decree or to the officer, if any, appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court or to the proper officer thereof.

The Court may in its discretion refuse execution at the same time against the person and property of the judgment-debtor.

(*a*) See No. 542, *Gazette of India*, p. 896, April 24, 1869.

(*b*) Jadab Chandra Toi Paramanik *v.* Dinanath Das, 4 B. L. R., A. C., 134, Macpherson and E. Jackson, JJ.

Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent application to execute the same decree shall be granted unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree ; and the order of the Court granting any such subsequent application shall be conclusive evidence that due diligence was used to procure such satisfaction.

And no such subsequent application shall be granted after the expiration of twelve years from any of the following dates (namely)—

(*a*) the date of the decree sought to be enforced, or of the decree (if any) on appeal affirming the same, or

(*b*) where the decree or any subsequent order directs the payment of money or the delivery of property by instalments,—the date of the default in paying or delivering the instalment in respect of which the applicant seeks to enforce the decree.

Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of twelve years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application.

Notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years after the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years.

The first paragraph of this section corresponds with Act VIII of 1859, s. 207, but it enables an officer "appointed in this behalf" to deal with the application. The second paragraph follows the case of *Davis* v. *Middleton* (*a*). The third paragraph is in accord-

(*a*) 4 Wym., S. C. Ref., 7, Peacock, C. J., and Markby, J. ; S. C., 8 Suth. W. R., 282, 284.

ance with the view taken by the Full Bench in *Eshan Chunder Bose* v. *Prannath Nag* (*a*). The rest of the section is new, and provides a special rule as to limitation when the application is not the first.

It is not competent to the Court to withhold execution until the expenses are paid (*b*).

Application by joint decree-holder.

231. (S.) If a decree has been passed jointly in favour of more persons than one, any one or more of such persons, or his or their representatives, may apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the representative in interest of the deceased.

If the Court sees sufficient cause for allowing the decree to be executed on an application so made, it shall pass such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

This section corresponds with the latter part of s. 207 of Act VIII of 1859 (*c*). The words "of such persons, or his, &c.," to the end of the first clause being substituted for "of them may make the application."

Although the Court may allow one of two decree-holders to take out execution of the whole of a decree which is joint, it cannot allow him to take out execution of a part of it, to the extent only of his own interest (*d*). But it has been held that where a plaintiff in a suit died, and the defendant was one of his heirs, the

(*a*) 14 B. L. R., F B., 152; see also Seton v Bijohn, 8 *ib.*, 255, Couch, C. J., and Macpherson, J.

(*b*) Kisto Kishore Ghose v Sorjonath Sircar, 10 Suth. W. R., 354, Phear and Hobhouse, JJ.

(*c*) See the case of Teja Singh v. Rajnarayan Singh, 1 B L. R., 62, Appeals, Peacock, C. J., and Mitter, J.

(*d*) Prannath Mitter v. Sreenath Haldar, 2 Wym. Rep., 185, S C., Prannath Mitter v. Mothoornath Chuckerbutty, 6 Suth. W. R., Mis., 65, Loch and Macpherson, JJ.; Thakoor Dass Sing v. Luchmeput Doogur, 7 Suth W. R., 10; Maharanee Indrojeet Kooer v Mohzum Khan, 2 Wym. Rep., 216, Loch and Macpherson, JJ.; Haro Sanker Sandyal v. Tarak Chandra Bhuttacharjee, 3 B. L. R., 114, Peacock and E. Jackson, JJ.; Balkishoon v. Mahomed Tazam Allee, 4 H. C. Rep., N. W. P., 90; Ram Autar v. Ajudhia Singh, I. L. R., 1 All., 232, Stuart, C. J, and Pearson, J.; and see the note to the next section.

other heirs can go on to execute the decree according to such rights as they may be able to prove (*a*).

Where one of several persons entitled to the benefit of a decree seeks to have it executed without joining the others interested, his proper course is to apply to the Court under this section (*b*). The Court has, however, a discretion in the matter (*c*). And where one of several decree-holders takes out execution, the Court should make an order in granting the execution, providing in express terms for the distribution among the several decree-holders of the proceeds to be realized (*d*).

Application by transferee of decree.

232. (S.) If a decree be transferred by assignment in writing or by operation of law from the decree-holder to any other person, the transferee may apply for its execution to the Court which passed it; and if that Court thinks fit, the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided that where the decree has been transferred by assignment, notice in writing of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to such execution:

Provided also that where a decree against several persons has been transferred to one of them, it shall not be executed against the others

This section corresponds with Act VIII of 1859, s. 208. The words "in writing" are added after "assignment." The words "to the Court which passed it" are introduced in conformity with the view taken by the High Court at Calcutta in the case of *Sheo Narayan Sing* v. *Harbans Lal* (*e*) referred to in the note to s. 228, *ante*. The provisos are new.

(*a*) Wise *v.* Moulvie Abdool Ali, 7 Suth. W. R., 136, Loch and Macpherson, JJ.

(*b*) Musst. Amatool Russool *v.* Musst. Luteefun, 19 Suth. W. R, 302.

(*c*) Hera Roy *v.* Baboo Gujadhur, 24 Suth W. R, 286

(*d*) Tarasundari Burmoni *v* Beharilal Roy, 1 B L R., Appeals, 28, Phear and Hobhouse, JJ.

(*e*) 5 B. L. R., 497, Bayley and Markby, JJ.

Where a decree is assigned to B. benami for A., who is the real assignee, B. can execute it (*a*).

This section refers to the assignment of the *whole* decree,—that is to say, when the whole decree is unsatisfied, and wholly capable of execution; but where a part of the decree is admittedly satisfied, the decree-holder may go on to execute it so far as it remains unsatisfied; and where a decree is perfect for execution in certain respects, but imperfect in other respects, execution may be taken out for the portion which is perfect; thus where there is a decree for land, and for mesne profits which are to be assessed in execution, the decree cannot be executed as regards the mesne profits until they are ascertained, but it can be executed by possession of the land being given to the decree-holder, although the claim for mesne profits may not have been investigated, and may be in process of investigation (*b*).

The first proviso seems to contemplate an enquiry into and decision by the Court which passed the decree as to the assignment where notice can be given to the transferor, and the decision, would not be open to appeal (s. 588, *post*), and this was so under the old Act (*c*). But it is questionable whether the section could be interpreted so as to bar a suit for the purpose of reversing an order made in pursuance of it. It was considered by the Judicial Committee that the corresponding section of Act VIII of 1859 did not apply where the person seeking to execute is not a transferee from the original decree-holder either by assignment or by operation of law; nor to cases where the right to an equitable interest in a decree was seriously contested (*d*). That section did not contain this proviso, but the grounds upon which the case was decided seem to be applicable. The Committee observed that, "it "was not intended to enable the Court to try an important ques-"tion, such as the legitimacy or illegitimacy of an heir. They are "further fortified in this view by the consideration that ..... no "appeal would lie from any judgment or decision given in a "proceeding under this section (208); it appears difficult te suppose "that such an important question as this should be triable without

(*a*) Purna Chandra Roy *v.* Abhaya Chandra Roy, 4 B. L. R, Apx., 40, L. S. Jackson and Glover, JJ.

(*b*) Haro Sankar Sandyal *v* Tarak Chandra Bhuttacharjee, 3 B. L. R., A. C., 114, Peacock, C.J., and E. Jackson, J.

(*c*) Megh Narayan Sing *v.* Radha Prasad Sing, 4 B. L R, A. C., 201.

(*d*) Abidunnissa Khatoon *v* Amirunnissa Khatoon, I. L. R, 2 Cal. Series, 327, P. C.; S. C., 20 Suth. W. R., 305

"appeal." ..... "Even if [the section] did apply, it would "appear to their Lordships that, inasmuch as proceedings under it "are not subject to appeal, probably a suit would lie for the "purpose of reversing an order made in pursuance of it."

The Court, on a mere application, where the parties were natives, and it was unnecessary to obtain administration in order to represent the estate of a deceased person, allowed a person to execute a decree as representative of his deceased daughter, saying that a certificate under Act XXVII of 1860 was not necessary for this purpose (*a*). That Act only enables the Court to grant a certificate to collect debts; if the grant purports to enable the certificate-holder to do what the Act does not contemplate, it is made without jurisdiction, and so far a nullity. But the applicant must show to the satisfaction of the Court that he is entitled by the law to which he is subject to represent the deceased person (*b*). In these cases the representation may be complete without any formal document; but where the Indian Succession Act applies, no one has any right to execute a decree in favour of a deceased person, but an executor or administrator duly appointed (see s. 179 of that Act), or an Administrator-General or a person holding his certificate under Act II of 1874, s. 36, and the following sections, the whole estate left by the deceased person not exceeding in value 1,000 rupees.

This section puts the person to whom a decree has been transferred into the same position as the original decree-holder, and he may (if the Court think fit) have the decree executed in the same manner as if he were the original decree-holder (*c*).

It was considered inequitable that one of several debtors by purchasing the creditor's rights in the decree, and extinguishing the whole claim against himself, should use the same decree as a means of obtaining a profit out of his co-debtors by execution (*d*). This was decided by a Full Bench on a reference in consequence of some conflicting opinions, and the result has been adopted by the Legislature in the enactment of the second proviso to

(*a*) Syed Ekram Hossein *v* Rajah Kirtee Chunder Bahadoor, 3 Suth. W. R., Mis, 9, Loch and Seton-Karr, JJ.

(*b*) Rajah Gopal Singh Deb *v.* Gopal Chunder Chuckerbutty, 7 *ib.*, 393, Loch and Macpherson, JJ.

(*c*) Shamanund Surmah *v.* Shumboo Chunder Doss, 7 Suth. W. R., 205, Loch and Seton-Karr, JJ.

(*d*) Degumburree Dabea *v.* Eshan Chunder Sein, and Sooroop Chandra Hazra *v.* Troylokhonath Roy, 5 Wym. Rep., F. B, 187; S. C., 9 Suth. W. R., 232.

this section; the principle being that the debtor who buys the decree is a surety for his co-debtors, and his proper remedy, as stated by Peacock, C. J., in that case, is to sue them for contribution and compel them to pay their shares of the amount for which the decree was purchased, having regard to the proportion in which they were bound, *inter se*, to satisfy the original decree (*a*).

A plaintiff sought to execute his decree against the defendant, who objected to the proceeding on the ground that he himself had another decree against the plaintiff, in execution of which he had attached and sold the plaintiff's decree and bought it himself. No record of these proceedings appeared in the Court in which the plaintiff held his decree, the two decrees being in different Courts. It was held that the Court could not recognize the sale of the plaintiff's decree, as it had not been certified to the Court as required by s. 206 of Act VIII of 1859, corresponding to s. 258 of this Act, *post*. And it was also held, that s. 208 did not apply to the case, the purchaser of the decree and the defendant being one and the same person (*b*).

Transferee to hold subject to equities enforceable against original holder.

233. (S.) Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

This is a new section. It overrules the case of *Sheik Ruziuddeen* v. *Sheik Jehangeer* (*c*), the decision in which case was questioned in *Fakeer Chund* v. *Greesh Chunder* (*d*).

If judgment-debtor die before execution, application may be made against his representative.

234. (S.) If a judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

Such representative shall be liable only to the extent of the property of the deceased which has come to his

(*a*) See Story's Equity Jurisprudence, § 499, (b), (c) and (d); Reed v. Norris, 2 Mylne and Craig, 361; Dowbiggen v. Bourne, 2 Y. and C., 462, all cited.

(*b*) Bharut Chunder Roy v. Nawab Nazir Ali Khan Bahadoor, 10 Suth. W. R., 354, Phear and Hobhouse, JJ.

(*c*) 1 Wym., 154.

(*d*) 2 Wym., 204; S. C., 6 Suth. W. R., Mis., 72; and see Musst. Peeloo Chowdhrain v. The Court of Wards, 7 Suth. W. R., 219.

hands and has not been duly disposed of; and for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion, or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit.

The first part of this section corresponds with s. 210 of Act VIII of 1859. It is of course inapplicable where the suit has been from the first wholly irregular for want of proper parties. Thus a suit was instituted by A. against B., and carried on to final decree. It turned out that B. had died *before the plaint was filed.* It was, therefore, held that the decree could not be executed against his personal representative (*a*); there being no defendant, and no one to contest the proceedings in the suit. And the same objection applies when the defendant dies pending the suit. The law "only contemplates the case of a person who, "being alive when a decree is passed against him, dies before execu-"tion is fully had of that decree"(*b*). In such a case steps should be taken to substitute a proper legal representative as described in chap. xxi, *post.*

Execution can only be had against the representative to the extent pointed out in this section (*c*); and it lies upon the applicant for execution to show that the person against whom he seeks to execute the decree as representative of his judgment-debtor is liable to the extent mentioned in this section to satisfy the decree (*d*). But although this has always been the case, and has been clearly pointed out, a great deal of confusion has arisen from, and a great deal of litigation has been caused by, inattention to this rule; and this has been aggravated by the fact that there is no general rule in this country, as there might very well be, without any interference with the laws and customs of any class, for the constitution of a representative of a deceased person with full

(*a*) Girendronath Tagore *v.* Huronath Roy, 10 Suth. W. R., 455; S. C., 14 B. L. R., 334 note, Bayley and Macpherson, JJ.

(*b*) See 14 B. L. R., 336, note.

(*c*) Following the case of Chowdry Wahed Ali *v.* Musst. Jumaee, 11 B. L. R., 149, P. C.; see also Ameerunissa Khatoon *v.* Meer Mozuffer Hossein Chowdhry, 12 B. L. R., 65, Jackson and Mitter, JJ.; Doorga Soonduree Debia *v.* Soorjo Monee Debia, 8 Suth. W. R., 101, L. S. Jackson and Hobhouse, JJ.

(*d*) Ram Runjun Chuckerbutty *v.* Rajah Jowhir Jummah Khan, 21 Suth. W. R., 420, Markby and R. Mitter, JJ.

power to protect the property of the latter. Under the present system people are constantly brought on the record in suits concerning which they have nothing to do, and even if the case is decided in favor of the person so wrongly introduced, he is put to considerable trouble and expense in defending his own interests. It not unfrequently happens that the Court wrongly decides against him, as in the following instance. There was a decree against R., the petitioner being the son of R., and after several proceedings in execution of that decree, R. having died, the petitioner was brought on and substituted as her heir and representative. The Court was proceeding to sell some property of his when he objected. Jackson, J., observed:—"The Court threw out his objection, as far as "I can understand, upon this sort of reasoning. R. was the widow "of one A.; A. had property; consequently R. must have had "property; that property must have devolved presumably upon "the petitioner; and as he does not prove that he inherited "no property from his mother, he is liable" (*a*). His Lordship, after showing that this view of the case is quite wrong, goes on to describe the proper proceeding, which is not altered by the new Code, as follows:—"The Court should issue a notice "under s. 216 (corresponding with s. 248, *post*), to the Rajah, call-"ing on him to show cause why the decree should not be executed "against him as representative of his deceased mother; and sup-"posing the Court to have ordered that it should be so executed, it "would then be for the decree-holder, in the first place, to make "search for property of the deceased; and if no such property "could be found, then to prove that some property of the deceased "had come into this petitioner's possession." It would be more prudent for the decree-holder to make this enquiry in the first instance, otherwise, if the representative be found to have never had any property of the deceased person, no legal liability would attach to him, and the application of the decree-holder would be dismissed, and probably with costs. "If that were proved, it would lie upon him to "prove that he had applied the property to the payment of his "mother's debts, and upon his failing to prove that, he would be "liable to the extent of such property. In this case the Court "appears to have gone far beyond that, because without taking "proof from the decree-holder as to any property of the deceased

(*a*) Rajah Roodro Narain Roy *v.* Nittyanund Doss, 8 Suth. W. R., 195.

"lady, he assumes that the petitioner has received such property, "and then, without enquiring what the extent of the property was, "he proceeds to sell the ancestral property of the petitioner as if "he had been the original debtor."

Where the deceased person was not a Hindu, Bhuddhist, or Mahomedan, or a person exempted from the operation of the Indian Succession Act, the Judge of the District is directed, by s. 64 of Act II of 1874, to take possession of the property of the deceased lying within his district, and to hold possession of it until the estate is represented by some one who shall obtain a grant of probate, or letters of administration, from a competent Court, or a certificate from an Administrator-General, which can be given (see s. 36 *et seq.* of the same Act) only when the value of the property left by the deceased does not exceed Rs. 1,000. The decree cannot be executed against the Judge or against the property pending the grant of probate, administration, or a certificate. The Judge is in no sense the representative of the deceased, but is merely the custodian of the property, and is directed to deliver it, not to an execution-creditor, but to the representative of the deceased; the estate is unrepresented, and steps should be taken to get it represented. If the property exceeds Rs. 1,000 in value, and the executor or next-of-kin, that is to say, the absolute next-of-kin, not merely the next-of-kin in India (*a*), does not apply for administration within a month, the Administrator-General must apply (see Act II of 1874, s. 16) within a reasonable time after he has notice, and he may apply before that period has elapsed (see s. 23); but where the property is not of greater value than Rs. 1,000, the Administrator-General need not apply; and in that case he may grant a certificate to the executor, or widow, or any person entitled to administer, other than a creditor (s. 36), or to a creditor after the lapse of three months, unless he elect to take charge of the estate himself without letters of administration (s. 37), or the person entitled to administer may apply in the ordinary way to a Court of competent jurisdiction for probate or letters of administration.

In the case of a Hindu dying and leaving a will which comes within the operation of the Hindu Wills Act (XXI of 1870), the

(*a*) *In re* Smallwood, MSS Norman, J., July 20, 1868; see also In the goods of Peacock, Morton's Rep. by Montriou, 8; and In the goods of De Mello, *ib.*, 18.

proper representative is the executor or administrator with the will annexed.

In any case, a person who takes possession of the property of a deceased person without letters of administration, probate, or a certificate, constitutes himself representative of the deceased to the extent of the property he takes; and is bound to account for it in the same way as a duly constituted representative (*a*).

In the case of a Hindu, Mahomedan or Buddhist, or person exempt from the operation of the Indian Succession Act, dying intestate, or leaving a will not subject to Act XXI of 1870, the High Court in the Presidency towns may, under certain circumstances, but is not bound to, grant letters of administration or probate of the will (*b*). The Supreme Courts might and did do so (*c*). This jurisdiction is continued in the High Courts, and is expressly recognized by Act II of 1874, ss. 17 and 18. It has, however, been held that such a grant of letters of administration does not affect the landed property of the deceased (*d*).

In these cases, where a representative is appointed by the Court, or when one takes possession of the property of a deceased person and so renders himself liable to the extent of the property he takes, the Court can make the representative a party to the suit before decree under chap. xxi; or execute the decree in his favor under s. 231, or against him under s. 234. But where no such formally constituted representative exists, as may be the case in the instance of property of a deceased Hindu, Mahomedan or Buddhist, or person exempted from the operation of the Indian Succession Act, and where no grant of probate or letters of administration has been made, the applicant for execution, as before stated, must be prepared with evidence to make out his case if he claims to represent the deceased creditor, or to show that the person against whom he seeks to execute his decree is the legal representative of the debtor, and liable as such, or that having wasted or misapplied the property of the deceased he is so far personally liable.

The decree cannot be against the estate of the judgment-debtor, but against the judgment-debtor himself; and must be

(*a*) See Indian Succession Act, Part XXXII, the cases already cited, and also the case of Chowdhry Wahed Ali *v.* Musst. Jumaee, 11 B L. R., 149, P. C.

(*b*) Morley, Vol. I, Title Executors and Administrators.

(*c*) *Ibid.*

(*d*) Kadumbinee Dossee *v.* Koylash Kaminee Dossee, I. L. R., 2 Cal., 431.

executed against him or against his representative; execution cannot be had against the estate of a deceased person unless there is some one representing it (*a*). But where the property belongs to an idol, although property devoted to religious purposes is not as a rule alienable, the sebait may incur debts and borrow money for the service of the idol, and a decree against the property of the idol properly obtained is binding against the property in the hands of the sebait for the time being (*b*).

Except under the Hindu Wills Act, the Courts in the mofussil do not in India grant letters of administration to the estates of natives dying intestate, or probate if they have wills. Reg. V of 1799, which is in force throughout Lower Bengal and the North-Western Provinces, except the scheduled districts (see Act XV of 1874), prohibits the interference of the Courts except on a regular complaint; see also Madras Reg. III of 1802, s. 16. But where there are debts of the deceased person to be collected, the Courts are empowered to grant certificates, which enable the certificate-holder to give a good receipt to the debtor, who cannot be compelled to pay the debt without the production of the certificate, unless it can be shown that he does so from fraudulent or vexatious motives. The Court can take security from the certificate-holder for rendering an account and duly distributing the debt, and the certificate has effect throughout the Presidency for which it was granted; but it has a limited operation, and applies only to the collection of *debts*. It does not constitute the holder a representative for any other purpose, nor can it be more than *primâ facie* sufficient to induce the Court to make him representative for the purpose of a suit, and to the extent of the debts he has collected under it, or other property of which, assuming himself to be the representative, he has taken possession.

There is, however, some authority for saying that a District Court has power to grant probate of the will of a person of the excepted classes, or appoint an administrator if there be no will. The question first arose in 1868 in the Recorder's Court at Rangoon. *In the goods of Kokya Dine* (*c*), the following points were referred to the High Court:—(1) Can the District

(*a*) Lekraj Roy *v.* Becharam Misser, 7 Suth. W. R., 52, Loch and Macpherson, JJ.

(*b*) Prosunno Kumari Debya *v.* Golab Chand Baboo, L. R, 2 I A., 145.

(*c*) 2 B. L. R., A. C., 79; S. C., Porter's Burma Reports, 124.

Judge grant probate under the Indian Succession Act of the will of a Buddhist, the will being made after the 1st of January, 1866? (2) Is it necessary that the will of a Buddhist should be executed according to the formalities required by the Indian Succession Act, in order to support an application for a grant of probate under that Act? In referring the case, the Recorder stated: "With "regard to the first question, it seems to me that there is nothing "in the wording of s. 331 of the Indian Succession Act, 1865, "taking away, in the case of the will of a Buddhist, the general "jurisdiction given to the District Judge by s. 235 in granting "probates in all cases within his jurisdiction. S. 331 refers in its "first part to intestate and testamentary succession, and exempts "Buddhists, amongst others, from the operation of the Act, so far "as those subjects are concerned. By that I understand that, in the "case of the will of a Buddhist, it shall not be governed by the "rules of law laid down in the Act,—that is to say, it shall not "require to be executed as prescribed in Part viii, or attested as "required in Part x, and so on;—not that it shall not be admitted "to probate. The Succession Act consists, it seems to me, of two "distinct portions: the first portion relating to substantive law, and "the last to mere rules of procedure. It may very well be that the "part of the Act dealing with substantive law is not to be applied "in the case of a Buddhist, while the part relating to procedure "is so applied, the object of s. 331 being to prevent interference "with the rules relating to the devolution of property after death "in the cases of certain excepted classes. The same objection does "not apply to matters of mere procedure," &c. And he added—"my own opinion is, that the District Judge has jurisdiction to "grant probate of the will of a Buddhist made after the 1st of "January, 1866; but that it is not necessary that the will should "be executed according to the formalities required by the Indian "Succession Act." In that opinion Peacock, C. J., and Dwarkanath Mitter, J., expressly concurred.

Another case (*a*) was referred by the Recorder of Moulmein in 1869. This was an application for a grant of letters of administration under the Indian Succession Act, made by Fakeeroodeen Adam Saw, the eldest son of the deceased, who was a Mahomedan, and the Recorder referred the following questions:—(1) Whether it is competent to this Court to grant the administration prayed for?

(*a*) In the goods of Adam Saw, Porter's Burma Reports, 131.

(2) In case the Court has such power, in what sense is the exception made in s. 331 of the Indian Succession Act to be construed?

The Recorder stated that, in his own opinion, until the ruling given in the case last referred to, s. 331 of the Indian Succession Act debarred Hindus, Mahomedans, and Buddhists from the privilege accorded by the Act both in respect of probate and administration. This case was also decided by Peacock, C. J., and Dwarkanath Mitter, J., who held that the Recorder's Court had the same power to grant probate of the will of a native of British India as the High Court had before the passing of the Indian Succession Act. S. 331 of that Act did not take away from the Recorders' Courts that power more than they took it away from the High Court, to grant probate or letters of administration in such cases, or probates of wills made prior to the 1st January, 1866; and that the Recorder's Court has power to grant probate or letters of administration to the estates of natives or of wills made before the 1st of January, 1866, though it cannot grant administration to the estate of a Hindu, Mahomedan, or Buddhist, so as to interfere with the law of inheritance or succession.

Both these cases, it will be observed, as was pointed out by the Chief Justice in his judgment in the case of Adam Saw, were references from Recorders' Courts in Burma, whose jurisdiction was conferred by a special enactment (XXI of 1863) now repealed. This Act did not give to those Courts any special powers as Courts of Probate; but they were bound under s. 21 of the Act to administer the same law as the High Court in certain civil suits.

It has been considered, therefore, in Burma, that the same rule, which was declared in these two cases to be applicable to the Recorders' Courts, is equally applicable in the District Courts; and in that province it has been very extensively applied, Act XXVII of 1860 falling into disuse.

There seems to be no reason why the estate of a native deceased person liable for the payment of his debts should not be as fully represented as any other, and it would be certainly more proper to make a representative so constituted a party to the suit or to proceedings in execution of the decree, than to allow of such proceedings as were described by L. S. Jackson, J., in the case already referred to (*a*). If there exists no uniform rule for constituting a complete representative for the purpose of the suit, and

(*a*) 8 Suth. W. R., 195.

Act XXVII of 1860 certainly does not supply one, the Court, in executing the decree, or in substituting a representative, is forced to try a wholly collateral issue, and to go into evidence upon a question which is entirely separate and distinct from the main question to be determined.

Contents of application for execution of decree.

235. (S.) The application for the execution of a decree shall be in writing, verified in manner hereinbefore provided for the verification of plaints, and shall contain in a tabular form the following particulars (namely)—

(*a*) the number of the suit;

(*b*) the names of the parties;

(*c*) the date of the decree;

(*d*) whether any appeal has been preferred from the decree;

(*e*) whether any and what adjustment of the matter in dispute has been made between the parties subsequently to the decree;

(*f*) whether any and what previous applications have been made for execution of the decree, and with what result;

(*g*) the amount of the debt or compensation, with the interest, if any, due upon the decree, or other relief granted thereby;

(*h*) the amount of costs, if any, awarded;

(*i*) the name of the person against whom the enforcement of the decree is sought; and

(*j*) the mode in which the assistance of the Court is required, whether by the delivery of property specifically decreed, by the arrest and imprisonment of the person named in the application, or by the attachment of his property, or otherwise as the nature of the relief sought may require.

This section corresponds with Act VIII of 1859, s. 212. The verification was not required under the Code of 1859,

and it was not necessary to state, as required by clause (f), whether any and what previous application had been made for execution of the decree and with what results.

Where an application for execution of a decree omits to give the names of all the parties as required by this section, the persons named must be understood to be the parties against whom execution of the decree is sought, even if it should appear from other parts of the proceedings who those parties are (*a*).

It used to be thought that the application should be accompanied by a copy of the decree; but this has been several times decided to be unnecessary (*b*). There seems to have been some misapprehension as to the practice, which it was necessary for the Courts to correct by pointing out that such copies are nowhere required. In this respect Act VIII of 1859 corresponds with the present Act.

Application for attachment of moveable property to be accompanied with inventory.

236. (S.) If the application be for the attachment of any moveable property belonging to the judgment-debtor, but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

This section corresponds with Act VIII of 1859, s. 214; but relates only to property not in the possession of the judgment-debtor, and makes the annexing of an inventory imperative. It is particularly to be noted that the last paragraph of s. 214, which enabled the judgment-debtor to apply for a general attachment of the debtor's moveable property, wherever the same can be found, is not repeated here. Even when those words operated, it was held that an attachment in general terms of the rights and interests of the judgment-debtor was no attachment. It must specify what is attached. After the attachment, the defendant's rights and interests in the subject-matter of the attachment only can be sold (*c*).

(*a*) Shaikh Abdool Kureem *v.* Syud Jaun Ali, 18 Suth. W. R., 56, Couch, C. J., and Ainslie, J.

(*b*) Gunga Gobind Gooptoo *v.* Makhun Lall Hattee, 9 Suth. W. R., 362, Loch and Hobhouse, JJ.; Dhunput Singh *v.* Leelanund Singh, 11 Suth. W. R., 28, Kemp and Glover, JJ.; S.C., 2 B L R., Apx., 18.

(*c*) Nga Tha Yah *v.* Burn, 2 B. L. R., F. B., 91, *per* Peacock, C. J., 97.

Further particulars when application is for attachment of immoveable property.

237. If the application be for the attachment of any immoveable property belonging to the judgment-debtor, it shall contain at the foot a description of the property sufficient to identify it, and also a specification of the judgment-debtor's share or interest therein to the best of the belief of the applicant and so far as he has been able to ascertain the same.

Every such description and specification shall be verified in manner hereinbefore provided for the verification of plaints.

This section corresponds with the first part of s 213 of Act VIII of 1859, but the provision for the verification of the description of the property, &c, is new. Here also the description must be reasonably accurate. "It would not do to stick up in the "zillah that the creditor attached all the rights and interests which "the debtor possesses in any property in the entire zillah" (*a*).

When application must be accompanied by extract from Collector's register.

238. If the property be land registered in the Collector's office, the application for attachment shall be accompanied by an authenticated extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for such land, and the shares of the registered proprietors.

This section corresponds with the latter part of s. 213 of Act VIII of 1859, s. 213, which applied to "an estate paying revenue to Government;" here it is "land registered in the Collector's office."

C.—Of staying Execution.

When Court may stay execution.

239. (S.) The Court, to which a decree has been sent for execution under this chapter, shall, upon sufficient cause being shown, stay

(*a*) *Per* Peacock, C J, in Nga Tha Yah *v* Burn, 2 B. L. R, F. B, 97; Cowar Raj Kumar Roy *v* S. M. Kadambini Debi, 4 B. L. R., F. B., 175; Maharajah Dheraj Mahtab Chund Bahadoor *v* Burodanath Mundul, 18 Suth. W R., 411, Kemp and Glover, JJ

the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was made, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto;

and in case the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution or discharge of such property or person pending the result of the application for such order.

This section corresponds with Act VIII of 1859, s. 290.

With regard to staying the execution of decrees under appeal, see *post*, s. 545. There may be various reasons for staying execution, the pending of an appeal may be one of them.

Where an appeal has been heard in the High Court, and a further appeal to the Privy Council is pending, the Court should, as a general rule, stay execution, but in doing so it has no power to demand security from the appellant; that is the function of the High Court; and the High Court, on a proper application, will not allow execution to go without security, unless for good reason. And the Judge, on being made aware of the fact that an appeal is pending in the Privy Council, should communicate with the High Court (*a*). Again, the Judge can stay execution for the purpose of allowing the defendant to apply to the Court which passed the decree for its reversal, on the ground that it had been obtained *ex parte* without his knowledge (*b*). So the Court executing the decree should not enter into the question whether it has been satisfied, if the certificate sent to it shows the contrary; but on such an allegation being made it should stay execution, and should refer the point to the Court which passed the decree (*c*).

(*a*) Wise *v.* Rajmohun Roy, 2 Wym. Rep., 194; Hubeeboollah Khan *v.* Khajah Gowher Ali Khan, 7 Suth W. R., 225

(*b*) Mirtoonjoy Chuckerbutty *v.* Cochrane, 8 Suth. W. R., 202, L. S. Jackson and Hobhouse, JJ.

(*c*) Bykunt Chunder Moostafee *v.* Khema Moyee Debia, 9 Suth. W. R., 360, Loch and Hobhouse, JJ.

240. (S.) Before passing an order under section 239 to stay execution, or for the restitution of property or the discharge of the judgment debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

Power to require security from, or impose conditions upon, judgment-debtor.

This section corresponds with Act VIII of 1859, s. 291.

241. (S.) No discharge under section 239 of the property or person of a judgment-debtor shall prevent it or him from being retaken in execution of the decree sent for execution.

Liability of judgment-debtor discharged to be re-taken.

This section corresponds with Act VIII of 1859, s. 293; but includes the case of a re-taking after the release of the property, as well as of the person of the judgment-debtor.

242. (S.) Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

Order of Court passing decree or of Appellate Court to be binding upon Court applied to.

This section corresponds with Act VIII of 1859, s. 292.

243. (S.) If a suit be pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may (if it think fit) stay execution on the decree, either absolutely or on such terms as it thinks fit, until the pending suit has been decided.

Stay of execution pending suit between decree-holder and judgment-debtor.

This section corresponds with the last sentence of s. 209, Act VIII of 1859.

The Court has here a discretion; it may stay execution pending an appeal in a cross suit, as where the appellant had obtained a decree for a larger amount than that recovered against him in the case in which execution was applied for, and that decree was

under appeal to the Judicial Committee (*a*), or refuse to do so (*b*). All that was alleged in the case of *Motichand* v. *Rajnarain Ghose* was, that the defendant had brought another suit against the plaintiff, and was confident that he should obtain the judgment of the Court, which he should not be able to realize because the present plaintiff was a poor man. Phear, J, considered that these circumstances did not render it inequitable that he should be obliged to pay to the present plaintiff the sum of money which the Court had decreed that he should pay.

D.—Questions for Court executing decree.

Questions to be decided by Court executing decree.

244. (S.) The following questions shall be determined by order of the Court executing a decree and not by separate suit (namely)—

(*a*) questions regarding the amount of any mesne profits as to which the decree has directed inquiry;

(*b*) questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit between the date of its institution and the execution of the decree, or the expiration of three years from the date of the decree;

(*c*) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution of the decree.

Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree.

This section corresponds with s. 11 of Act XXIII of 1861, which was substituted for s. 283 of Act VIII of 1859. The provision as to appeal contained in s. 11 is omitted, appeals against orders being regulated by s. 588, *post*, and the procedure in appeal by chap. xli, see s. 590, *post*. And the proviso to the effect that no notice need be sent to the respondent when the Court on perusing the petition of appeal sees no ground for altering the order, although not here

(*a*) Taramonee Dassee v. Radhajeebun Moostafee, 2 Wym, 214.

(*b*) Luchmeeput v. Mir Mahomed Lukee Chowdhry, 3 Suth. W. R., Mis, 20; see also Moolchand v. Rajnarain Ghose, 1 In. Jur., N. S, 330.

re-enacted, is contained in s. 551, *post*, being an obvious rule of practice and now part of the general law as to procedure in appeals. Clause (b) adopts the same words as the first clause of s. 11 of Act XXIII of 1861, adding "or the expiration of three years from the date of the decree;" and (c) adopts the words of the later clause in s. 11, adding "or their representatives" after the word "passed;" and the last para. declares, what had been decided, that the plaintiff may bring a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree. The effect of the new clause seems, therefore, to be to leave the law as to mesne profits as it stood before, limiting the enquiry in the execution proceedings to the period between the date of the institution of the suit and the execution of the decree, or the expiration of three years from the date of the decree. The clause "as well as questions relating to sums paid in discharge or satisfaction of the decree or the like" is omitted; but that matter can be enquired into under the general clause (c).

It was observed by the Judicial Committee that under Act XXIII of 1861, s. 11, "notwithstanding some earlier decisions to the "contrary, all the High Courts of India had accepted, as settled law, "these propositions: 1st, that where the decree is silent touching "interest or mesne profits subsequent to the institution of the suit, "the Court executing the decree could not assess or give execution "for such interest or mesne profits, interpreting the words 'payable "in respect of the subject-matter of a suit' to mean 'payable under "a decree in respect,' &c.; and 2ndly that the plaintiff was still at "liberty to assert his right to such mesne profits in a separate suit." Numerous decisions to this effect were referred to in a case which went up on appeal to the Queen in Council, and some of earlier date, which had been decided the other way. As the legislature has now adopted the construction put upon the clause by the later decisions, it is unnecessary to refer more particularly to them. It is enough to state that the Judicial Committee of the Privy Council, in the same case (*a*), inclined to the construction put upon the section by the earlier decisions; but, observing that they had been overruled by the general consent of the Courts in India, declined to run counter to so long a course of decision upon what is, in fact, merely a matter

(*a*) Sadasiva Pillai *v.* Ramalinga Pillai, 15 B. L. R., P. C., 383; S. C., L. R., 2 I. A, 219.

of procedure, it being admitted that the plaintiff might assert his rights if they existed in a separate suit. But in the case before them the defendant had entered into agreements in consideration of his being left in possession of the land pending his appeal, and had come under an obligation to account in that suit for the subsequent mesne profits of the land, which was capable of being enforced by proceedings in execution, notwithstanding the construction of the 11th section of Act XXIII of 1861, which had been established in India. The Judicial Committee thought that this liability made the accounting "a question relating to the execution of the decree" within the meaning of the later clause of the section. But even if it did not, they thought that, upon the ordinary principles of estoppel, the respondent could not then be heard to say that the mesne profits in question were not payable under the decree.

The principle upon which it was held that mesne profits could not be enquired into where the decree was silent on the subject is, that the Court in executing the decree has no power to alter it, which it would be doing if it were to award interest or meshe profits where none were given by the decree; but if the Court gives interest or mesne profits from a certain day, the amount is a mere matter of calculation, and can be ascertained by the Court executing the decree (*a*). The assessment of mesne profits should be made by the Court passing the decree, and the Court should fix the period in respect of which mesne profits are to be assessed (*b*). Although a judgment-creditor under a decree awarding a fixed sum for mesne profits "with costs and interest till the date of liquidation," cannot recover mesne profits accruing during the pendency, nor subsequent to the decision of the suit (*c*), yet where a decree for restitution is made in reversal of a decree for possession, the mesne profits follow (*d*); and it would seem from the judgment of Peacock, C.J., in that case, that the Court executing the decree in such a case could go into the question of these mesne profits (but the point in issue was whether an application for mesne profits was such a proceeding as would keep the decree alive). This accords with the

(*a*) *Per* Peacock, C. J., in Mosoodun Lall *v.* Bekaree Singh, B. L. R., F. B., 602.

(*b*) Wise *v.* Rajendur Coomar Roy, 11 Suth. W. R., 200, Peacock, C. J., and Mitter, J.

(*c*) Rajah Tek Narain Singh *v.* Furlong, 2 Suth. W. R, Mis, 4.

(*d*) Hurro Chunder Roy Chowdhry *v.* Shoorodhonee Debia, 9 Suth. W. R., 403, F. B.

case of *Musst. Hookum Beebee* v. *Khajah Mahomed Moosa Khan* (*a*); but in other cases (*b*) it has been held, that a separate suit would lie for the mesne profits where the decree was reversed and the defendant restored to possession. This question arose in a recent case before the Judicial Committee. In this case plaintiff claimed possession and mesne profits, his suit was dismissed by the Courts in India, and went ultimately to the Judicial Committee: and it was ordered that the Court below should direct possession to be given to the plaintiff. It was held that this order, of its own force, included the mesne profits (*c*). This decision does not, however, appear to interfere with the general rule that the decree must be executed as it stands, and which had been adopted in the case already quoted from 15 B. L. R., 383, and L. R., 2 I. A., 219; but merely decides that, under the circumstances of the case, the mesne profits followed on the order for possession. The decision is explained by Sir J. Colville, in a later case "the Committee did not make any decree, but only a declaration of the rights of the parties, leaving it to the lower Court to work them out" adding—here the decree is complete and final. In that case (*d*) the Judicial Committee affirmed the rule that where a complete and final decree is silent as to mesne profits or interest, the Court executing the decree cannot give them, and consequently that interest could not be given by the Court executing the decree, on the costs awarded by the decree, where it was not ordered that such costs should carry interest. Now, since s. 13, expl. 3, enacts that any relief claimed in the plaint, and not expressly granted by the decree, shall so far as to bar a separate suit be deemed to have been refused, it is clear that no separate suit would lie for mesne profits which were asked for in the plaint, but not given by the decree.

Where a decree-holder in execution takes possession of more land than is covered by the decree, and on an objection raised and after inquiry made the excess land is subsequently relinquished, the

(*a*) 6 Suth. W. R., Mis., 14. See also Shibnarayan Pohraj *v.* Kishor Narayan Pohraj, 1 B. L. R., 146; Rajkissen Singh, petitioner, B. L. R., F. B., 605; and see the note to the next section. See also Radhabai *v.* Radhabai, 4 Bom. H. C. Rep., A. C., 181; Chowdhree Nain Singh *v.* Jawahur Singh, 1 All. H. C. Rep., 167, Morgan, C.J., and Ross, J.

(*b*) Abhram Alli *v.* Natha Jallam 5 Bom. H. C. Rep., App., 74, Couch, C. J., and Newton, J.

(*c*) Rajah Lelanund Singh *v.* Maharajah Luckmissar Singh Bahadoor, 13 Moo. I. A., 490.

(*d*) Forester *v.* Secretary of State, I. L. R., 3 Calc., 161.

question of wasilat being one which arises between the parties to the suit with reference to the execution of the decree, must be determined by the Court executing the decree, and not by a separate suit (*a*).

Where a decree provides for the ascertainment of mesne profits at the time of execution, the decree-holder is not concluded by what he may have said in his plaint as to the amount thereof (*b*). This appears from the report to have been repeatedly held. What that amount should be is defined by s. 211, explanation, *ante*.

In a suit for possession and mesne profits, the Court of first instance awarded mesne profits; but the lower Appellate Court, considering that no evidence had been given by the plaintiff of the mesne profits which he was entitled to recover, allowed him up to date of suit only the amount which he had paid as Government revenue upon his mehal. It was held that, as it had been decided that mesne profits were payable, the Court executing the decree was not prevented from ascertaining the amount of mesne profits which had accrued between the date of decree and the date of possession, although for want of evidence the Court which tried the case had thought fit to restrict the amount up to the date of suit to a certain sum (*c*). A defendant who, upon an enquiry into mesne profits, absents himself at the time of the enquiry by the commissioner, withholds his accounts and papers, and lays before the lower Court no materials on which it can come to any decision as to the expenses at which he has been, is not entitled to invoke the assistance of the Court of appeal (*d*), supposing that there is an appeal under s. 588, *post*, which seems to be doubtful.

A decree for interest upon mesne profits from the date on which they are ascertained means from the date on which they are ascertained by the Court, and not by an ameen (*e*). It has been held that when a suit is for mesne profits alone, the Court executing the decree is not competent to "give the amount" in the course of execution (*f*).

(*a*) Bama Soonduree Dabee *v.* Tarinee Kant Lahoree, 20 Suth. W. R., 415, Kemp and Glover, JJ.

(*b*) Hurro Gobind Bhukut *v.* Digumburee Debia, 9 Suth. W. R., 217.

(*c*) Shaikh Mahomed Busheeroollah Chowdhry *v.* Hedaet Ali Chowdhry 3 Suth. W. R., 42, L. S. Jackson and Hobhouse, JJ.

(*d*) Jodoo Nath Roy *v.* Ram Buksh Chulungee, 8 Suth. W. R, 203, L. S. Jackson and Hobhouse, JJ.

(*e*) Doorga Soonduree Debia *v.* Shibessuree Debia, 10 Suth. W. R., 391 Kemp and E. Jackson, JJ.

(*f*) Bhoobunessuree Chowdhrain *v.*, Manson, 22 Suth. W. R., 160, Kemp and Birch, JJ.

The decision in this case turned upon the words of the decree which are set out in the report as follows: "that the plaintiff, the lessee, "is to obtain possession again of the 10 annas [share] up to the "term of his lease; and for that share as well as for his share the "term of which had expired, namely the 3 anna 6 gundah 2 cowrie "2 krant share, he was to receive wasilat "বেদখলের সময়" that is, "wasilat for the time he was out of possession as per plaint "*That wasilat was to be ascertained by an enquiry*, and interest "on the sum ascertained was to run from the date of ascertainment "at 6 per cent. per annum." The report is not very clear, the words "give the amount, &c." may mean from the context that the Court could not give more than the decree gave: it appears that the result of the enquiry was that a much larger sum was given than that fixed by the Court.

Where the Court which passed the decree (that of a Subordinate Judge), was done away with and not in existence at the time the judgment-creditor applied for execution, and he consequently applied to the District Judge who issued the process, it was held by Loch, L. S. Jackson, Macpherson and Hobhouse, JJ., that the judge had jurisdiction in the matter, both on the first application and on a second application which was made to him afterwards when the Court of the Subordinate Judge was re-established. The decree was passed in that case ordering the defendant to restore to the plaintiff certain landed property and to account to him for the mesne profits, and the proceedings before the Judge were taken in order to ascertain the amount of the mesne profits (*a*).

The recovery back of money taken in execution of a decree which is afterwards reversed on appeal, is not the subject of a new suit. The matter must be enquired into by the Court which passed the decree, the question arising between the parties relating to the execution of the decree (*b*).

Where a defendant was imprisoned in execution of a decree, and the plaintiff afterwards petitioned to have him discharged, there being a compromise not certified, the High Court, on an application of the debtor re-arrested, ordered the Judge "to enquire "what was the arrangement or adjustment upon which the plaintiff

(*a*) Sharoda Moyee Burmonee *v.* Wooma Moyee Burmonee, 8 Suth. W. R., 9.

(*b*) Nursing Churn Sein *v.* Bidayadhuree Dossee, 2 Suth. W. R., 275; Jadoonath Gossain *v.* Nobokissen Chatterjee, 1 Wym. Rep., 13; S. C., 4 Suth. W. R., 66; Saligram Sing *v.* Gobind Sahai, 4 B. L. R., Apx., 64.

"petitioned for the release of the defendant from imprisonment "and the cancelling of his application for the attachment, and to "give effect to whatever arrangement or adjustment he might find "to have been so made. Costs of the application to follow the "result of the enquiry" (*a*). It has been held that a question raised for the first time between the parties to a decree at the time of its execution, and relating to the subject of the suit, although not expressly reserved in that decree for determination at the time of its execution, may be enquired into and determined by the Court executing the decree (*b*). Where a judgment-creditor caused certain property of his judgment-debtor to be sold in execution, and the proceeds realized did not amount to the full judgment-debt, and afterwards the judgment-debt was reduced on appeal to a sum far below the amount realized in execution, and the judgment-debtor brought a suit to recover the excess moneys,—it was held, that the suit would not lie, but that the Court which was charged with the execution of the decree had full jurisdiction to determine the question and order a refund (*c*).

A claim for damages in respect of injury sustained by goods while under attachment in execution of a decree, which was afterwards set aside, is not a matter to be disposed of under this section, but must be made the subject of a separate suit (*d*). No suit lies for money paid out of Court in execution without satisfaction being entered (*e*). If there was an agreement to certify, express or implied, a suit apparently will lie for the breach of it. See the note to s. 258, *post*; but that section now gives another remedy, in the form of an application to the Court for an order directing the decree-holder to certify, and such an order is expressly appealable; see s. 588. Where a mortgagee, part of whose debt was

(*a*) Chango Valad Dudha Mahajan *v.* Kaluram Narayandas, 4 Bom. H. C. Rep., App., 120, Couch, C. J., and Warden, J., citing 2 Suth. W. R., Mis., 43; 4 *ib.*, 11; 7 *ib.*, Civ. Rep., 134.

(*b*) Janoji Banaji *v.* Venkatesh Shrinivas, 1 Bom. H. C. Rep., 393, Tucker and Warden, JJ.

(*c*) Mothoora Pershad Singh *v.* Mohunt Shumbhoo Geer, 19 Suth. W. R, 413, Phear and Anslie, JJ.

(*d*) Kashee Kishore Roy Chowdhry *v.* Noor Khan, 7 Suth. W. R., 45, Loch and Macpherson, JJ.

(*e*) Alumja Beebee *v.* Gooroo Churn Roy, Suth. S. C. C. Cases, 126, Bayley and E. Jackson, JJ.; see also Jumeer Mundle *v.* Brojonath Chuckerbutty, *ib.*, 73 (same Judges); Ahimia Bibee *v.* Gooroo Churn Roy, 3 Suth. W. R., S. C. C. Ref, 3; Arunachella Pillai *v.* Appava Pillai, 3 Mad. H. C. Rep., 188.

not paid, obtained a decree for possession, and was put in possession, it was held that his decree was fully executed, and that if the mortgagor wanted an account he must institute a separate suit (*a*).

The parties between whom these questions may be gone into in proceedings in execution must be parties *to the suit* or their representatives, not parties to some collateral proceeding. In the latter case a separate suit is the proper proceeding, thus where a suit was against a defendant, who had become security for the appearance of a defendant in a former suit under s. 76 of Act VIII of 1859 (corresponding with s. 479 of this Act), on an application under s. 74 (corresponding with s. 477), and was founded on a bond given by the defendant, on the defendant in the other suit absconding, it was held, that the suits not being identical the plaintiff was not precluded from bringing a separate suit (*b*).

This section expressly enables the Court in executing the decree to deal with questions arising not only between the parties to the suit, but their representatives. This is in accordance with the decisions noted below (*c*), and the word "representative," which is introduced into this section, would perhaps cover the assignee of an insolvent-debtor, although it was held that s. 11 did not apply to him (*d*). But the representative of a deceased person is only liable as representative, and so far as he has assets of the original-debtor (see s. 234 and note), not in his individual capacity, or in respect of his own property, except in so far as he may have misappropriated the property of the deceased (*e*). A stranger who makes an objection is unaffected by this provision (*f*), and it has

(*a*) Ravji Shivram Joshi *v.* Kaluram, 12 Bom. H. C. Rep., 161, F. B.; followed in the case of Ramchandra Ballai *v.* Baba Esgonda, *ib.*, 163, and overruling the decision in the case of Janoji Banaji *v.* Vyankatesh Shrinivas, 2 *ib.*, 371, and several unreported decisions of the same Court.

(*b*) Sikooram Agurwalla *v.* Kamolakant Dey, 2 Suth. W. R., 65; Dwarka Nath Samooyel *v.* Protab Chunder Dutt, 20 *ib.*, 233.

(*c*) Hurolal Dass *v.* Soojawut Ali, 8 Suth. W. R., 197, L. S. Jackson and Hobhouse, JJ.; Tarachand Hajrah *v.* Doorgachurn Hajrah, 10 *ib.*, 205, Kemp and E. Jackson, JJ.; Chowdry Wahed Ali *v.* Musst. Jumaee, 11 B. L. R., P. C., 149; Ameerunissa Khatoon *v.* Meer Mozuffer Hossain Chowdhry, 12 *ib.*, 65, &c.

(*d*) Cœmerer *v.* Birch, 1 Mad. H. C. Rep., 8, Strange and Frere, JJ.

(*e*) Chowdhry Wahad Ali *v.* Musst. Jumaee, 11 B. L. R., P. C., 149; and see the judgment of the Full Bench of the High Court in Calcutta in the same case, 2 B. L. R., 73; Ameerunissa Khatoon *v.* Meer Mazuffer Hossein Chowdhry, 12 *ib*, 71; and see s. 252, *post.*

(*f*) Lutchmeenarayan Singh and others, petitioners, 8 Sev., 97.

been held that the corresponding clause of the old Code does not include a purchaser at a sale in execution (*a*), which seems inconsistent with the case of *Baboo Soorjo Buksh Singh* v. *Sreekishen Dass* (*b*), where it was held by Loch and Macpherson, JJ., that a defaulting purchaser and the decree-holder are parties within the meaning of the clause in conjunction with the last clause of s. 254 of Act VIII of 1859; that clause is not, however, re-enacted in the corresponding section (308) of the present Code (*c*). Where A. obtained a money-decree against B., declaring certain properties belonging to B. liable to be sold in satisfaction of it, other decrees were subsequently obtained against B., in execution of one of which certain of these properties were sold (subject to the lien), and purchased by A. himself, and in execution of another decree, certain others were sold also (subject to the lien) and purchased by C. On A.'s proceeding to execute his own decree against B., C. sought to have it declared that satisfaction should be entered upon to the extent of the property purchased by A. It was held, that he could not appear in the proceedings (*d*). Where a person was made a party to the suit, and again dismissed from the suit before the decree was given, it was held that he was not a party so as to be barred from bringing a separate suit (*e*).

The case of a judgment-debtor, who alleges that the decree was obtained by fraud and false personation, does not come within this section. The debtor's remedy is by suit to set aside the decree as fraudulent and collusive, or he may apply to the lower Court to review its order and direct an enquiry, not into the mere outward regularity of the proceeding, but into the substantial regularity of the suit (*f*).

(*a*) Bhoondur Mull *v.* Gunga Pershad, 2 Suth. W. R., Mis., 50, Loch and Seton-Karr, JJ.

(*b*) 3 Wym., 5.

(*c*) See also Ramdial *v.* Ramdas, I. R. R., 1 All., 181, F. B., citing Joobraj Singh *v.* Gour Buksh Lal, 7 Suth. W. R., 110, Loch and Macpherson, JJ.; see also Soorjoo Buksh Singh *v.* Sree Kishen Dass, 3 Wym, 5; S. C., 6 Suth. W. R., Mis., 126, Loch and Macpherson, JJ.; and Bisokha Moyee *v.* Sonatun Dass, 16 Suth. W. R., 14, where some doubt is expressed on the point; and Sree Narain Mitter *v.* Mahtab Chund, 3 *ib.*, 3.

(*d*) Greeja Bhoosun Mitter *v.* Kishen Kishore Ghose, 7 Suth. W. R., 221, L. S. Jackson, J.

(*e*) Gour Kishore Chowdhry *v.* Mahomed Hassim Chowdhry, 10 Suth. W. R., 191, Loch and Glover, JJ.

(*f*) Musst. Rajbansee Koomaree *v.* Bhugwattee Koomaree, 1 Suth. W. R., Mis., 29; Piraj Opadhia *v.* Musst, Doorja, S. D. A., N. W. P., 1864, p. 472; Umbicachurn Chuckerbutty *v.* Dwarkanath Ghose, 8 Suth. W. R., 506.

Where a question, such as is provided for under this section, instead of being determined by order of the Court executing the decree, was made the subject of a separate suit in that Court, it was held, that though the form of proceeding was wrong, there was not a want of jurisdiction, which could be made a ground of objection on appeal (*a*).

A surety against whom the judgment-creditor was proceeding under s. 204 of Act VIII of 1859, corresponding with s. 253 of this Act, was held to be a party (*b*). It is to be observed, with reference to this, that orders under s. 253 are not among the appealable orders enumerated in s. 588, but s. 253 itself enacts that the decree may be executed against the surety, &c., "in the same manner as a decree may be executed against a defendant,"—the same words (except that 'executed' is put for 'enforced') as are used in s. 204 of Act of 1859. If, therefore, the surety be considered a party as heretofore within the meaning of the present clause, it is suggested that the order in his case will be appealable so far as it would have been appealable in any other case under this section (244).

Section 588 (j), *post*, makes orders appealable under this section "as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of the suit." It was held, under the old Act, that an appeal will lie when a sale in execution is set aside on the ground that the decree was barred by lapse of time (*c*). But such an appeal would apparently be barred now, see s. 588 (e) and s. 54 (b). Where a Judge, executing several decrees against one defendant, appropriated the proceeds of sale improperly among them, it was held that the decree-holders could not appeal either amongst themselves or against the common debtor (*d*). Macpherson, J., however, held, dissenting from the rest of the Court, that an appeal would lie

(*a*) Purmessuree Pershad Narain Singh *v.* Jankee Koer, 19 Suth. W. R., 90, Couch, C. J., and Mitter, J.

(*b*) Ghoree Lal Jha *v.* Sheo Narain Singh, 8 Suth. W. R., 24, L. S. Jackson and Hobhouse, JJ.; S. C., *nom.* Aghoori Lal Jha *v.* Sheo Narain Singh, 4 Wym, 53; *Ex-parte* Bhikaji Vithal Ambeekar, 4 Bom H. C. Rep., App., 119, Couch, C. J., Newton and Warden, JJ.

(*c*) Dhan Bibi *v.* Haradhan Ram, 2 B. L. R., Apx., 11, L. S. Jackson and Markby, JJ.

(*d*) Kanya Lall Pundit *v.* Radha Muddun Mohun Doss, 9 Suth. W. R., 224, F. B.; S. C., B. L. R., F. B., 927.

as against the common debtor (*a*). Orders directing the discharge of prisoners are appealable at any rate where the prisoner takes the benefit of chap. xx, *post* (*b*), and orders to imprison a person in execution are not appealable, but other orders for imprisonment may be appealed against, see s. 588 (a), *post*. An appeal was held to lie, under the Act of 1859, from an order made on a question arising between the parties to the suit giving time to the execution-debtor to pay his debt (*c*). Where the Court gave a decree to plaintiff for possession of land against A., the original defendant in the suit, but exempted land in the possession of B, who had intervened, and had been made a co-defendant, and the Appellate Court reversed so much of the decree as adjudicated upon the claim against B., decreed against A., and gave costs against B., it was held that B., still continued a party to the suit, and could appeal under s. 11 of Act XXIII of 1861, and should not sue (*d*). The plaintiff, in execution of a decree for land, endeavoured to obtain possession of the land, and to pull down buildings erected by the defendant upon part of the land alleged by him to be comprised in the decree. The defendant objected that the land in question was not part of the land comprised in the decree, whereupon the plaintiff applied to the Court executing the decree, and was referred by that Court to a fresh suit, on the ground that the decree was silent about the demolition of the buildings. *Held*, that the plaintiff should have appealed against that order as a matter to be determined in execution of a decree, and that no fresh suit lay upon it (*e*). The right to appeal against orders made under this section is, however, so very much abridged, and the language of the Act itself is so uncertain, leaving as it does everything to a supposed analogy, that it is unsafe to predict of any case that an appeal does or does not lie. Orders passed in appeals from orders are now in all cases final; see s. 588, *post*.

(*a*) See also Afzuloonnisa Begum *v.* Parbutty Koonwur, 2 Suth. W. R., Mis., 42; Misree Kowur *v.* Maharajah Buksh Singh, Marsh., 527, F. B.; Deendoyal Shahoo *v.* Muddun Mohun Dass, 5 Wym. Rep, 156; Issan Chunder Doss *v.* Chundro Bodinee, 7 Suth. W. R., 361, Loch and Macpherson, JJ.

(*b*) See s 351, and see also Yeshvantrav Amritrav Jamin *v.* Ismael Ali Khan, 2 Bom. H. C. Rep., 94.

(*c*) Hunooman Pershad *v.* Ajoodhia Pershad, 10 Suth. W. R., 5, F. B. Rul., L. S. Jackson, J, dissenting.

(*d*) Huree Kishore Roy *v.* Kalee Kishore Sein, 8 Suth. W. R., 114, L. S. Jackson and Hobhouse, JJ.

(*e*) Radhagobind Shaha *v.* Brojender Coomar Roy Chowdhry, 7 Suth. W. R, 372

E.—Of the mode of executing Decrees.

Procedure on receiving application for execution of decree.

245. (S.) The Court, on receiving an application for the execution of a decree, shall ascertain whether it contains the particulars mentioned in section 235, or such of them as may be applicable to the case, and whether it is accompanied by the inventory mentioned in section 236; and if such particulars or inventory are or is wanting, it shall reject the application or return it for amendment or for the addition of the inventory, as the case may be, or amend it then and there. Every amendment made under this section shall be attested by the signature of the Judge.

Procedure on admitting application.

When the application is admitted, the Court shall enter in the register of the suit a note of the application and the date on which it was made, and shall order execution of the decree according to the nature of the application.

Provided that, in the case of a decree for money, the value of the property attached shall as nearly as may be correspond with the amount for which the decree has been made.

This corresponds with s. 15 of Act XXIII of 1861, substituted for s. 215 of Act VIII of 1859. The proviso at the end of the section is new. Section 284 *post*, contains a similar provision limiting the amount of the property to be sold to a sufficient portion of what has been attached to satisfy the decree.

It is not necessary to file the decree or a copy of it, but only the above particulars (*a*). The Court should not reject the application merely on the ground of a formal irregularity (*b*): it should amend it. A decree does not vest in the decree-holder a right in his judgment-debtor's property, so as to enable him to maintain a suit for the unsatisfied portion of the decree. He must proceed to execute his decree in the way prescribed by the

(*a*) Supur Ali *v.* MohesChunder Kang, 4 Suth. W. R., Mis., 16.

(*b*) Chowdhry Purladh Mohapattur *v* Chowdhry Junardon Mohapather, 6 Suth. W. R., Mis., 15.

Code of Civil Procedure, and in no other way (*a*); and, as has been stated in the note to the last section, the Court must execute the decree as it finds it, it cannot alter it even by the consent of the parties (*b*).

Where a decree was made on the 1st July, 1863, and by a kistibandi of 3rd July, 1864, it was agreed that the amount payable by the decree should be paid by instalments with interest, and the debtor treated this kistibandi as subsisting, and as a decree in several proceedings to execute it as a decree, it was held that he could not, in a subsequent execution-proceeding, object to the kistibandi, and ask that the plaintiff might not be allowed to execute it as a decree (*c*). The case in 14 B L. R, 287, was distinguished by Markby and Mitter, JJ., from that of *Ram Runjun Chuckerbutty* v. *Rajah Jowhurujumah Khan* (*d*), where they held that the decree must be executed in its integrity (*e*). Where an execution creditor and debtor agreed that the decree should be paid by instalments, and the debtor said on the face of the document, "if I fail "to pay according to instalments you shall recover the amount "with interest under the judgment kisteebandi and mal zamani as "by execution of a decree," and the seal of the Judge appeared on the back of the judgment, it was held that the judgment-creditor could not now execute the original decree, but must proceed on the subsequent agreement, by attachment and sale not by suit (*f*). In this case the Court by affixing its seal may be said to have amended its own decree, making it a decree payable by instalments. An application for an order making the decree payable by instalments must now be made within six months from the date of the decree: Act XV of 1877, sched. ii, 3rd div., No. 175. But no such agreement can be made so as to have the effect

(*a*) Mirza Mahomed Aga Ali Khan Bahadoor *v.* The Widow of Balmakund, L R, 3 I. A., 241.

(*b*) See also Krishna Kamal Sing *v.* Hiru Sirdar, 4 B. L R, F. B, 101; S C., 13 Suth. W R, F. B., 44; Azim Nulla *v.* Cruikshank, 11 *ib*, 70; Teja Singh *v.* Rajnarayan Singh, 1 B. L. R, 63; Ambaram Harivallabhadas *v.* Himatsing Kalianji, 2 Bom. H. C. Rep., 103, Couch, Newton, and Warden, JJ.

(*c*) Dinonath Sen *v.* Gooruchurn Pal, 14 B L R, 287; S. C, 21 Suth W. R, 310, Couch, C. J, and Jackson, J.; *contra* Madhub Chunder Dundput *v.* Madhub Lall Khan, *ib*, 288 note; Kanhyall Pundit *v.* The Collector of Cuttack, *ib.*, 291 note; and see the note to s 258, *post*.

(*d*) 23 W. R, 129.

(*e*) Darbha Venkata Sastri *v.* Vurella Gangania, 2 Mad. H. C. R., 305.

(*f*) Tarit Biswas *v.* Kalidas Banerjee, 2 B. L. R, A. C, 224, Loch and Mitter, JJ.

of imposing on the debtor, a new law of limitation or enable the creditor to execute his decree or bring a separate suit after the time allowed by the Limitation Act (*a*). If the parties come to a new agreement after decree, which gives the creditor a new right to sue, a new suit can be brought; but it must be brought within the time fixed by law, counting from the date when the law states that the time is to begin to run.

If a decree is subject to a condition to be performed by the decree-holder, and he does not comply with the condition, he cannot have the benefit of the decree. This principle would equally apply to the case of the other party against whom the decree was made; if some conditions were in his favor, and the rest onerous, he could not claim the benefit of the former unless he fulfilled the latter. Where a decree in a pre-emption suit stipulated for the payment by the decree-holder of the purchase-money within a specified time, and he did not pay it, the Court refused to execute the decree (*b*).

Where once a decree against several jointly has been made, it remains a joint decree, any act or conduct of the decree-holders notwithstanding (*c*); and the Court cannot treat it as a several decree against the different defendants in respect of their proportionate shares (*d*). The decree-holder can execute his decree against one or any or all of the joint judgment-debtors; if he has received any sum in part-payment of his decree from one of the joint debtors, and chooses to absolve him from further liability, and to proceed against the others, this will not affect the position of the debtors *inter se*, or their mutual responsibilities, or absolve the debtor who has paid from contributing, if he has paid less than he is liable to as between him and his co-debtors (*e*).

Where a plaintiff sues as agent, and the suit is dismissed on

(*a*) Krishna Kamal Sing *v.* Hiru Sirdar, 4 B. L. R., F. B., 101.

(*b*) Shaikh Ewaz *v.* Mokuna Bibi, I. L. R., 1 All., 133, Spankie and Oldfield, JJ., Feb. 11, 1876. See also Sheo Pershad Lall *v.* Thakoor Rai, H. C. R., N. W. P., 1868, p. 254, cited Bhanushankar Gopal Ram *v.* Rughonath Ram Mangal Ram, 2 Bom. H. C. R, 103; Onraet *v.* Sankar Dutt Sing, 5 B. L. R, Apx., 60, Couch, C. J., and Kemp, J.; Narayan Ayyur *v.* Lakshmi Amal, 3 Mad., 216.

(*c*) Juggernath Singh *v.* Shaikh Ahmedoollah, 8 Suth. W. R, 132.

(*d*) Musst. Omutool Khair *v.* Musst. Somayee Bibee, 6 Suth. W. R., Mis., 40.

(*e*) Gopal Pershad *v.* Ramanoogra Singh, 5 Suth. W. R., Mis., 9; Rughoonath Doss *v.* Alladun Puttack, 8 *ib.*, 201.

the ground that it should have been brought in the name of the principal, execution for costs cannot be taken out against the principal (*a*).

A decree, so long as it is unreversed, may be executed. Thus, where the parties in twelve suits had agreed that all the suits should be governed by the evidence in one of them, and judgment was given accordingly the same on all, some of the suits being appealable, the Appellate Court reversed the decree; the rest were not appealable; it was held that the decrees in the unappealed cases, although contrary to the decrees in appeal in the other similar cases might still be carried out to execution (*b*).

Execution of part of a decree cannot be had, it must be of the whole (*c*). But execution may issue with respect to ascertained wasilat pending enquiry as to unascertained wasilat (*d*).

Where a judgment-debtor becomes by inheritance one of the decree-holders in respect of the same property or a share of it the decree is extinguished *pro tanto* (*e*).

Cross-decrees.

246. (S.) If cross-decrees between the same parties for the payment of money be produced to the Court, execution shall be taken out only by the party who holds a decree for the larger sum, and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

If the two sums be equal, satisfaction shall be entered upon both decrees.

Explanation I.—The decrees contemplated by this section are (a) decrees made by the same Court, (b) decrees

(*a*) Bhobo Tarinee Dassia *v.* Madhub Chunder Dutt, 7 Suth. W. R., 143, Loch and Macpherson, JJ.

(*b*) Nga Bike *v.* Snadden, 9 Suth W. R., 276, Peacock, C. J., and Hobhouse, J.

(*c*) Haro Sankar Sandyal *v.* Tarak Chandra Bhuttacharjee, 3 B. L. R., A. C., 114, Peacock, C. J., and E Jackson, J; Purna Chandra Mookerjee *v.* Saroda Charan Roy, *ib.*, 21, L. S. Jackson and Markby, JJ.; Nund Coomar Toutehdar *v.* Bunso Gopal Sahoy, 23 Suth. W. R., 342.

(*d*) S. M. Arfunnissa Chowdhrain *v.* S. M. Rokubunnissa Chowdhrain, 24 Suth. W. R., 444.

(*e*) Pogose *v* Fukurooddeen Mahomed Ashan, 25 Suth. W. R., 343.

sent to the same Court for execution, and (c) decrees of which one is made by the Court and the other is sent to the same Court for execution; but not (d) decrees of which one is made by one Court and the other is made by another Court and not sent for execution to the former Court.

Explanation II.—This section applies where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as by the assignee himself.

Explanation III.—This section does not apply unless

(*e*) both decrees are capable of execution at the same time;

(*f*) the decree-holder in one if the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

(*g*) the sums due under the decrees are definite.

Illustrations.

(*a.*) A. holds a decree against B. for Rs. 1,000. B. holds a decree against A. for the payment of Rs. 1,000 in case A. fails to deliver certain goods at a future day. B. cannot treat his decree as a cross-decree under this section.

(*b.*) A. and B., co-plaintiffs, obtain a decree for Rs. 1,000 against C., and C. obtains a decree for Rs. 1,000 against B. C. cannot treat his decree as a cross-decree under this section.

(*c.*) A. obtains a decree against B. for Rs. 1,000. C., who is a trustee for B., obtains a decree on behalf of B. against A. for Rs. 1,000. B. cannot treat C.'s decree as a cross-decree under this section.

This section corresponds with s. 209 of Act VIII of 1859. Explanation I follows the Full Bench case of *Fakeer Chund Khan* v. *Greesh Chunder Lahoory* (*a*) and *Ramcoomar Ghose* v. *Gobindnath Sandyal* (*b*). It has been held that a Court cannot transfer its decree to another Court in order to create this right of

(*a* 2 Wym., 204; S C., B. L. R., Sup. Vol, 503; 6 Suth. W. R., 72.

(*b*) 7 Suth. W. R., 480, Keimp and Glover, JJ.; Mittun Bibee *v.* Buzloor Khan, 8 *ib.*, 392, L. S. Jackson and Hobhouse, JJ.

set-off. If it can execute it within its own jurisdiction, it should do so (*a*).

The cross-decrees must be between the identical parties; thus a decree in favor of A. and B. against C. cannot be set off against a decree in favor of C. against A. only (*b*); and where the parties are not the same, the decrees cannot be set off, whatever may be the position of trust or benamiship between them (*c*). Where there are cross-decrees, the fact that one party intends to appeal, if he has not actually taken proceedings, does not prevent the set-off of the one against the other (*d*). Where a party who assigned over a decree was liable on account of a cross-decree for a considerable sum to his judgment-debtor, it was held that, until the respective liabilities of the two parties had been settled, the Court was justified in refusing to allow one of them to assign his decree to a third person (*e*). The assignee of the decree takes it subject to the set-off (*f*); but the assignee cannot take advantage of the set-off when the assignment to him was fraudulent (*g*). A sum due under a private award cannot be set off against a sum due under a decree (*h*). The set-off must be effected in the manner indicated in these sections, in proceedings in execution, not by a separate suit (*i*).

Cross-claims under same decree.

247. (S.) When two parties are entitled under the same decree to recover from each other sums of different amounts, the party entitled to the smaller sum shall not take out execution against the other party; but satisfaction for the smaller sum shall be entered on the decree.

When the amounts are equal, neither party shall take

(*a*) Maharajah of Burdwan *v.* Sreenarain Mitter, 5 Wym., 222; see the note to s. 223.

(*b*) Kasimunnissa Bibi *v.* Hills, 6 B. L. R, Apx., 125.

(*c*) Tarachand Ghose *v.* Anund Chunder Chowdhry, 3 B. L. R., A. C., 110; S C., 10 Suth. W. R., 450.

(*d*) Hurro Pershad Roy Chowdhry *v.* Shama Pershad Roy Chowdhry, 1 Wym. Rep, 357.

(*e*) Jodoonath Roy *v.* Ram Buksh Chatterjee, 8 Suth. W. R, 202.

(*f*) Kaim Ali Jawadar *v.* Lakhikant Chuckerbutty, 1 B. L. R, F. B., 23.

(*g*) Syud Talub Hossein *v.* Walker, 7 Suth. W. R., 470, Kemp and Glover, JJ.

(*h*) Dheeraj Singh *v.* Deen Dyal Singh, 11 Suth. W. R., 144, E. Jackson and Glover, JJ.

(*i*) Rughu Nundun Rain *v.* Sumessar Panday, 13 B. L. R., 489.

out execution, but satisfaction for each sum shall be entered on the decree.

This section is new, following the last section as explained by a decision of L. S. Jackson and Glover, JJ. (*a*).

Notice to show cause why decree should not be executed.

248. (S.) The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him,

(*a*) if more than one year has elapsed between the date of the decree and the application for its execution, or

(*b*) if the enforcement of the decree be applied for against the legal representative of a party to the suit in which the decree was made:

Proviso.

Provided that no such notice shall be necessary

in consequence of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of any decree passed on appeal from the decree sought to be executed or of the last order against the party against whom execution is applied for passed on any previous application for execution, or

in consequence of the application being against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person, the Court has ordered execution to issue against him.

Explanation.—In this section the phrase "the Court" means the Court by which the decree was passed, unless the decree has been sent to another Court for execution, in which case it means such other Court.

This corresponds with Act VIII of 1859, s. 216. The explanation defining the word 'Court,' following the decision in *Bagram* v. *Wise* (*b*), settles the practice about which there had

(*a*) Jugo Mohun Bukshee *v.* Soorendronath Roy Chowdhry, 13 Suth W. R., 106.

(*b*) 1 B L. R., F. B., 91; S. C., 10 Suth. W. R., F. B., 46.

been some doubt. If it is desired to execute an old decree, &c., in a Court which did not pass it, the proper course is to get it revived by the Court which passed it, by issue of notice, &c., and then get it sent down for execution (*a*).

The person who wants the Court to execute the decree should apply for execution, not for the issue of a notice to the other side; and the Court, if it appears that the circumstances require that a notice shall issue, should issue one (*b*). It was held also in that case, and this was the principal point for decision, if the application had been *bonâ fide* made, that the issue of a notice was a proceeding sufficient to keep alive the decree within the meaning of the Limitation Act (then Act XIV of 1859, sched. ii, 3rd div., No. 179), and that is so now under the new clause of the Limitation Act, XV of 1877, which also sets at rest the question of joint and several judgment-creditors or judgment-debtors; but the proceedings must have been taken by the party in good faith; see the judgment in the above case. But a notice under this section stands upon a different footing from a summons or other notice which a party is bound to serve, and it must be presumed that a Court, until the contrary is proved, has duly issued such notice where required by law to do so (*c*), the burthen of proof being upon the execution-debtor (*d*).

The second paragraph of the proviso is applicable only to the case where the Court, on the first occasion, has ordered execution, and even should a notice in such a case, although unnecessary, be issued by the Court, it would not be open to the representative to dispute his representative character on the occasion of the subsequent issue of execution against him (*e*); but the decree can only be satisfied out of the property of the deceased which has come to the hands of the representative and has not been duly applied by him, or against him personally, where he has received property of the deceased and has not duly applied it; see s. 252, *post*. Where the

(*a*) Monohur Doss *v.* Joy Fuckarrot Dowla Bahadoor, MSS., Phear, J. June 5, 1866.

(*b*) Ram Sahoy Singh *v.* Gooroo Dass Akoolee, 1 In. Jur., N. S., 421, F. B.; S. C., 2 Wym., 278; 6 Suth. W. R., Mis., 98, *nom.* Ram Sahaye Singh *v.* Degun Singh.

(*c*) Bimola Soondurce Dassee *v* Kalee Kishen Mojoomdar, 22 Suth. W. R., 5, L. S. Jackson and McDonnell, JJ.

(*d*) Kasee Nath Roy Chowdhry *v.* Hullodur Roy, 2 Suth. W. R., 60, Steer and E. Jackson, JJ.

(*e*) Maharajah Dheraj Mahtab Chund Bahadoor *v.* Musst. Pearee Dossee, 6 Suth. W. R., Mis., 61.

Court has not ordered execution to issue on the first occasion, but has struck the case off, or not dealt with it, a fresh notice must be given on the second application (*a*).

It has been held, that the order for execution of an old decree was merely a summary proceeding, which may be conclusive as between the decree-holder who obtained it and those against whom it was made, but was not in any degree conclusive against the latter among themselves; and had not necessarily the same effect, so far as regarded contribution *inter se*, as the original decree in the suit (*b*).

Procedure after issue of notice.

249. (S.) If the person to whom notice is issued under the last preceding section does not appear, or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

If he offers any objection to the enforcement of the decree, the Court shall consider such objection and pass such order as it thinks fit.

This corresponds with s. 217 of Act VIII of 1859.

Where a person served with notice as representative did not appear, it was held that he could not afterwards set aside the decree on the ground that he was not representative (*c*).

Where the judgment-debtor appears by pleader, and files an objection, the Judge should fix a day for hearing the point; he should not call on the case on a subsequent day and dismiss it because the pleader does not happen to be there. If after a day has been fixed, the judgment-debtor or his pleader makes no appearance, the Judge can go into the objection in his absence (*d*).

It has been held under the old Act that the judgment-debtor showing cause need not put in a verified petition (*e*); but, considering the terms of s. 647, *post*, it seems that there should be

(*a*) Roghooburdyal Mundur *v.* Christian, 3 Suth. W. R., 123, Peacock, C. J., and E. Jackson and Glover, JJ.

(*b*) Nund Coomar Singh *v.* Gunga Pershad, 3 Suth. W. R., 207.

(*c*) *In re* Cochrane, 14 B. L. R., 330; S.C., 23 Suth. W. R., 310; and see the next section.

(*d*) Rajballab Saha *v.* Ramsodoy Ghose, 5 B. L. R., Apx., 65, L. S. Jackson and Glover, JJ.

(*e*) Sunt Gopal Chunder *v.* Maharajah Jugat Inder Bunwaree, 8 Suth. W. R, 200, L. S. Jackson and Hobhouse, JJ.

a verified petition filed on showing cause under this section in the same manner as a verification is required for a written statement.

Warrant when to issue.

250. (S.) When the preliminary measures (if any) required by the foregoing provisions have been taken, the Court, unless it sees cause to the contrary, shall issue its warrant for the execution of the decree.

This corresponds with Act VIII of 1859, s. 221.

Date, signature, seal, and delivery.

251. (S.) Such warrant shall be dated the day on which it is issued, signed by the Judge or such officer as the Court appoints in this behalf, sealed with the seal of the Court, and delivered to the proper officer to be executed.

And a day shall be specified in such warrant on or before which it must be executed, and the proper officer shall endorse thereon the day and manner in which it was executed, or if it was not executed, the reason why it was not executed, and shall return it with such endorsement to the Court from which it issued.

This section corresponds with s. 222 of Act VIII of 1859, but the Judge now need not sign the warrant himself.

The nazir's return has been held not to be evidence, unlike the return of the sheriff, which is evidence of the facts stated therein (*a*).

Decree against representative of deceased for money to be paid out of deceased's property.

252. If the decree be against a party as the legal representative of a deceased person, and the decree be for money to be paid out of the property of the deceased, it may be executed by the attachment and sale of any such property.

If no such property can be found, and the judgment-debtor fails to satisfy the Court that he has duly applied

(*a*) Obhoy Chunder Dutt *v.* Erskine, 3 Suth. W. R., Mis., 11, Peacock, C. J., and Loch, J.; Sreenath Thakoor *v.* Watson, 4 Suth. W. R., Mis., 4, Loch and Glover, JJ.; Shah Koondun Lall *v.* Noor Ali, 10 *ib.*, 3, Mitter and Hobhouse, JJ.

such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property not duly applied by him, in the same manner as if the decree had been against him personally.

This section corresponds with Act VIII of 1859, ss. 203 and 211; see notes to ss. 234 and 244, *ante*.

A decree cannot be made, and therefore cannot be executed, against property alone; there must be some parties through whom the property is made liable (*a*) Where a plaintiff sues a defendant for a debt due by a deceased person, and charges the defendant with assets of the deceased, the question of assets or no assets must be decided in the suit, and if the plaintiff fail in proving that the defendant had received assets, the suit must be dismissed; but if the suit against the defendant be simply against him as representative, and the defendant deny the receipt of assets, the plaintiff is entitled to succeed, if he prove the debt, without going into the question of assets, and the question of assets or no assets will be a matter for enquiry in proceedings in the execution of the decree (*b*). When the representative admits assets, he should file and prove an inventory of those assets, if he claims exemption from attachment of any property which he alleges to be his own and not derived from the ancestor (*c*).

The representative may have become a representative at any stage of the suit (*d*).

As the enquiry in the second case, whether the defendant who is sued in a representative capacity has assets or no assets of the testator is to be determined in the proceedings in execution, it follows that it is one of the questions which are to be enquired into under s. 244, *ante*, and as such, the decision is apparently not open to appeal, unless it can be considered to be a decision on a question

(*a*) Avul Khadar *v* Andhu Set, 2 Mad. H. C. Rep., 423, Frere and Innes, JJ., see p. 425; Lekraj Roy *v.* Becharam Misser, 7 Suth W R., 52, Loch and Macpherson, JJ.

(*b*) *In re* Hiralall Mookerjee, 6 B. L R., Apx., 100, Norman, Offg. C. J, and Loch, J.; Chowdry Wahid Ali *v* Musst Jumaee, 11 *ib*, P. C, 149, Ameerunnissa Khatoon *v.* Meer Mozuffer Hossein Chowdry, 12 *ib*, 65, L. S. Jackson and Mitter, JJ.; Oneemunnissa Khatoon *v.* Ameeroonnissa Khatoon, 20 Suth. W. R, 162, Couch, C. J, and Glover, J.

(*c*) Joogul Kishore Singh *v* Kalee Churn Singh, 25 Suth. W R, 224.

(*d*) Syud Jafur Hossein *v* Hingun Jan, 8 Suth W. R, 161, L S. Jackson and Hobhouse, JJ

of the same nature with an appealable order made in the course of the suit, which does not seem to be the case; see s. 588 (j), *post*. Until this last clause has received a definite judicial interpretation, it would be better to charge the defendant with assets in the plaint, otherwise, if there be no appeal, the plaintiff would be without any further remedy, for s. 244 prohibits a second suit, the representative being clearly a party to the suit (*a*).

Whether the plaintiff charge the defendant in his plaint with assets, or leave the matter to be enquired into in the execution, the onus lies upon him to prove that the defendant representative has received, and not duly applied, assets of the deceased (*b*).

Questions have arisen as to the application of this provision of the law in the case of the estate of a Hindu dying without male issue, the property being in the possession of the widow in whom the estate is for the time vested absolutely, although in some respects for a qualified interest (*c*); she represents the estate fully, so long as her right to hold it exists. But her dominion over it is confined within certain definite limits beyond which she has no power to go (*d*). Although she may sell her so-called life-interest (*e*), yet the male heirs of her husband would have a right to take legal steps to restrain her from wasting the purchase-money: they might have an injunction (*f*), although until her death it could not be ascertained who would be entitled to succeed (*g*). For when she dies, her husband's then heirs, not her heirs, succeed (*h*). And she has only this limited estate even although there may be no heirs of her husband capable of taking on her death (*i*).

Execution of a decree against the representatives of a deceased judgment-debtor is *primâ facie* against the property of the deceased judgment-debtor (*j*). And when a suit is brought and decreed against a Hindu widow in respect of the debt due by her deceased

(*a*) Chowdry Wahid Ali *v.* Musst. Jumaee, *supra*.

(*b*) Shurfun Bebee *v.* Collector of Sarun, 12 B. L. R., 66 note, Phear and Hobhouse, JJ.; Rajah Roodro Narain Roy *v.* Nittyanund Doss, 8 Suth. W. R., 195, Loch and Hobhouse, JJ.

(*c*) Katama Natchiar *v.* The Rajah of Shivagunga, 9 Moo. I. A., 604.

(*d*) *Ibid*, and Kery Kolitany *v.* Monee Ram Kolita, 13 B. L. R., 5.

(*e*) Kery Kolitany *v.* Monee Ram Kolita, 13 B. L. R., 8.

(*f*) *Ibid*, p. 10.

(*g*) 9 Moo. I. A., 604.

(*h*) Dayabhaga, c. xi.

(*i*) Collector of Masulipatam *v.* Cavaly Vencata Narrainapah, 8 Moo. I. A., 553, in which case the Crown is the reversioner, *ib*.

(*j*) Lalla Seeta Ram *v.* Ram Buksh Thakoor, 24 Suth. W. R., 383.

husband, the decree against the widow, although it may be apparently a decree against her personally, is not to be considered as such, but as a decree against her as representative of her husband's estate, and may be executed as such (*a*). But a personal decree against a Hindu widow in possession of her deceased husband's estate can only be enforced against her own property in the estate, even although the money for which the plaintiff sues was advanced by him in payment to the Collector to save the estate from sale. If the plaintiff wish to obtain a charge on the estate, he must ask for it in his plaint. In that case, although it was said that the widow may represent the whole estate as well in respect of the reversionary interest as her own, the persons entitled to the reversion presumptively after the widow's death have a right to come in and redeem the debt, and should be afforded an opportunity of doing so (*b*).

A Hindu widow in possession of the estate of her deceased husband, having the estate of a Hindu widow, is *primâ facie* personally responsible for the payment of the rent due after her husband's death, and only her interest can be sold in execution of a decree for the unpaid arrears, unless where the proceeding is one which authorizes the sale of the tenure (as under Act VIII of 1869, B. C.), or if the estate is to be charged so as to bind the person who takes after the widow for the arrears of rent or other debt becoming due after the death of the husband, it can only be upon the ground that the debts were necessarily contracted by the widow, or under such circumstances, as to make the whole estate liable, and not merely the interest of the widow (*c*). In that case a passage in the judgment of the Judicial Committee in the case of *Nogender Chunder Ghose* v. *S. M. Kaminee*

(*a*) Ishan Chunder Mitter *v.* Buksh Ali Soudagur, Marsh., 614; S. C., Suth. F. B. Rep., 119, approved in Court of Wards *v.* Maharajah Coomar Ramput Sing, 14 Moo. I. A., 605; S. C., 10 B. L. R., P. C., 294; Mohima Chunder Roy Chowdry *v.* Ram Kishore Acharjee Chowdhry, 15 B. L. R., 142; S. C., 23 Suth. W.R., 174; Anund Moyee Dossee *v.* Mohendro Narain Doss, 15 Suth. W. R., 264; Teluck Chunder Chuckerbutty *v.* Muddon Mohun Joogee, 15 B. L. R., 143 note.

(*b*) Nugender Chunder Ghose *v.* S. M. Kaminee Dossee, 11 Moo. I. A., 241, see p. 257; Baijun Doobey *v.* Brij Bhookun Lal Awusti, L. R., 2 I. A., 275; S. C., I. L. R., 1 Cal., 133, P. C.; 24 Suth. W. R., 306; Kisto Moyee Dossee *v.* Prosunno Narain Chowdhry, 6 Suth. W. R, 304, cited.

(*c*) Mohima Chunder Roy Chowdry *v.* Ramkishore Acharjee Chowdry, 15 B. L. R., 142, Couch, C.J., and Ainslie, J.; see p. 156, *per* Couch, C.J.

Dossee (*a*) was relied on in order to charge the whole estate: it was, that the Judicial Committee "wish it to be understood that "they leave unimpaired the general rule that, in a suit brought by "a third person, the object of which is to recover, or to charge an "estate of which a Hindu widow is the proprietress, she will, as "defendant, represent and protect the estate, as well in respect of "her own as of the reversionary interest;" but Couch, C. J., was of opinion that this passage was not applicable, and that in suits of this nature the widow cannot be said to represent or protect the estate in respect of the reversionary interest; that the Judicial Committee referred only to suits where the widow might be sued for the recovery of property in her possession as part of the estate, and which she would bring or defend as representing the estate and not only in respect of her own interest. As to the general rule, see the case of *Katama Natchiar* v. *The Rajah of Shivagunga* (*b*), where the Judicial Committee point out that, until the widow's death, it cannot be ascertained who would be entitled to succeed, and that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow. That, however, was the case of a suit to recover a zemindary.

The legal representative, whether executor, administrator, or holder of a certificate from an Administrator-General, or one who has made himself executor *de son tort*, and who have taken assets, is liable *pro tanto* to discharge the debts of the deceased. Where the case falls under the Indian Succession Act, see that Act and Act II of 1874.

The question of liability of a Hindu in possession of the estate of a deceased Hindu to pay his debts, was fully gone into in a case (*c*) decided by Phear, J., and his judgment was affirmed on appeal by Peacock, C. J., and Macpherson, J. The authorities cited by Phear, J., were numerous (*d*); and the conclusions

(*a*) 11 Moore's I. A., 241.

(*b*) 9 Moo. I. A., 539, see p. 604.

(*c*) Jogendernarain Deb Roykut *v.* Temple, 2 In. Jur., N. S., 234.

(*d*) Manu, c. xi, v. 66; Jagannatha's 1 Dig., 166, 167, 169, 171, 172, 173, 174, 198, 199, 220; 1 Strange's Hindu Law, c. viii, p. 166, s. 1; Vyavahara Mayakha, c. v; Vyavastha Darpana by Shamachurn Sircar; and a note of Sir William Jones quoted in Colebrooke's Digest—"Without assets the son and grandson are under a moral and religious, not a civil, obligation to pay the debts if they can, but the assets may be followed in the hands of any representatives."

arrived at by his Lordship were: (1) "that the person who, on the "death of another, takes the latter's property by due course of "inheritance or descent, is bound to pay the deceased's debts to the "extent of the assets which have come down to him; (2) that "neither the son nor any other heir, whatever may be his moral "responsibilities on this point, is legally bound to pay the debts "of his ancestor unless he has received assets; (3) if the debtor "dies leaving his debt unsatisfied, the creditor must look to the "person who has received the deceased's property in due course "of descent, or in Bengal, if the deceased man has left a will, "to the executor who has taken assets, or to an administrator "who has taken out administration." And he proceeds as follow: "Now, by what outward signs is the creditor to recognize the "person who bears any one of these characters? Obviously there "is but one available clue to him, *viz.*, the factum of his dealing "with the assets of the deceased. And I am of opinion that "here, as in England, the creditor is not obliged to seek out "the root of any one's authority whom he finds in possession "of the property which the deceased man left at his death. "He may sue such a person on the foundation of that posses-"sion only, and in the event of his doing so it will be on the "defendant to show not only that he did not in fact become possess-"ed of the property in either one of the characters of heir, exe-"cutor, or administrator, but also to establish that he has a good "title to hold it by some other right. If he is unable to do this, the "Court will hold him liable, as of his own wrong, to discharge the "plaintiff's claim in the same way, and to the same extent, as if he "were actually clothed with one of the three characters which I "have specified. I conceive this to be a matter of evidence alone "depending on those principles which have led in England to the "vicarial liability hidden under the name of executor *de son tort*." Peacock, C. J., on the appeal, said: "If he (the defendant) has "taken the estate of his brother, and has become his representative, "it appears to me that he ought to pay his debts, and it is not "denied that the assets are enough to pay the plaintiff." . . . "Whether a son is bound to pay his father's debts or not, if he has "not assets, it is clear that if he takes the father's estate, he is bound "to pay the father's debts out of the assets. If a person takes an "estate as heir of the deceased, he is under an obligation to pay the "debts of the deceased. In the case of an entire stranger it

"might be necessary to make the heirs parties" (*a*). The explanation of s. 366, *post*, in chap. xxi, which deals with incidental proceedings on the death, marriage, or insolvency of parties, shows that a certificate of heirship, or a certificate to collect debts, does not of itself make the person holding it a representative of the deceased, but the person holding it is liable to the extent of any property of the deceased which he obtains, and may be so far treated as a representative.

Again, in a later case, which was heard on appeal before the Judicial Committee, it was said "ancestral property which descends "to a father under the Mitakshara law is not exempted from liabi-"lity to pay his debts because a son is born to him." . . . "The "freedom of the son from the obligation to discharge the father's "debt has respect to the nature of the debt and not to the nature "of the estate, whether ancestral or acquired, by the creator of "the debt" . . . If the "debt of the father had been contracted "for an immoral purpose, the son might not be under any pious "obligation to pay it; and he might possibly object to those estates "which had come to the father as ancestral property being made "liable to the debt (*b*); but the purchaser at the sale in execution "is not bound to go back beyond the decree to ascertain whether "the Court was right in giving the decree, or having given it, in "putting up the property for sale under an execution upon it" (*c*).

The Hindu law then imposes a moral obligation on a son or grandson, or heir, to pay his father's debts, and it had even been held in the Bombay Presidency that this was more than a moral obligation; that he could be compelled by law to do so, even although he had realized no assets from his father's estate. The injustice of this rule led to the passing of Act I of 1866 (Bom.) on the report of the Advocate-General Mr. Sewell White, now one of the Judges of the High Court at Fort William (*d*).

(*a*) See also Budree Lall *v.* Kantee Lall, 23 Suth. W. R., 260; Muddun Gopal Lall *v.* Musst. Gowrunbutty, *ib.*, 365; Burtoo Sing *v.* Ram Purmessur Singh, 24 *ib.*, 364; Musst. Sanjoogee Kooer *v.* Hur Pershad, *ib.*, 274; Musst. Omuthunissa *v.* Puresmun Narain Singh, 25 *ib.*, 202.

(*b*) *Per* Sir B. Peacock, delivering the opinion of the Judicial Committee in the case of Girdharee Lall *v.* Kantoo Lall, 14 B. L. R, P. C, 187, see pp. 196, 197, citing Hunoomanpersaud Panday *v.* Musst. Babooee Munraj Koonweree, 6 Moo. I. A., 393, see p. 421; Omed Rae *v.* Hera Lall, 6 S. D. A, N. W. P., 218; Musst. Junnuk Kishoree Koonwur *v.* Rughoonundun Sing, S. D. A., 1861, p. 213.

(*c*) *Ibid.*

(*d*) The Report and the Act are printed at the end of the 2nd volume of the Bombay High Court Reports.

The Mahomedan law recognizes an executor who completely represents the estate (*a*). The first duty of the executor is to pay the funeral expenses (*b*) and then the debts (*c*).

There are conflicting decisions on the question whether, in this country, an execution-creditor is entitled to have his decree satisfied out of the assets of the deceased judgment-debtor, whose estate, in the hands of a duly constituted representative, is unable to pay all the claims upon it, or only to come in and take rateably with other creditors. The tendency of modern legislation is in favour of an equal division of the assets among the general body of creditors, after payment of the expenses of collection and distribution and of certain preferential claims. Thus, although ss. 279 to 281 of the Succession Act (X of 1865) give priority in administration to certain claims on account of the funeral and medical attendance, death-bed charges, a month's board and lodging previous to death, the expenses of representing the estate, wages of labourers, artizans, and domestic servants, s. 282 says:—"Save as aforesaid, no creditor "is to have a right of priority over another by reason that his debt "is secured by an instrument under seal, *nor on any other account;* "but the executor or administrator shall pay all such debts as he "knows of, including his own, equally and rateably, so far as the "assets of the deceased will extend."

The law in England, since the beginning of 1870, has been very similar to this. By 32 and 33 Vict., c. 46, the distinction between specialty and simple contract-debts of deceased persons has been abolished, and the law of England is applicable to the payment out of their moveable assets of the debts of deceased persons dying in India, but, as is very frequently the case, domiciled in England; see Act X of 1865, s. 283.

The sections in this Code of Civil Procedure, relating to the distribution of property in the analogous case of insolvency, direct that the creditors are to receive rateably without any preference. So also the old law, which gave the first attaching-creditor priority, is now done away with, and all decree-holders who have applied for execution (s. 295, *post*) take rateably. Thus the legislature admits this principle of fairness among all creditors, and there seems to be no reason why a judgment-creditor should have a better right to be paid in full than any other, still less why a creditor who is not a judgment-creditor when the death of the

(*a*) Hedaya, Book 52, c. 7. (*b*) Baillie, 683. (*c*) *Ibid*, & p. 622.

debtor takes place should be allowed to bring a suit against the representative, and by so doing obtain a larger share of the assets than he was before entitled to. The latter question, however, arose in 1872 and was decided in favor of the judgment-creditor by Couch, C. J., and Ainslie, J. (*a*). This was a suit brought against a Mrs. Reed, as the representative of her deceased husband, for goods supplied to him. The claim was decreed against her in her representative capacity, and the amount was decreed by the Court of Small Causes of the Suburbs of Calcutta to be realized out of the estate of the deceased. Mrs. Reed had previously obtained from the Administrator-General a certificate under Act XXIV of 1867, s. 34, entitling her to receive the assets of the deceased, valued at Rs. 479, a part of which consisted of salary due to the deceased in the hands of the agent of the East Indian Railway Company, which had been attached before execution of the decree. (The report says "by this Court," presumably by the High Court, but it does not give any further particulars of this attachment, at whose suit, whether before or after decree, or the amount attached). Mrs. Reed having objected to the whole of the plaintiff's claim being satisfied out of the sum attached, evidence was given on both sides, and the Judge, having ascertained the whole amount of assets left by the deceased, held, that the plaintiff was entitled to what remained after deducting the expenses chargeable under ss. 279 to 281 of the Succession Act. (Those sections, if the 281st section is included, give priority not only to certain *expenses*, but to certain *claims*.) An order was, accordingly, passed, to the effect that the plaintiff was entitled to have Rs. 97-12-6 out of the money attached handed over to him. The defendant applied for a review of this order on two grounds, one of which was, that the Judge was wrong in declaring the plaintiff entitled to have the whole of his decree satisfied out of the assets of the estate, as far as they went, to the exclusion of other parties who had claims against the estate which were admitted to be correct, but who had not obtained decrees of Court. In support of this contention the defendant relied on s. 282 of the Indian Succession Act, it being argued that words "on any other account" in that section included a decree of Court. The Judge of the Small Cause Court, being of opinion that the words were not meant to cover a decree of Court, and that the construction contended for could not be reconciled with the provi-

(*a*) Nil Komul Shaw *v.* Reed, 12 B. L. R., 287.

sions of ss. 203 and 211 of the Civil Procedure Code (Act VIII of 1859, corresponding with s. 252 of the present Code), referred for the opinion of the High Court the question, whether the plaintiff, under the circumstances stated above, was entitled to satisfaction of his decree to the exclusion of the other creditors, or whether it should be left to the discretion of the defendant to satisfy the decree *pari passu* with the other proved claims (not being of the nature specified in ss. 279 to 281 of Act X of 1875). The Court was of opinion that the plaintiff was entitled to have the Rs. 97-12-6, the balance of the assets, after making the necessary deduction for the expenses referred to before, paid to him towards satisfaction of the decree, which he had obtained. Couch, C. J., who delivered the opinion of the Court, said, that "the provision in "s. 203, Act VIII of 1859, entitles the decree-holder to have "his decree satisfied out of the property of the deceased, or "out of the property of the defendant, the executor, if it should "appear that he has not duly applied the property of the deceased, "and s. 282 of the Indian Succession Act does not interfere with "that right. All that it does, is to point out the mode in which "the executor or administrator is to administer the assets of the "deceased, but it does not enable the executor or administrator, "where a decree has been obtained against him, to say, that *no* "*portion* of the assets of the deceased person is to be paid in "satisfaction of that decree, but he is to deal with them just as if no "decree had been passed, which appears to be the objection raised in "this case." If the case is correctly reported, that was not the objection raised by the defendant, who did not contend that the creditor was entitled to no portion, but merely that she ought to distribute the property rateably under s. 282, as she clearly would have been right in doing, if there had been no decree, or, before execution of the decree, her having done so would have been a due application of the property of the deceased sufficient to protect her own.

If the creditor can then, by suing the representative, put himself in a better position, and treat s. 282 as a nullity, the prudent course for every creditor to take upon the death of his debtor will be to file his suit at once against the representative, as soon as he can be ascertained. The expense which must be caused to the estate by such proceedings will, of course, be very great. While the case of *Nilkomul Shaw* v. *Reed* decides that s. 282 of the Indian Succession Act does not affect the law relating to the

execution of decrees; it also decides that ss. 279 to 281 do affect that law, and give a preference to the special claimants under those sections over the execution-creditor: no reason is given for this distinction.

This state of the law applies only in cases where the estate is represented by a private individual. Where it is represented by an Administrator-General, one creditor cannot give himself a preference over all the rest in this manner. Section 35 of Act II of 1874 provides that, "if any suit be brought by a creditor against any "Administrator-General in his representative character, the plaintiff "shall be liable to pay the costs of the suit down to, and including, "the decree, unless upon proof by affidavit, or otherwise, that not "less than one month previous to the institution of the suit he "had applied in writing to the Administrator-General stating the "amount and other particulars of the claim and supporting the "same by such evidence, as, under the circumstances of the case, "the Administrator-General was reasonably entitled to require, and "that the Administrator-General had refused, or neglected, to regis-"ter the claim according to the practice of his office."

"If in any such suit judgment is pronounced in favour of "the plaintiff, he shall, nevertheless, be only entitled to payment out "of the assets of the deceased equally and rateably with the "other creditors."

In a case (*a*) decided on December 6th, 1875, by Stuart, C. J., and Oldfield, J., in the High Court at Agra, F. died intestate on 14th January, 1875, and the Administrator-General obtained a grant of letters of administration to his estate on the 4th May, 1875. The plaintiff, on the 1st of October, 1874, had obtained a decree against the deceased in the Small Cause Court at Mussoorie, and it had been passed in accordance with an arrangement between the parties. The decree not having been satisfied, the assets of the estate in the hands of the Administrator-General were attached by an order of the Small Cause Court passed on 9th July, 1875. The Administrator-General applied to have this order set aside, alleging that certain irregularities, which are not material to this question, had taken place, and that a judgment-creditor was not entitled to any priority over the general body of creditors. The case was referred to the High Court at Allaha-

(*a*) Mitter *v* Administrator-General of Bengal, *Englishman* newspaper, March 17, 1876.

bad. The following were the opinions of the learned Judges:—
STUART, C. J.—"I have carefully considered this reference, and "I am of opinion that the Administrator-General is right and the "Judge wrong. In the law of England the priority allowed to judg-"ments is a privilege peculiar to the judgments of what are called "'Courts of Records,' which the Courts of Small Causes in India "clearly are not; nor do I think it necessary to offer any opinion "as to the whether the judgments of these Courts are 'public "proceedings of great solemnity.' The authorities on the law of "England will be found collected in Williams on Executors and "Administrators, Vol. II, p. 932, 6th edition (1867), and it is "important in the present case to see what was done. The decree "was not contentious, but *ex parte*, and payment was agreed to "as explained by the Judge; and although in this way the "defendant might be said to have virtually accepted judgment, still "the matter was essentially in the nature of a private arrangement "between the parties, of no higher legal authority than any "contract or instrument under seal, and might be properly under-"stood as coming within the words 'or on any other account' in "s. 282 of Act X of 1865. These words, in fact, relate to contracts "or proceedings *ejusdem generis*, which, I think, the arrangement "in the present case may be said to be. My opinion, indeed, is, "that these words of the section might even include a contentious "decree, whether of a Small Cause Court or of any other Court "not established by Royal Charter. My answer to this reference, "therefore, is, that the decree obtained and arranged for against "Colonel Ferris is carried by the words 'or on any other account' "in s. 282, Act X of 1865, and has no priority." OLDFIELD, J.—"The answer to the reference should, in my opinion, be, that a "debt due on a judgment does not give the judgment-creditor "priority over other creditors of the estate of a deceased person. "And referring to s. 282, Indian Succession Act, the terms 'on any "other account' seem to me intended to include judgment-debts; "and I consider that it was only intended to give priority to the "debts mentioned in the preceding sections. The provisions of "the Indian Succession Act indicate the law to be followed in "cases of estates in administration by the Administrator-General, "when not opposed to the provisions of Act II, 1874 (s. 66 of "that Act), and nothing in s. 282 is so opposed; on the contrary, "its provisions, as I would interpret them, are in the same direc-

"tion as those in s. 35, Act II of 1874, by which a creditor, obtain-
"ing judgment in a suit against the Administrator-General, is only
"entitled to payment out of the assets of the deceased rateably
"with the other creditors."

Where the creditor has not only obtained a decree but attached the property, the representative takes it subject to the attachment, whatever may be its effect, which attachment, if improperly obtained, as in the instance of a suit brought against the estate of the deceased without a representative, or with a wrong person placed as representative on the record, may be removed by proper proceedings. In such a case the proper representative may come in; indeed, it has been held that he must do so if he intends to contest the proceedings in execution however irregular those proceedings may have been (*a*), as where a suit was brought by A. on March 26th, 1866, against D., as manager of S. M. and Co., proprietors of an indigo factory, to recover possession of land and mesne profits. The indigo concern had been mortgaged to the Agra and Masterman's Bank, and the Bank entered into possession under its mortgage in 1866. At the date of the institution of the suit no member of the firm of S. M. and Co. was alive; the suit was, however, defended apparently by the Bank, and a decree was given for the plaintiff in December, 1866, and A. was put in possession under the decree. In 1869, the executors of M., the last survivor of the firm of S. M. and Co., sold the equity of redemption of the indigo concern to the Agra Bank, with the *dena pawna* of the concern. A. afterwards applied to execute the decree against the Bank as representing S. M. and Co., on the ground that the Bank had undertaken the *dena pawna*. A notice was issued calling on Mr. Cochrane, the manager of the Agra Bank, to show cause why the decree should not be executed against the Bank. The notice was duly served, but Mr. Cochrane failed to appear, and the amount of mesne profits were assessed in his absence. Another notice was issued to him, but he did not appear; and in his absence the amount so fixed was ordered to be levied, and was levied by sale of a patni talook belonging to the Bank. He did not oppose the sale, which was confirmed, and A., who was the purchaser, obtained possession. Mr. Cochrane then applied for an order to set the sale aside, and for an injunction restraining the plaintiff from further proceeding under the decree against the Bank's property. He

(*a*) *In re* Cochrane, petitioner, 14 B. L. R., 330, L. S. Jackson and McDonell, JJ.

contended that the suit was barred, on the ground, amongst others, that it was wrongly instituted, not having been brought against M.'s executor, and therefore that Mr. Cochrane was justified in treating the proceedings as a nullity. This application was refused, whereupon the Bank applied to the High Court to interfere under 24 and 25 Vict., c. 15, and obtained a rule calling on the decree-holder to show cause why the order refusing Mr. Cochrane application should not be set aside, and his prayer granted. The rule was afterwards discharged on the ground that Mr. Cochrane ought not to have treated the proceedings in execution as nullities, and it was said that the rule was refused with the less hesitation, as a suit to set aside the sale would certainly succeed. A suit, and not an objection in the execution proceedings would appear therefore to be the proper remedy (*a*). Such proceedings, however, ought not to be forced upon the representative, he has often no personal interest in the matter, and they have the effect of diminishing, often very seriously (for litigation is excessively costly in this country), the fund to which the creditors have to look for payment of their debts.

Decree against surety.

253. (S.) Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant:

Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety.

This section corresponds with Act VIII of 1859, s. 204; the proviso as to notice is added; and it is here also expressly enacted that the surety must have become so before the passing of the decree in the original suit. S. 204 was held applicable in cases where the surety had entered into the surety bond in the course of the proceedings, but it was not applicable to a surety who entered into an independent agreement after the passing of the

(*a*) Ramanoogro Singh *v.* Kishen Kishore Narain Sing, 23 Suth. W. R., 265, Phear, J.

decree with the judgment-debtor (*a*), and this seems to be all that is meant by the introduction of the words "before the passing of a decree in an original suit," for security may be given for the performance of a decree appealed against under s. 545, *post*, and proceedings in execution of the appellate decree are to be executed, s. 583, *post*, according to the rules prescribed for the execution of decrees in suits.

A surety against whom the judgment-debtor is proceeding, was held to be a party to the suit within the meaning of s. 11 of Act XXIII of 1861, corresponding with s. 244 of this Act (*b*).

Decree for money.

254. (S.) Every decree or order directing a party to pay money, as compensation or costs, or as the alternative to some other relief granted by the decree or order, or otherwise, may be enforced by the imprisonment of the judgment-debtor, or by the attachment and sale of his property in manner hereinafter provided, or by both.

This section corresponds with the first part of s. 201 and s. 232 of Act VIII of 1859; as to the property liable to attachment, and the mode of attaching it, see s. 266, *post*, and the following sections.

If the application be made in proper form, the Court must issue execution as prayed (*c*); but it may, in its discretion, refuse an application for immediate execution made verbally or for execution against person and property at the same time (*d*), under s 230, *ante*. Where a judgment-debtor absconded when a writ was issued to arrest him in execution, a second writ was issued against his moveable property, the Court not requiring the other writ to be returned (*e*).

(*a*) Ramkishen Doss *v.* Hurkoo Sing, 7 Suth W. R., 329, Loch and Macpherson, JJ.; see also Gajendranarayan Roy *v.* Hemangini Dasi, 4 B. L. R, Apx., 27; S. C., 13 Suth. W. R., 35, where that case was followed by L. S. Jackson *v.* Markby, JJ.

(*b*) Ghoree Lall Jha *v.* Sheo Narain Singh, 8 Suth. W. R., 24, L. S. Jackson and Hobhouse, JJ.; *Ex parte* Bhikaji Vithal Ambekar, 4 Bom. H. C. Rep., A. C., 119, Couch, C. J., Newton and Warden, JJ.

(*c*) Bisheshur Roy Chowdhry *v.* Bisheshur Bose, 8 Suth. W. R., 277, L. S. Jackson and Hobhouse, JJ.; Davis *v.* Middleton, *ib.*, 282, Peacock, C. J., and Markby, J.; S. C., 4 Wym. S. C. C. Ref., 7.

(*d*) *Ibid.*

(*e*) Gregory *v.* Hadjee Eusuff Coonjee, 1 In. Jur., N. S., 244, Phear, J.

In a case (*a*) decided by Couch, C. J., and Macpherson, J., it was considered whether a creditor could, as a matter of right, claim the writ or attachment of the person of his creditor, having in the first instance attached his property, which failed to satisfy the claim. This was an appeal from the decision of Phear, J., who followed his former opinion in an earlier case (*b*), where he had held, that on a second application, the Court had a discretion in the matter, and this view had been followed by Peacock, C. J., and Macpherson, J. (*c*). However it was held that the creditor was entitled to attach his debtor's person on the second occasion as well as the first, and that the Court had no discretion in the matter; and the ground on which Couch, C. J., put it was this: s. 8 of Act XXIII of 1861 directed the Court to examine the prisoner brought up in execution; and applying for his discharge under Act VIII of 1859, s. 273; the prisoner was entitled to this (*d*). And to refuse the judgment-creditor execution against the person would be tantamount to assuming that the prisoner was entitled to be discharged from arrest, a position it rather lay upon him to prove than upon the creditor to disprove. The clauses of Act VIII of 1859 (ss. 273, 274, superseded by s. 8 of Act XXIII of 1861, and 275) are now replaced by chap. XX of this Code, which enables the debtor, when arrested, to apply to be declared insolvent. The onus of proof still remains upon him, and the application may be refused if he has been guilty of any act of bad faith.

A question of considerable importance arises when a mortgagee instead of suing to have his rights declared under his mortgage, or for foreclosure and sale of the mortgaged property, contents himself with a decree for the mortgage debt, and then proceeds to execute that decree against the mortgaged property. It is obvious that if, by taking this course, he impairs his security, his proceeding is attended with great risk (*e*); for ordinarily the estate sold is only the right, title, and interest of the judgment-debtor (*f*), purchasers

(*a*) Seton *v.* Bijohn, 8 B. L. R., 255.

(*b*) Byjnath Pundit *v.* Kunhya Lall Pundit, 9 W. R., 527.

(*c*) Nittai Chandra Pal *v.* Thakur Dass Biswas, 8 B. L. R., 258.

(*d*) See also Chyet Ram *v.* Ram Chunder Dutt, 1 Bourke, 101; Shamasoondery Dassee *v.* Nundcoomar, see note to C. C. P. (Broughton), s. 274.

(*e*) Goluck Monee Debia *v.* Mahomed Enoos, 24 Suth. W. R., 348.

(*f*) Ishan Chunder Mitter *v.* Buksh Ali Sowdagur, 1 Marsh., 614; Court of Wards *v.* Maharajah Coomar Ramaput Sing, 14 Moo. I. A., 605; S. C., 10 B. L. R., 294; 17 Suth. W. R., 459; Musst. Nuzeerun *v.* Moulvie Ameerooddeen, 24 *ib.*, 3.

will therefore naturally bid not more than the value of whatever remains in the debtor, subject to the encumbrance. If in point of fact the sale be held to pass more than this, the mortgagee may be a considerable loser, and find himself without other remedy than the personal security of his debtor, who may have no other property sufficient to satisfy the balance of his decree: this, as will be seen, from the later decision would be the case if he executed his money decree by selling the mortgaged property.

Where property has been pledged in security for a loan, and the lender, in a suit to recover the money, does not seek to have his claim satisfied from the property so mortgaged to him, but is satisfied with a simple money-decree, which does not declare the property to be hypothecated and liable to sale for the debt; and a third person, not a party to the suit, has, after the mortgage, purchased and is in possession of the property in good faith, and for a valuable consideration, the judgment-creditor cannot execute the decree against the property to the prejudice of the *bonâ fide* purchaser. He is simply in the position of an ordinary judgment-creditor in respect of his decree, and can only seize the rights or interests of his debtor. It was held however that he might enforce his lien by separate suit against the party in possession of the property pledged to him, but that he was not entitled to execute a money-decree against the property in the hands of the subsequent purchaser (*a*). And a purchaser of the decree from the decree-holder stands of course in the same position (*b*). Again where a plaintiff, on October 25th, 1853, obtained a bond from one K. A., an ameen, under which the latter admitted that he had received Rs. 2,500 from the plaintiff, and agreed to pay it with interest within a certain time, and also pledged certain fees in deposit or to be deposited to his credit in the Collectorate as security. In 1859 the plaintiff sued, and on the 9th November,

(*a*) Gupinath Sing *v.* Sheo Sahay Singh, B. L. R., F. B., 72; S. C., 1 Suth. W. R., 315, F. B; see also Mirza Abid Hossein *v.* Brijo Behuree Lall, S. D. A. Rep., 30th April, 1861, p. 185; and Dayungeer Sunnyassy *v.* Gour Johun Shah, *ib.*, 22nd June, 1857, p. 1063; Goluckmonee Dabea *v.* Ramsoondur Chuckerbutty, 5 Wym. Rep., p. 46, Loch and Mitter, JJ.; French *v.* Baranashee Banerjee, 8 Suth. W. R., 29, Peacock, C J., and Markby, J; Gopee Muhtoon *v.* Jhugoo Muhtoon, 9 *ib.*, 150, Kemp and E. Jackson, JJ.; Shaik Mowla Buksh *v.* Bhyrab Doss, 5 Suth. W. R., 115; Bindabun Chunder Shaha *v.* Janee Bibee, 6 *ib.*, 312.

(*b*) Sawruth Sing *v.* Bheenuck Sahoo, 14 B. L. R., 422 note.

1862, got a simple decree for money for the Rs. 2,500 and interest without any declaration of his right upon the property pledged. On 25th August, 1862, the Court of Wards obtained a decree for rent against K. A., and attached the fees in execution. On March 16th, 1863, the plaintiff applied, in execution of his decree, to have the fees paid to him; but his application was refused in consequence of the attachment of the Court of Wards. The plaintiff then sued K. A. and the Court of Wards to recover the fees. His suit was dismissed, first, on the ground that the pledge of future fees was too general, and secondly that he must be held to have waived his right to the pledge by taking an ordinary money-decree. The plaintiff ultimately appealed to the High Court. The Judges reversed the decision of the Court below, concurring in the opinion which had been before expressed by several Division Courts that a person who sues upon a bond containing a lien only to obtain a money-decree in the first instance, can afterwards bring a suit to enforce his lien (*a*). Again a plaintiff, a mortgagee of land, obtained a money-decree for the mortgage debt, in a suit against his mortgagor. It does not appear that he took any steps to execute this decree. He afterwards discovered that some of the property mortgaged to him was in the possession of B., whom he sued to establish his lien upon the land. He obtained a decree against B., and in execution the property was sold. He found that other parts of the property were in the hand of C., and he brought a similar suit against C. It was held that he might bring these three separate suits and although he might have joined them all in one suit he was not bound to do so (*b*). Again where it was objected that a plaintiff having obtained a money-decree on a bond hypothecating property as a security for the money lent could not afterwards sue to establish his mortgage lien, this objection was held to be perfectly groundless (*c*). But where the plaintiff gets a money-decree and sells the land mortgaged and enters up satisfaction for the whole of his debt, the lien is satisfied and ceases to exist. Thus in a case K. and M., in 1859, by their bond, hypothecated land to the ancestor of L. L. sued upon

(*a*) Lala Tilakdhari Lal *v.* Furlong, 2 B. L R., 230, E. Jackson and Hobhouse, JJ.

(*b*) *In re* Hurry Mohun Paramanick, 14 B. L. R., 418 note, decided in 1871, Loch and Mookerjee, JJ.

(*c*) Duma Sahu *v.* Jeo Narayan Lal, 4 B. L. R., A. C., 27 note, Glover and Mitter, JJ.

the bond, and got a decree for the money due on it. This decree was executed, and L. bought the land which was sold in execution, and was put in possession of it. It appears that he then entered satisfaction of his decree. H. then sued L. for the recovery of the property, on the ground that she, H., was in possession before L. bought it, having got possession after foreclosing a mortgage dated April 23rd, 1861, subsequent to the mortgage to L. H. succeeded in her suit. L. then sued to establish his lien and to get the property sold in satisfaction of his mortgage debt. It was held that L. could not recover, as his decree for the money due on the bond, under which he had sold the property and bought it himself, had been completely satisfied. But the Court recognized and agreed with the former decisions that a party getting a money-decree upon a deed of mortgage could bring a subsequent suit to declare the property liable on his mortgage (*a*).

And it was formerly considered in Bengal that a plaintiff who obtained a money-decree and executed it by sale of the mortgaged property, under which sale he had realized only part of his debt, could bring a fresh suit to enforce his lien. Thus where the defendants K. and R. gave the defendant K. M., in 1856, a bond to secure a sum of money, and by it hypothecated certain land. In 1861, K. and R. sold the lands to B. In 1863, K. M. obtained a money-decree on the bond, in execution of which decree K. M. attached the land and applied for its sale. B. opposed this application, but it was granted; the land was sold and purchased by K. M. in execution of his own decree. B. then sued to establish his title under his purchase, and to set aside the sale at which K. M. bought the land. B. succeeded in his suit. Afterwards the plaintiff bought K. M.'s rights under his decree of 1863, and sued, praying to have the land sold in execution of that decree on the ground that it was mortgaged to K. M. in 1856. The case was decided in favor of the plaintiff, and on appeal to the High Court the decision was upheld on the authority of *Gopeenath Singh* v. *Sheo Sahoy Singh* (*b*). Where a mortgagee obtained a money-decree against the mortgagor on the mortgage bond, and sold the mortgaged property under that decree, and then, as her whole debt was not so satisfied, took a fresh agreement from the

(*a*) Kasimannissa Bibi *v.* Huranissa Bibi, 7 B. L. R., Apx., 8, Kemp and Glover, JJ.

(*b*) Biswanath Mukhopadhya *v.* Gosaindas Bara Madak, 3 B. L. R., Apx., 140, Macpherson and Glover, JJ.

mortgagor, whereby he pledged other property in addition to that originally pledged,—it was held, that the mortgagee retained her lien upon the property originally pledged, but not apparently upon those subsequently pledged; and that another mortgagee who afterwards foreclosed a mortgage which was dated before the second agreement, but not apparently before the original sale in execution, took the property subject to the original mortgage lien (*a*).

But in subsequent cases restrictions were placed upon the judgment-creditor in executing his money-decree: thus, where a bond was in the following form: "Being unable to pay off this sum at "present, I mortgage to you 3½ katas of land, being my one-"fourth share. I appoint six months' time for repaying the above "amount. If I do not pay off the money within the above term, "then you will, after the expiration of the term, sell the above one-"fourth share of the land, and recover the money with interest, &c. "If by sale of the above land, the money receivable by you be not "satisfied with charges, then you will realize the proper amount "by selling my other landed properties, to which I will make no "objection or excuse." The obligee, or mortgagee, brought a suit for the money. He did not ask for the sale of the land, but only for a decree for the money due. The suit was undefended. Markby, J., held that the bond left the plaintiff all his other remedies, and that he was entitled to a decree for his money, but must be restricted in executing his decree to the moveable property of the defendant (*b*). This seems to be in principle in accordance with the proviso at the end of s. 271 of Act VIII of 1859, which is re-enacted in s. 295 of this Code. And in a similar case (*c*). Phear, J., refused to admit a plaint in a suit for money on a similar bond.

But it has been held, that where the form of the mortgage (form not given in the report, but apparently a Bengalee mortgage of which a form will be found in the Appendix to Macpherson on Mortgage, 6th edition) does not vest any estate in the mortgagee, but only establishes a lien as incident to the debt, such lien continues when it passes from a contract debt into a judgment-debt, and so continues when the judgment-debt is assigned to a

(*a*) Ramchurn Lall *v.* Koondun Koomaree, 14 B. L. R., 423 note, Phear and E. Jackson, JJ.

(*b*) Jogeswar Dutt *v.* Nitaichand Chuckerbutty, 4 B. L. R., Apx., 48.

(*c*) S. M. Umasundari Dasi *v.* Umacharn Sadkhan, 6 B. L. R., Apx, 117.

purchaser. The mortgagee, after assigning the judgment-debt to a purchaser for what must be taken as its full value, cannot retain the lien (*a*). So far this is not inconsistent with the retention of the lien by the judgment-creditor mortgagee, supposing him to have executed his money-decree in part only by sale of the mortgaged property, the proceeds of the sale being insufficient to satisfy that decree in full. But the judgment proceeds: "An attachment "under a money-decree and the mortgage lien cannot co-exist "separately in the property hypothecated; and such attachment "must be treated when existing as an attachment enforcing the "lien. This attachment, existing at the date of M. H.'s purchase," (the purchase of the judgment-debt) "passed as an incident of the "decree purchased by him, and as the property was sold pending "such attachment, the lien was transferred to the purchase-money, "and thereupon the property became thenceforward discharged "of the lien." This can be only consistent with the supposition that the sale in execution under the money-decree effected a transfer to the purchaser at that sale not only of the rights of the mortgagor in the property, but of the rights of the mortgagee. It was apparently on that ground that the question was raised in *Syud Emam Momtaz-ood-deen Mahomed v. Rajcoomar Dass* and *Harranchunder Ghose v. Dinbundoo Bose* (*b*) whether a mortgagee who had obtained a decree under s. 53 of Act XX of 1866, on the mortgage bond, the bond being a registered mofussil mortgage bond, and the proceeding being a summary

(*a*) Syud Nadir Hossein *v.* Pearoo Thovildarinee, 14 B. L. R., 425 note, Kemp and Pontifex, JJ.

(*b*) 14 B. L. R. 408, S. C. 23 Suth. W. R. 187, decided by Couch, C. J., Kemp, L. S. Jackson, Markby, and Ainslie, JJ., and see the case of Ramlochun Sirkar *v.* S. M. Kamini Debi, 5 B. L. R., 460 note, and other cases cited in the note to s. 266, *post.* An Act for the Registration of Assurances, Act XX of 1866, s. 53, *et seq*, allowed a bond to be sued on in a summary way if specially registered. This special remedy had been first introduced in Act XIV of 1864, s. 52, an earlier Registration Act. These clauses were omitted from the Act of 1871 and the subsequent Act III of 1877, on the ground that they led to frauds; see the speech of the Hon'ble F. Cockerell. *Proceedings of the Legislative Council of the Viceroy and Governor-General of India, p.* 324. They seem to have been introduced for the purpose of giving a simple remedy on ordinary bonds for money in the same way as the summary procedure on Bills of Exchange Act, applied to India by Act V of 1866, gives a simple remedy on negotiable instruments, but an ordinary form of mortgage in the mofussil in India is a bond, and the Act was allowed to apply to such mortgage bonds.

proceeding under the special provision of that Act, which enabled the obligee to obtain a decree at once on a registered bond without trial, and had recovered *a portion* of his claim in execution of the decree so obtained, could afterwards sue for the enforcement of his remedies under the bond, merely giving the defendant credit for the amounts he had already recovered. The report of the first case does not state how the mortgagee had proceeded to execute his decree. But he had executed it and got Rs. 800, less his costs, on account of a debt of about Rs. 4,000. He died, and his representative is reported afterwards to have "taken back the bond" on the ground that he could not get any interest at the stipulated rate after the date of the decree, and could not avail himself of the mortgage of land. Having obtained the bond he sued to recover the balance which was due to him.

In the second case also it is not stated what the proceedings in execution were, or whether they were by way of sale of the mortgaged property or otherwise; but the decree was under the same Act (which is now repealed); and he sued again, stating that he had only succeeded in realizing one rupee by his former suit, asking that he might have a decree for the unrealized portion of the debt recoverable by the sale of the mortgaged property which had passed into the hands of one of the defendants, who bought it from the other defendant, who had bought it at an auction-sale held in execution of a decree obtained by a subsequent mortgagee. The defence was the same as in the other case.

The two cases were referred to a Full Bench by L. S. Jackson, J. and McDonell, J., with the following expression of opinion on the part of L. S. Jackson, J., who, observing on a previous decision (*a*) of Kemp, J., says:—"It appears to us clear that the "plaintiff is entitled to institute a regular suit, which he has "done, to have the question tried whether the property pledged in "this bond is liable for the debt covered by the bond." In that case the plaintiff had already obtained a decree for the money due to him. L. S. Jackson, J., states upon this: "If the sentence were "taken by itself, it might seem to indicate merely the opinion that "the plaintiff, having already got a summary decree for the money "lent, would be entitled to have the question tried whether he could "follow the property pledged into the hands of a third party. If "that were all that was affirmed by that decision, I do not know

(*a*) Ootshub Narain Chowdhry *v.* Chittra Recka Goopta, 14 B. L. R., 411 note.

"that I should be inclined to question it, always supposing that "there is something remaining to execute in execution of the decree "obtained against the judgment-debtor; but it really appears to me "that the judgment of the learned Judge goes further," &c. L. S. Jackson, J., then goes on to say that the plaintiff is either estopped by the operation of the rule of *res adjudicata*, or that his second suit is barred by s. 7 of Act XIII of 1859, which corresponds with, but does not go so far as, s. 43 of this Act, and which prevents a plaintiff suing in respect of a part of his claim arising on the same cause of action. The last clause of s. 43 of the present Act is an important addition, but it was not in operation when the cases under discussion were decided.

The question referred "whether a creditor who has resorted "to the summary procedure provided by Act XX of 1866, s. 53, "and has recovered a portion of his claim in execution of the "decree so obtained is afterwards at liberty to bring a regular suit "for the enforcement of his remedies under the bond, merely "giving the defendant credit for such amounts as he has already "recovered," divides itself into two questions: first, whether the summary proceeding was a suit at all; and secondly, supposing it to be a suit or its equivalent, whether the plaintiff could still maintain a suit to enforce his mortgage lien for the unsatisfied balance of his debt.

It was decided that the summary proceeding was in the nature of a suit (on this point it is necessary to say no more here) and it was also held that the second suit was barred, on the principle of the *Duchess of Kingston's* case, which is expressed in s. 13 of the present Act, *ante*, pp. 65 to 91, which follows s. 2 of Act III of 1859.

After dealing with the first question referred (as to whether a proceeding under Act XX of 1856, s. 53, is of the nature of, and has the same effect as, a suit) Couch, C. J., and Kemp and Anislie, JJ., go on to say: "And on examination it seems to us that there is no sub-"stantial difference between the effect of an ordinary money-decree "upon a mortgage bond and a decree on the same bond for the "recovery of the money due by sale of the mortgaged property. So "that whether a decree for the money be made under s. 53, or in a "regular suit, the remedy of the mortgagee is the same. *Where a "creditor under a bond by which property is mortgaged takes a "money-decree, and proceeds to attach and sell the mortgaged pro-"perty, he thereby transfers to the purchaser the benefit of his own "lien and the right of redemption of his debtor; and if there be no*

"third party interested in the property, it becomes vested absolutely "in the purchaser. If the sale be under a decree for sale, it can "do no more than this. There is, we think, no warrant for holding "that, when a sale is under a decree for sale it conveys the rights of "both creditor and debtor; but that when it is in execution of a "simple money-decree only, the rights of the debtor pass and the "creditor retains his lien. The object of a sale of mortgaged "property in execution of a decree is not to transfer the debt from "the debtor to the purchaser of the mortgaged property, but to obtain "satisfaction out of the security. Thus, whether the decree do, or do "not direct the sale of the mortgaged property, the mortgagee, when "he puts that property up for sale, sells the entire interest that he "and the mortgagor could jointly sell. It cannot be rightly con-"tended that the mere taking of a money-decree extinguishes the "creditor's lien. There is a case (a) which seems to go that length, " . . . . . and the case of Ramchurn Lall v. *Koondun Koo-"maree (b) is directly the other way. If then the lien be not "extinguished by taking a money-decree, and if it continue an "incident to the debt when it passes from a contract debt into a "judgment debt (c) as the creditor cannot sell the property and retain "the lien, it must continue in existence so far as may be necessary "for the protection of the purchaser. An order for sale cannot "conclude persons not parties to the suit, and without such an "order, in the absence of any third party interested in the property, "a complete title passes by the sale in execution of the money-"decree.* Markby, J., agreed in this last proposition, but doubted whether the sale in execution by a first mortgagee might not nevertheless affect the rights of a second mortgagee as being a sale clear of subsequent encumbrances.

L. S. Jackson and Markby, JJ., delivered separate judgments. The former learned Judge, after dealing with the question as to whether a proceeding under s. 53 of Act XX of 1866, was equivalent to a suit or not, and holding that the summary decision operated as *res adjudicata*, observed—" and the difference between the plain-"tiff's position with such a decree, and what it would have been "at the conclusion of a regular suit, is this, that he would have "over and above the judgment for his money, a right created by

(a) Sawruth Sing *v.* Bheenuck Sahoo, 14 B. L. R., 422 note, Kemp and Glover, JJ.

(b) *Ibid*, 423 note.

(c) Syud Nadir Hossein *v.* Pearoo Thovildarinee, *ib.*, 425 note, see p. 432 note.

"the deed but undeclared by the decree, to enforce that judgment "by sale of the property mortgaged. It is not necessary here to "state precisely how the difference would affect the decree-holder; "it is enough to say that he would be in a distinctly less favour-"able position as regards third parties. If the land continued in "the hands of the debtor, it would probably make no difference "at all, for he could always attach the land in execution, and the "11th section of Act XXIII of 1861" (corresponding with s. 244 of this Act) "would prove abundantly efficacious for the decision "of any question that might arise between debtor and creditor. "As regards third parties, if the land had been intermediately "alienated, it seems to me that the creditor would have a good "cause of action against his borrower, and the purchasers from "that person, upon the separate contract to hold the land at his "disposal for the satisfaction of his claim." And with regard to the second case referred, the learned Judge held, that the plaintiff had a right to a declaration of his lien against the alienees. Markby, J., stated, that "the purchaser" (at a sale in execution under a money-decree) "takes all that the creditor, as well as the debtor, is able to convey."

In a subsequent case where there was a first and also a second mortgage, the first mortgagee sold the property in execution and purchased it himself, the second mortgagee also sold the same property in execution and purchased it himself, neither mortgagee being a party to the proceedings of the other. The first mortgagee then sued for possession, to have the purchase of the second mortgagee who had obtained possession set aside, and to establish his title.

It was held that the first mortgagee was entitled to possession, but that he took subject to the right of the second mortgagee to redeem the first mortgage, and so to make his own the first charge upon the property (*a*). It is to be observed that in this case both the charges are treated as still subsisting. The reason is that the first and second mortgagee having in each case purchased himself they still, as against the mortgagor, could only hold the land as security for the debt due to them; the right to redeem still remaining in the mortgagor (*b*). There may, however, be some

(*a*) Gopee Bundhoo Shantra Mohapattur *v.* Kalee Pudo Banerjee, 23 Suth. W. R., 338, Markby and Romes Chunder Mitter, JJ.

(*b*) S. M. Kamini Debi *v.* Ramlochan Sircar, 5 B. L. R., 451, Macpherson, J.; Ramlochan Sircar *v.* S. M. Kamini Debi, *ib.* 460, note, Norman, J.; see also Brajanath Kundu Chowdhry *v.* S. M. Gobindmani Dasi, 4 *ib.* 83, Phear, J.

difficulty in applying the decision of the Full Bench to a case where the first mortgagee had sold to a stranger. The majority of the Court seemed to think that the lien of the mortgagee who sells in execution "must continue to exist so far as may be necessary for the protection of a purchaser" but it may be that the first mortgagee is fully paid off, and he is generally paid off to some extent, so that it is not easy to protect the purchaser in this way. Some doubt is further thrown upon the above report of the decision of the Full Bench by one of the learned Judges who composed it (*a*). It will be seen further on (s. 294) that a decree-holder must not bid at the sale in execution of his decree, unless he obtain the express permission of the Court to do so, from what has been said in the cases noted above, it will appear that a mortgagee ought not to be allowed to bid at a sale of the mortgaged property in execution of a decree for the mortgage debt, or of a decree establishing his lien on the mortgaged property, nor except under very special circumstances at a sale in execution of his decree for an independent debt, except upon terms which will clearly make known what is to be sold. It is the practice in the High Court at Calcutta not to allow the mortgagee to bid unless the property is put up for sale at an upset price to be fixed by the registrar after valuation, and on the terms that the mortgagee shall pay the costs of any abortive sale.

The cases described above were, as has been stated, cases in which the mortgage was created by a bond in the form used in the mofussil in Bengal. The same principle has been held in a recent case to apply to mortgages of land in Calcutta made in the English form (*b*). Phear, J., in the course of his judgment in this case, said: "In this Court (the High Court, as "a Court of original jurisdiction), which is a Court of equity, as "well as of law, the relations between mortgagor and mortgagee "of immoveable property, though, no doubt, governed by the "mortgage contract, do not amount to two estates or two sorts of "property. This Court only recognizes in the mortgagee the right "to recover the money due on the mortgage, and the right to "obtain and hold the mortgaged property till foreclosure as security "for repayment. On the other hand, the mortgagor has the whole

(*a*) Muthoora Mohun Roy Chowdhry *v.* Pearee Mohun Shaha, 23 Suth. W. R., 344.

(*b*) Bhuggobutty Dossee *v.* Shamachurn Bose, I. L. R., 1 Cal., 337, Garth, C. J., and Pontifex, J., in appeal from the judgment of Phear, J., which was confirmed.

"beneficial interest in the lands subject to the mortgagee's right to "have effect given to his security;" and held that a sale under a *fi-fa* issued on a warrant to confess judgment, which was given by the mortgagor to the mortgagee before Act XXIV of 1865 abolished such warrants, passed the mortgagee's lien, even although the purchase-money realized by the mortgagee under the sale by the sheriff fell short of the money due upon the mortgage, and this decision was upheld by Garth, C. J., and Pontifex, J., adopting the Full Bench decision in *Syud Emam Momtazooddeen's* case, as a decision on principle, not upon the peculiar circumstances of the Bengalee mortgage.

Thus the law has been decided in Lower Bengal. The High Court at Allahabad, however, expressly dissented from this doctrine (*a*). Turner, J., referring to the case of *Syud Emam Momtaz-* "*ooddeen*, said:—it cannot be doubted that the mere taking of a "money-decree does not destroy the lien, and that it continues a col-"lateral security for the debt when it has merged in a judgment-debt, "but I fail to see on what ground it can be held, that the collater-"al security passes by the sale or continues in existence to protect "the purchaser. The mortgagee has not in the case supposed "elected to avail himself of the collateral security. The lien "subsists, nevertheless, until the debt is discharged, when the "object for which it was created fails, and it ceases."

In a case (*b*) decided in 1873 by the High Court at Madras, the plaintiff sued to recover the amount due on a mortgage bond (*A*) executed in his favor by the first defendant in 1869, by means of the mortgaged property. The first defendant admitted the execution of the bond sued on, and did not contest the plaintiff's claim. The second defendant pleaded that the property mortgaged under (*A*) had been mortgaged to him under various bonds executed by the first defendant's father between 1861 and 1870. The second defendant obtained a simple money-decree on his bonds, and attached the mortgaged lands; they were sold at auction and purchased by the second defendant himself for a sum considerably less than the amount of his claim against the first defendant under the several deeds of mortgage. It was held by the Civil Judge, that the second defendant when he purchased the lands took them subject to all existing charges, so that as proprietor of the lands, he could

(*a*) Akhe Ram *v.* Nand Kishore, I. L. R., 1 All., 236, F. B., and Khub Chand *v.* Kalian Das, *ib.* 240, F. B.

(*b*) Ramu Naikan *v.* Subbaraya Mudali, 7 Mad. H. C. Rep., 229.

not successfully prevent the lands from being held liable to the plaintiff's mortgage lien. But that, as prior mortgagee, he had the right to have these lands held liable for his debt first; that in fact, he still retained his mortgage lien. This decision was upheld by the High Court on appeal by Holloway, Acting C. J., and Kindersley, J. The point does not seem to have arisen in Bombay.

Where the money-decree has been set aside, the suit to establish the lien upon the property has been held to be unobjectionable (*a*). But the later decisions upon the question of estoppel by reason of s. 2 of Act VIII of 1859, and s. 13 of the present Act, would seem to operate in this case also.

A mortgage of an undivided share of a Hindu joint estate attaches to the share allotted to the mortgagee under a butwarra in lieu of such share, and not to the shares allotted to the other shareholders (*b*).

A decree cannot be executed against a person who, although originally named as a defendant in the suit, was not named in the decree as one of those against whom it was given (*c*).

Decree for mesne profits or other matter, amount of which to be subsequently ascertained.

255. (S.) If the decree be for mesne profits or any other matter the amount of which in money is to be subsequently determined, the property of the judgment-debtor may, before the amount due from him under the decree has been ascertained, be attached as in the case of an ordinary decree for money.

This is a new provision, it follows the interpretation put upon the Code of 1859, by Peacock, C. J., who after citing several instances in which it had been held that execution could not be had of a *part* of a decree, adds: "I do not mean to say that a "person may not apply for execution of part of a decree if he "admits that the remainder has been satisfied, nor do I mean to "say that where a decree is perfect for execution in certain respects, "and imperfect in other respects, that execution may not be taken "out for the portion which is imperfect;" as in the case of a decree for possession and mesne profits (*d*). A person who has obtained

(*a*) Utshab Narayan Chowdhry *v.* Chitra Raka Gupta, 8 B. L.R., Apx., 92.

(*b*) Byjnath Lall *v.* Ramoodeen Chowdhry, L. R, 1 I. A, 106.

(*c*) Bhoobun Moyee Debia Chowdhrain *v.* Brojonath Roy, 7 Suth. W. R., 62, Loch and Macpherson, JJ.

(*d*) Haro Sanker Sandyal *v.* Tarak Chandra Bhuttacharjee, 3 B. L. R., A. C., 141.

a decree for possession and mesne profits is not bound to apply simultaneously for execution of both, the amount of the mesne profits being as yet unascertained (*a*).

Power to direct immediate execution of decree for money not exceeding Rs. 1,000.

256. (S.) When a decree is passed for a sum of money only, and the amount decreed does not exceed the sum of one thousand rupees, the Court may, when passing the decree, on the oral application of the decree-holder, order immediate execution thereof by the issue of a warrant directed either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court, or against his moveable property within the same limits.

This section corresponds with the first part of s. 13, Act XXIII of 1861, and the Small Cause Court Act (XI of 1865), s. 19. The second part of s. 13 of Act XXIII of 1861 enabled the Court to direct the warrant against the general property of the judgment-debtor within its jurisdiction or against whatever personal property of his might be indicated by the judgment-creditor. Now general warrants are no larger to be issued, see s. 236 *ante*. Act XI of 1865, s. 20, enables a Court of Civil Judicature having "general jurisdiction" to execute a decree of a Small Cause Court against the immoveable property of the debtor within its jurisdiction, if the Small Cause Court certifies that it has exhausted his moveable property and that the decree still remains unsatisfied. Section 47 of the Small Cause Court Act applied the provision of the Code of Civil Procedure so far as they were applicable to all suits and proceedings under that Act, and it was held that a Small Cause Court could always send a decree which it could not execute itself to another Court for execution (*b*). Section 47 of the Small Cause Court Act is repealed by this Act, and the clauses of this Act enabling a Court to get its decree executed through another Court, ss. 223 to 229 *ante*, are not applicable to Courts of Small Causes. The words "general jurisdiction" refer to the ordinary Civil Courts (*c*). The clerk of the Small

(*a*) Following Barodakant Roy *v.* Ramkishore Dutt, 4 Wym., 66; S. C., 8 Suth. W. R., 99.

(*b*) Anon., 5 Wym. S C. C. Ref, 29, F. B; S. C, 9 Suth. W. R., 175; Taher Buksh Meeah *v* Halim Mundle, *ib.*, 32, F. B.

(*c*) Anon, Suth. S. C. Ref., 120.

Cause Court cannot sign the certificate to enable such a Court to execute against immoveable property (*a*), and the Court before sending such a certificate should be first satisfied that the judgment-debtor has no moveable property unsold within its jurisdiction (*b*).

Modes of paying money under decree.

257. (S.) All money payable under a decree shall be paid as follows (namely)—

(*a*) into the Court whose duty it is to execute the decree ; or

(*b*) out of Court to the decree-holder; or

(*c*) otherwise as the Court which made the decree directs.

This and the following section correspond with s. 206 of Act VIII of 1859, which, however, while forbidding the Court to recognize any adjustment of the decree unless made through the Court or certified to the Court, provided no summary means, as is now provided by the following section, of obliging the decree-holder, who had been paid out of Court, to certify the payment to the Court.

All adjustments of decrees, whatever be the nature of the subject of those decrees, must be made with the knowledge of the Court (*c*). A debtor under a money-decree can, at any time, bring the amount of his debt into Court to be paid to the judgment-creditor ; and by analogy any other person against whom a decree is made for the delivery of moveable or immoveable property, has an equal right to relieve himself from further vexation by making satisfaction with the knowledge of the Court in such mode as the circumstances of the case admit of (*d*). A payment by a judgment-debtor to an officer of the Court, arresting him under a warrant, is an adjustment through the Court within the meaning of this section (*e*).

The parties may agree that the decree shall be paid by instalments, and the Court may recognize and register the agreement and ought not to allow the judgment-creditor to execute his decree in

(*a*) Anon., Suth. S. C. C Ref., 136 ; Anon., 5 Wym. S. C. C. Ref, 29, F. B.

(*b*) Chinnasvami *v.* Anon., 1 Mad. H. C. Rep., 191, Scotland, C. J., and Holloway, J. ; Maya *v.* Gooroo Churn Dass, Suth. S. C. C. Ref., F. B., 55.

(*c*) Raj Lucklhee Chowdhrain *v.* Shib Dyal Tewaree Chowdhry, 18 Suth. W. R., 520, Markby and Ainslie, JJ.

(*d*) *Ibid.*

(*e*) Bidhoo Bibee *v.* Lalla Keshub Chunder Baboo, 5 Wym. Rep., 256, L. S. Jackson and Hobhouse, JJ. ; S. C., 9 Suth. W. R, 462.

contravention of his agreement (*a*). It may restrain him by injunction (*b*) But a letter from a decree-holder to his vakeel, who is not an officer of the Court, desiring him to certify to the Court, is not such an adjustment (*c*). The mere fact that the plaintiff admits that he told the defendant that he would not execute part of the decree without certifying any binding agreement to the Court, is not a bar to the issue of execution (*d*). Nor does the fact that the plaintiff sues on the fresh agreement or *kisteebundee* necessarily make it an adjustment through the Court (*e*).

Where a defendant was imprisoned in execution of a decree, and the plaintiff afterwards petitioned the Court to have him discharged, there being a compromise not certified, the High Court, on application of the debtor re-arrested, ordered the Judge to enquire what was the arrangement, and to give effect to it. Costs of the application to follow the result of the enquiry (*f*).

Payment of money out of Court to decree-holder.

258. (S.) If the money is paid out of Court, or the decree is otherwise adjusted to the satisfaction of the decree-holder, he shall certify the payment or adjustment to the Court whose duty it is to execute the decree; and no satisfaction of a decree in part or in whole by such payment or adjustment shall be recognized by such Court unless the payment or adjustment be certified as aforesaid. Where the decree-holder fails to certify as aforesaid, the judgment-debtor may apply to such Court for an order directing the decree-holder to certify as aforesaid, and the Court, after hearing the decree-holder, may make such order, and if the decree-holder disobeys the same, may refuse further to execute the decree.

This section also corresponds with s. 206 of Act VIII of 1859,

(*a*) Chundernath Misser *v.* Gouree Komul Bhuttacharjee, 10 B. L. R., Apx., 28, L. S. Jackson and Mitter, JJ.; and see the cases referred to in the note to s. 245, *ante*.

(*b*) Nubokishen Mookerjee *v.* Debnath Roy Chowdhry, 22 Suth. W. R., 194, Couch, C. J., and Ainslie, J.

(*c*) Thakoor Lall Missree *v.* Kanye Lall Tewaree, 7 Suth. W. R., 510, Loch and Macpherson, JJ.

(*d*) Bhuban Mohan Banerjee *v* Sadu Charan Sirkar, 6 B. L. R., 339, Norman, (offg.) C. J., and Phear, J.

(*e*) Muddun Mohun Mitter *v.* Bibee Peer Bukshun, 7 Suth. W. R., 485, Bayley and Macpherson, JJ.; Bhya Bhoopnath Sahee *v* Kunwan, *ib*, 134.

(*f*) Chango *v.* Kaluram, 4 Bom. H. C. Rep, Ap., 120, Couch, C. J., and Warden, J., citing 4 Suth. W. R., Mis., 11; 2 *ib*, 43; 7 *ib*., Civ Rep., 134.

the last provision is new. It gives a new summary remedy, concurrent with the remedy by suit, which the defrauded judgment-debtor was held to have under the old law, for it had been held that, although an adjustment out of Court not certified cannot prevent execution of the decree (*a*), and although where a plaintiff sought to execute a decree against a defendant, who objected on the ground that he himself had another decree against the plaintiff, under which he had attached and sold the plaintiff's decree and bought it himself, but no record of these proceedings appeared in the Court in which the plaintiff had his decree, the two decrees being decrees of different Courts, and it was held that the sale of the plaintiff's decree could not be recognized, as it had not been certified (*b*), yet where a decree-holder expressly promises to certify to the Court payments made out of Court, a suit will lie against him if he breaks his promise (*c*).

The compromise or payment not certified cannot be recognized by "such" Court, *i.e.*, the Court whose duty it is to execute the decree, but it may be given in evidence in another suit. Thus, in a case a plaintiff sued three defendants to recover a house alleging that it was his property; that in 1859 he lent it to the first defendant, who fraudulently transferred it to the second, who transferred it to the third. The second defendant only appeared, and stated that the first defendant was the real owner, and had transferred the house to him for a debt; that the plaintiff afterwards got possession of it by fraud, on which he sued the plaintiff and got a decree, which was reversed on appeal, that he was about to appeal specially when a compromise was effected. It was held, that this compromise having been effected after the decree in favor of B. had been reversed, could be given in evidence (*d*).

(*a*) Kalee Pershad Surmah Roy *v.* Khetternauth Shaw, 4 Suth. W. R., Mis., 11, Loch and Glover, JJ.; Bhya Bhoopnath Sahee *v.* Kunwan, 7 *ib.*, 134, Loch and Macpherson, JJ.; Bykunt Ghose *v.* Kishen Chunder Ghose, 2 Suth. W. R., Mis., 43, Loch and Seton-Karr, JJ.; Hureenarain Chatterjee *v.* Smith, 3 *ib.*, S. C. C. Ref., 10, Morgan and Sumbhoonath Pundit, JJ.

(*b*) Bharut Chunder Roy *v.* Nawab Nuzir Ali Khan, 10 Suth. W. R., 354, Phear and Hobhouse, JJ.

(*c*) Bhuggoban Tanti *v.* Gobind Chunder Rai, 5 Wym. S. C. C. Ref., 20; S. C., 9 Suth. W. R., 210, Peacock, C. J., and Bayley, J.; Soojun Mundul *v.* Woojeer Mundul, 6 Suth. W. R., Civ. Ref., 20, Peacock, C. J., and L. S. Jackson, J.; see also Motee Lall Mookerjee *v.* Kandhai Lall, 1 H. C. Rep., N. W. P., 155, Morgan, C. J. Pearson and Turner, JJ.

(*d*) Hari Sadashiv Dikshit *v.* Bapu Balvant, 5 Bom. H. C. Rep., A. C., 78, Warden and Gibbs, JJ.

It has also been held by a Full Bench at Calcutta that proof can be given by the plaintiff of payments not made through the Court, for the purpose of taking the case out of the operation of the law of limitation; the law only requires the plaintiff to certify. If he admits the payments, the Court ought to issue execution, for the defendant (judgment-debtor) would then be at liberty to come in and show, if he could, that the payments were not in fact made by him, with a view to stopping the further execution on the ground of limitation. The provision is in favor of the debtor, and there is no time within which the creditor is required to certify. But if he does not do so, and the debtor takes proceedings to make him certify, they must be taken within ten days of the date of the decree (Act XV of 1877, schedule ii, third division, No. 161). This case (*a*) overrules the case of *Kedarnath Mahata* v. *Heeralol Mundul* (*b*). But the parties cannot by agreement enlarge the time prescribed by the law of limitation (*c*).

A suit may be brought to enforce the agreement by which the parties have adjusted the decree (*d*); but the agreement not being made part of the decree cannot be executed as part of the decree (*e*), for the parties cannot alter the decree even by consent, and the agreement not being embodied in the decree is no part of it (*f*). This is hardly consistent with another case (*g*), where it was held that by taking proceedings in the case, and by their conduct, the parties may so treat the agreement as part of the decree, as to render it inequitable for the judgment-debtor to object that the agreement is not capable of execution, and that a second suit must be brought. The circumstances of this case were, however, peculiar, and the decision is qualified by the words at the end of the judgment.

Where a judgment-debtor paid his debt, but not through the Court, and the creditor in fraud of this payment took out execu-

(*a*) Fakir Chand Bose *v.* Madan Mohan Ghose, 4 B. L. R., F. B., 130.

(*b*) 4 Suth. W. R., Mis., 21; conflicting with Bhubaneswari Debi *v.* Dinanath Sandyal, 2 B. L. R., A. C., 320, Peacock, C. J., and Mitter, J., which was recognized and followed in the Full Bench case.

(*c*) Krishna Kamal Sing *v.* Hiru Sirdar, 4 B. L. R., F. B., 101.

(*d*) Nujeem Mullick *v.* Erfan Mollah, 22 Suth. W. R., 298, Markby and Mitter, JJ.

(*e*) Krishna Kamal Sing *v.* Hiru Sirdar, 4 B. L. R., F. B., 101.

(*f*) Madhub Chunder Dhundput *v.* Madhub Lall Khan, 14 B. L. R., 288 note, Kemp and Paul, JJ.

(*g*) Dinonath Sen *v.* Guruchurn Pal, 14 B. L. R., 287, Couch, C. J., and L S. Jackson, J.; and see the note to s. 245, *ante*.

tion, it was held that the debtor could not sue the creditor to recover the money so paid a second time (*a*). But where the debtor, in satisfaction of the decree, gave the creditor a gold necklace worth more than the amount of the decree, and the creditor afterwards sued out execution, it was held that the debtor could maintain a suit for the gold necklace (*b*), and this would be so if he had paid money instead of giving the gold necklace. He could not recover the money paid in satisfaction of the execution, but he could recover the money he had paid in the first instance on the ground that the judgment-creditor had committed a fraud upon him by executing the decree after it had been in fact satisfied out of Court. This was decided in the following case. The practice, as appeared from several early decisions of the High Court in Bengal, was unsettled, and there was some doubt as to the proper course to be taken by a debtor who had been defrauded in this manner by his creditor. In consequence of this doubt a case was referred to a Full Bench for decision. In this case a defendant paid the amount of his decree to the plaintiff, who omitted to certify the payment to the Court, and then went on and got execution of his decree. It was held by the Full Bench, that the plaintiff so doing must be considered as a trustee for the defendant of the money paid to him, but the payment of which he had omitted to certify, and a suit would lie for the recovery of that money. In the case in the Madras Court it was observed that the suit was for money paid a second time in execution, and not for the money voluntarily paid before execution; and so, it was said, the cases were distinguishable. In the same case it was contended that a suit was barred by Act XXIII of 1861, s. 11, corresponding with s. 244 of this Act, as it was "a question arising between the parties to the suit in which the decree was passed," and ought to be "determined by the Court passing the decree;" but it was held that, as the Court was precluded by s. 206 from noticing the payment which had not been certified, it could not hear and determine anything regarding it (*c*). These cases are distinguishable from the case of *Marriot* v. *Hampton* (*d*), which

(*a*) Arunachella Pillai *v.* Appavu Pillai, 3 Mad. H. C. Rep., 188, Bittleston, Holloway and Collett, JJ., dissentiente Scotland, C. J., and Innes, J.

(*b*) Gulawad Chandabhai *v.* Rahimtulla Jamalbhai, 4 Bom. H. C. Rep., A. C., 76, Couch, C. J., and Newton, J.

(*c*) Guna Mani Dasi *v.* Prankishori Dasi, 5 B. L. R., 223, see particularly the judgment of Mitter, J., in referring the case; S. C., 13 Suth. W. R., 69, F. B.

(*d*) 7 Term Rep., 269; S. C., 2 Smith's L. C., 6th edn., 375.

decides that where money has been paid under compulsion of legal process, and it is afterwards discovered that the money was not due, it cannot be recovered in an action for money had and received. In that case judgment had gone against the plaintiff, and the money had been recovered, the defendant had paid the debt before, but he had lost his receipt for the money and he afterwards found it; but here the suits were instituted to recover the money paid in the first instance, or damages in respect of a fraud which had been practised.

This provision, using the words of Mitter, J., in the case before the Full Bench at Calcutta, was "intended to facilitate the execu-"tion of decrees, and has nothing whatever to do with the power "of the Court to compel the defendant to disgorge a sum of money "which she has no right whatever, according to equity and good "conscience, to retain." The words of the section itself are sufficient to show that this must be the case, as has been already observed; they do not shut out the evidence of adjustment in any proceeding in any Court, but in *the* Court, that is to say, the Court executing the decree, and only in proceedings which are taken while the decree is being executed (*a*); but "a person who has been "injured by the suing out execution after satisfaction of a decree "may bring a separate suit and obtain such remedy as the Court "is able to give him under the circumstances of the case" (*b*).

It is sufficient if one only of several plaintiffs certify the satisfaction of the decree to the Court. Thus, on an application by some of the plaintiffs in a suit for execution of a decree against one of several defendants, the answer of the defendant was that she had paid what was due from her to the plaintiffs to one of their number, who had certified the fact to the Court. It was held that the applicants, not being the whole of the decree-holders, had no right to make the application without showing sufficient cause for such a course, *viz.*, either that they did not know of the alleged payment to their co-plaintiff, or that if made it had been made to defraud them, and that the defendant was privy to the fraud (*c*).

Decrees for specific moveables, or recovery of wives.

259. (S.) If the decree be for any specific moveable, or for any share in a specific moveable, or for the recovery of a wife, it may be enforced by the seizure, if practicable,

(*a*) Obhoy Churn Mookerjea *v.* Musst. Pearee Dassia, 22 Suth. W. R., 270.

(*b*) *Ibid*, Ainslie, J.

(*c*) Ranee Nyna Kooer *v.* Doolee Chund, 22 W. R, 77, Phear and Morris, JJ.

of the moveable or share and by the delivery thereof to the party to whom it has been adjuged, or to such person as he appoints to receive delivery on his behalf, or by the imprisonment of the judgment-debtor, or by attaching his property and keeping the same under attachment until the further order of the Court, or by both imprisonment and attachment, if necessary.

No attachment under this section shall remain in force for more than six months, at the end of which time, if the judgment-debtor has not obeyed the decree, the property attached may be sold, and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and pay the balance, if any, to the judgment-debtor on his application.

The portion of this section which relates to the recovery of wives does not extend to Mofussil Courts of Small Causes.

This section corresponds with s. 200 of Act VIII of 1859; but the proviso at the end is new, as is also the clause relating to the execution of a decree for the recovery of a wife, which follows the decision of the Court in the case of *Jhotun Bebee* v. *Ameer Chand* (*a*). The wife cannot be delivered over to her husband, but her property may be attached and sold, and she may be imprisoned; the decree should state that the plaintiff is entitled to his conjugal rights, and that his wife be ordered to return to his protection (*b*).

Decree for specific performance or restitution of conjugal rights.

260. When the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for the performance of any other particular act, has been made, has had an opportunity of obeying the decree or injunction and has wilfully failed to obey it, the decree may be enforced by his imprisonment, or by the attachment of his property, or by both.

No attachment under this section shall remain in force

(*a*) 1 In. Jur., N. S, 317, Seton-Kerr, L. S. Jackson, and Macpherson, JJ.

(*b*) *Ibid*, 2 Wym, 104; see also Shaikh Koohur Khansama *v* Shaikh Jan Khansamah, 5 Wym, 12; Moonshee Bazloor *v.* Shumsoonissa Begum 8 Suth. W. R., P. C., 3.

for more than one year, at the end of which time, if the judgment-debtor has not obeyed the decree, the property attached may be sold and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and may pay the balance, if any, to the judgment-debtor on his application.

This section is new. The Specific Relief Act, I of 1877, s. 12, defines the cases in which specific performance of contracts may be decreed. See the case of *Umed Kika* v. *Nagindas Narotamdas* (*a*), in which the question of specific performance of a contract of betrothal between Hindus was very fully discussed. It was decided that such a contract could not be specifically performed, and it is so now expressly enacted. See the same Act, s. 21. A decree ordered the defendant to remove an obstruction; he refused or delayed to do so; the Judge ordered the officer of the Court to do so. This order was improper; the Judge should have arrested the defendant or attached his property, or have done both if necessary (*b*).

Decree for execution of conveyances, or endorsement of negotiable instruments.

261. If the decree be for the execution of a conveyance, or for the endorsement of a negotiable instrument, and the judgment-debtor neglects or refuses to comply with the decree, the decree-holder may prepare the draft of a conveyance or endorsement in accordance with the terms of the decree, and deliver the same to the Court.

The Court shall thereupon cause the draft to be served on the judgment-debtor in manner hereinbefore provided for serving a summons, together with a notice in writing stating that his objections, if any, thereto shall be made within such time (mentioning it) as the Court fixes in this behalf.

The decree-holder may also tender a duplicate of the draft to the Court for the execution upon the proper stamp-paper, if a stamp is required by law.

(*a*) 7 Bom. H. C. Rep., O. C., 122.

(*b*) Bhoobun Mohun Mondul *v.* Nobin Chunder Bullub, 10 B. L. R., Apx., 12, Kemp and Glover, JJ.

On proof of such service, the Court, or such officer as it appoints in this behalf, shall execute the duplicate so tendered, or may, if necessary, alter the same, so as to bring it into accordance with the terms of the decree, and execute the duplicate so altered :

Provided that if any party object to the draft so served as aforesaid, his objections shall, within the time so fixed, be stated in writing and argued before the Court, and the Court shall thereupon pass such order as it thinks fit, and execute, or alter and execute, the duplicate in accordance therewith.

This section corresponds with para. 9, s. 202 of Act VIII of 1859. The provisions relating to the service of the draft conveyance or endorsement on the judgment-debtor, and the investigation of his objections, are new.

Form and effect of execution of conveyance by Court.

262. The execution of a conveyance or the endorsement of a negotiable instrument by the Court under the last preceding section may be in the following form: " *C. D.*, Judge of the Court of (*or as the case may be*), for *A. B.*, in a suit by *E. F.*, against *A B.*," or in such other form as the High Court may from time to time prescribe, and shall have the same effect as the execution of the conveyance or endorsement of the instrument by the party ordered to execute or endorse the same.

This section, so far as it defines the effect of the conveyance, corresponds with s. 202 of Act VIII of 1859 in part; but in addition it gives a form of execution of the conveyance.

Decree for immoveable property.

263. If the decree be for the delivery of any immoveable property, possession thereof shall be delivered over to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, and, if need be, by removing any person bound by the decree who refuses to vacate the property.

This section corresponds with ss. 199 and 223 of Act VIII

of 1859; but while the latter section pointed to property in the possession of the defendant, or of some person claiming under a title created by the defendant subsequently to the institution of the suit, and ordered delivery to be given and the removal of any person who may refuse to vacate, this section merely states that delivery is to be given and any person bound by the decree is to be removed Any party to the suit is of course bound by the decree; and any person with notice, such as a surety under s. 253, *ante*, if in possession of the property, would be equally bound. A purchaser *pendente lite* of property in litigation would also be bound at any rate, unless he could show that he had no notice of the suit. The reason of this is thus stated by Mr. Justice Story (*a*): "Every man is presumed to be attentive to what passes "in the Courts of Justice of the State or sovereignty where he "resides. And therefore a purchase made of property actually "in litigation *pendente lite* for a valuable consideration, and without "any express or implied notice in point of fact, affects the pur-"chaser in the same way as if he had such notice, and he will "accordingly be bound by the judgment or decree in the suit." This rule is narrowed in England by Statute 2 Vict., c. 11, s. 7, which provides that *lis pendens*, unless registered, does not bind the purchaser or mortgagee without express notice. There is no provision for registration in this country, and on that ground Wells, J., thought that the doctrine had a wider operation here (*b*). The opposite conclusion was arrived at in Bombay by Melville, J. (*c*). In Madras it has been held, that the doctrine of *lis pendens* applies without limitation (*d*). It has been adopted in the North-West Provinces; thus in one case A. mortgaged land to D., and stipulated in the deed that he would not alienate the property; he afterwards leased it for 10 years. D. obtained a decree for sale of the mortgaged property in satisfaction of the mortgage debt. The suit was

(*a*) Equity Jurisprudence, s. 405.

(*b*) Kasim Shaw *v.* Unnodapersaud Chatterjee, 1 Hyde, 160. See also Bhuggobutty Dossee *v* Shamachurn Bose, I. L. R., 1 Cal., 337, see p. 341, *per* Phear J.; Ram Kishen *v.* Doolee Chund, 22 Suth. W. R., 547, Phear and Morris, JJ.; Rabia Kharum *v.* Wise, 23 *ib.*, 329; Dhondhai Singh *v.* Suleemooddeen Hossein, 24 *ib.*, 359.

(*c*) See Krishnappa Valad Mahadappa *v.* Bahiru Yadavrav, 8 Bom. H. C. Rep., A. C., 55.

(*d*) Sam *v.* Appundi Ibrahim Saib, 6 Mad. H. C. Rep., 75, Holloway and Kindersley, JJ.; Tranquebar Sami Ayyan *v.* Nathambedu Ammai Ammal, *ib.*, 234, Holloway and Innes, JJ.; Manual Fruval *v.* Sanatgapalli Latchmidevamma, 7 *ib.*, 104, Kernan and Kindersley, JJ.

brought before the lease was made. It was held that D. was not bound by the lease (*a*). But a purchaser of property from a defendant in a suit, the property not being actually property in litigation, is not necessarily bound as against the judgment-creditor by the decree in the suit, unless where he purchases property that has been attached (*b*). When the property to be delivered over under this section consists of a family dwelling-house, and the purchaser is a stranger to the family, some difficulty is experienced in putting the decree-holder in possession of the fruits of his decree. He is entitled to possession (*c*); but in execution of such a decree the house may be partitioned, the division being made in such a way as to be as little as possible inconvenient to the other occupants (*d*).

Delivery of immoveable property when in occupancy of tenant.

264. If the decree be for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum, or in such other mode as is customary, at some convenient place, the substance of the decree in regard to the property:

Provided that if the occupant can be found, a notice in writing containing such substance shall be served upon him, and in such case no proclamation need be made.

This section corresponds with s. 224 of Act VIII of 1859; the proviso is new. Where a decree is partly for a share of land occupied by the defendants, and partly for a share in the occupancy of ryots, the latter part of the decree only can be enforced as provided in this section (*e*). When a person has already obtained symbolical possession, he may subsequently ask for actual

(*a*) Chunni *v.* Thakur Das, I. L. R., 1 All., 126, Pearson and Turner, JJ.

(*b*) Ram Burun Singh *v.* Jankee Sahoo, 22 Suth. W. R., 473, Phear and Morris, JJ.; see note to s. 276, *post*.

(*c*) Kowar Bijoe Kesal Roy Bahadur *v.* Samasundari, B. L. R., F. B., 172; S. C., 2 Suth. W. R., Mis., 30, Kemp, J., dissenting; Ramtanu Chatterjee *v.* Issurchunder Neogee, S. D. A., 1853, p. 768; and Kesubnath Ghose *v.* Hurgovind Bose, *ib*, 1857, p. 1585.

(*d*) Oodoy Chunder Mullick *v.* Pitumber Pyne, 2 Wym. Rep, 217, Loch and Macpherson, JJ.

(*e*) Ranee Shama Soonderee Debea *v.* Jardine, 7 Suth. W. R, 376, Loch and Macpherson, JJ.

possession, if the terms of the decree allow of it (*a*). A plaintiff having only partially succeeded in a suit against R., G., and others, for possession of land and mesne profits, appealed to the High Court and got a decree with costs. All the defendants except R. and G. applied for a review, and obtained a modification of the decision, leaving the decree standing against R. and G. It was held that the plaintiffs could apply for execution for a delivery of the shares of R. and G. in the manner above prescribed, but that the Court in executing the decree could not enquire as to the extent or amount of these shares in relation to the other defendants (*b*). The provisions of s. 331, corresponding with s. 229 of Act VIII of 1859, do not apply to the case of a person put into possession of land in the manner prescribed by this section (*c*).

Partition of estate or separation of share.

265. If the decree be for the partition or for the separate possession of a share of an undivided estate paying revenue to Government, the partition of the estate or the separation of the share shall be made by the Collector.

This corresponds with Act VIII of 1859, s. 225; but it is no longer necessary for the Collector to make the partition under the orders of the Court. The Civil Courts of the N. W. P. have no jurisdiction in cases of partition of estates paying Government revenue except on appeal: Act XIX of 1863, s. 11; see *ante*, note to s. 11 of this Act.

F.—Of Attachment of Property.

Property liable to attachment and sale in execution of decree.

266. (S.) The following property is liable to attachment and sale in execution of a decree, (namely) lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in the capital or joint-stock of any railway, banking

(*a*) Robson *v.* Maseyk, 3 Suth W. R., Mis., 2; Adoremonee Dossee *v.* Premchand Mussaut, 9 *ib.*, 454, Mitter and Hobhouse, JJ.

(*b*) Anoda Pershad Mookerjee *v.* Troyluck Nath Paul Chowdhry, 13 Suth. W. R., 123, L. S. Jackson and Glover, JJ.

(*c*) Gunesh Pershad *v.* Jykishun, 1 H. C. Rep., All., 134, Pearson and Turner, JJ.

or other public company or corporation, and, except as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, and whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:

Provided that the following particulars shall not be liable to such attachment or sale (namely)—

(*a*) the necessary wearing apparel of the judgment-debtor, his wife and children:

(*b*) tools of artizans, implements of husbandry and such cattle as may in the opinion of the Court be necessary to enable the judgment-debtor to earn his livelihood as an agriculturist:

(*c*) the materials of houses and other buildings belonging to and occupied by agriculturists:

(*d*) books of account:

(*e*) mere rights to sue for damages:

(*f*) any right of personal service:

(*g*) stipends allowed to military and civil pensioners of Government, and political pensions:

(*h*) one moiety of the salary of a public officer or of the servant of a railway company:

(*i*) the pay and allowances of persons to whom the Native Articles of War apply:

(*j*) the wages of labourers and domestic servants:

(*k*) an expectancy of succession by survivorship or other merely contingent or possible right or interest:

(*l*) a right to future maintenance.

Explanation.—The particulars mentioned in clauses (*g*), (*h*), (*i*), and (*j*) are exempt from attachment or sale whether before or after they are actually payable:

Provided also that nothing in this section shall be deemed:

(*a*) to exempt the materials of houses and other

buildings from attachment or sale in execution of decrees for rent, or

(*b*) to affect the Statute for the time being in force for punishing mutiny and desertion and for the better payment of the Army and their quarters.

The portion of this section which relates to immoveable property does not extend to Mofussil Courts of Small Causes.

Attachment of the person or property, either by actual seizure or by prohibitory order, is the only mode of execution contemplated by this Act, except where the delivery of the property has been specifically decreed (*a*). Attachment has been held not to be always a necessary preliminary to a sale (*b*). But this was held in other cases to be so (*c*). There may be an attachment in execution not necessarily followed by a sale (*d*); the execution may, in the case of landed property, for instance, be complete without a sale.

This section corresponds with s. 205 of Act VIII of 1859, but states in a more specific manner what property is liable to attachment in execution of decrees.

The property to be attached must be something in its nature saleable (*e*), and must belong to the judgment-debtor in his own right; thus, in a suit against A., as B.'s representative, A.'s own property cannot be attached (*f*), unless A. has received property of B. and has misapplied it, and it has either been found in the suit that he has done so, and that he is personally liable, in which case the decree would make him so; or where he has misapplied the property, and the execution is against him personally under s. 234, *ante*. So, if the decree is against A. personally, the goods of B. in his hands as B.'s representative cannot be attached in execution of this decree (*g*). So also, if the property is encumbered, it is,

(*a*) Denonauth Ruckit *v.* Mutty Lall Paul, 1 Hyde, 158; Isshur Chunder Mundle *v.* Shonta Monee Debia, 1 Suth. W. R., 161.

(*b*) Sharoda Moyee Burmonee *v.* Wooma Moyee Burmonee, 8 Suth. W. R., 9.

(*c*) Baboo Luchmeeput *v.* Lekraj Roy, 8 Suth. W. R., 418; S. C., 4 Wym., 237; and Denonauth Ruckit *v.* Muttylall Paul, *supra*.

(*d*) Saroda Prosaud Mullick *v.* Lutchmeeput Singh Doogur, 10 B. L. R., 228, P. C.

(*e*) *In re* Pestanji Cursetji Shroff, 3 Bom. H. C. Rep., 42, Westropp, J.

(*f*) Maharajah Dheraj Mahtab Chund Bahadoor *v.* Musst. Pearee Dossee, 6 Suth. W. R., Mis., 61.

(*g*) Farr *v.* Newman, 4 T. R., 621; Haris Chandra Gupto *v.* S. M. Sashi Mala Gupti, 6 B. L. R, 721, E. Jackson and Mookerjee, JJ.; Ram Shewuk Roy *v.* Sheo Gobind Sahoo, 8 Suth. W. R., 519, Bayley and Phear, JJ.

so far as there is a valid encumbrance upon it, not the property of the debtor to satisfy his debts, but the property of the encumbrancer, so that a person, who has a decree for money and attaches and sells in execution the property of the judgment-debtor, sells it subject to prior encumbrances (*a*); and if he questions the right of the encumbrancer, he must bring a separate suit (*b*).

A decree may be attached (*c*); and see s. 273, *post*, as to how it is to be dealt with. But a decree cannot be attached and sold in portions in execution (*d*); it would be unfair upon the judgment-debtor to permit this to be done, as it would saddle him with the costs of several proceedings in the execution of the one decree against him, and an application to execute a part of a decree cannot, on appeal against the order rejecting it, be amended and changed into an application for an execution of the whole decree (*e*). But it is very doubtful whether under this Code (see s. 588, *post*) there is any appeal against such an order.

With regard to the things excepted from attachment by this section (a), &c., little need be said. A judgment-debtor's salary is, subject to exception (h), when due to him, a debt which may be attached (*f*). With regard to exception (j), an attempt was made to attach the pay due to coolies on a tea garden in the hands of the garden sirdar, in execution of a decree against him, on the ground that he held it, as was the custom, in his own hands by way of security for certain advances that he had made to the coolies. But it was held that it could not be attached. This was not, however, because it was the coolies' pay, and therefore a particular thing exempted from attachment, but because it was their property

(*a*) Musst. Moona *v.* Chand Monee Gossain, 7 Suth. W. R., 206, L. S. Jackson and Markby, JJ.; Sheo Prosun Singh *v.* Brojoo Sahoo, *ib.*, 232, Bayley and Sumbhoonath Pundit, JJ.; Achumbit Thakoor *v.* Choonee Loll Chowdhry, 10 *ib.*, 27, Kemp and Glover, JJ.; Sooney Ram Marwaree *v.* Byjnath Koer, 10 *ib.*, 88, Loch and Glover, JJ.; Biswanath Mukhopadhya *v.* Gosaindoss Bara Madak, 3 B L. R., Apx., 140, Macpherson and Glover, JJ.

(*b*) Shaikh Mowla Buksh *v.* Bhyrab Dass, 5 B. L. R., 115.

(*c*) Ram Baksh Chatlangi *v.* Maharajah Banwari Gobind Bahadoor, 2 B. L. R., Ap., 65, Peacock, C. J., and Mitter, J.; S. C., 10 Suth. W. R., 357; Gholam Mahomed *v.* Indra Chand Jahuri, 7 B. L. R., 318, Norman, Bayley, and Mitter, JJ.

(*d*) Sankar Sandyal *a.* Tarak Chandra Bhuttacharjee, 3 B. L. R., 114, Peacock, C. J., and E. Jackson, J.

(*e*) Purna Chandra Mookerjee *v.* Saroda Charan Roy, 3 B. L. R., Apx., 21.

(*f*) *In re* Hollick, 2 B. L. R., A. C., 109; Hussen Bhamjee *v.* Hicks, 18 Suth. W. R., 124; Kalu Shaikh Khansamah *v.* Beatson, 24 *ib.*, 446.

and not the property of the judgment-debtor (*a*). Exception (k) requires the right or interest of the judgment-debtor to be absolute, not contingent, in order that it may be attached: thus, although liquidated demands in their nature definite and certain, and although *sub lite* and unproved, may be attached; a mere expectancy, or a mere right of suit, cannot be: the attachment must operate at the time and must not be anticipatory, so as to fasten on some future right of property in which the suit may result (*b*). In the same way, in a suit between partners, plaintiff and defendant, the partnership being dissolved, and the property placed in the hands of a receiver, whose duty it was to take the accounts, pay the partnership debts, and hand over the surplus, whatever it might be, to the partners, it was held, that the share of the defendant could not be attached by the plaintiff (*c*), although an undivided share in property may be attached (*d*). The undivided share of one joint owner of ancestral property subject to the Mitakshara law, whether in Bengal, Bombay or Madras may be attached and sold in satisfaction of a decree against him personally, but the purchaser at the sale only acquires a right to compel a partition, as against the other sharers (*e*). A judgment-debtor's right as *shebait* to perform the service of an idol cannot be attached, nor can his right to the surplus profits of the sheba, so long as they are unascertained and uncertain (*f*). The expression "an expectancy of succession by survivorship," used in this exception, must be taken together with the word "contingent," and refers to such an expectancy as the right of the reversioner who may possibly succeed to the estate of a deceased Hindu who has died leaving a widow and no male issue, as it is a contingent right which is not ascertained until the death of the widow, and cannot be attached (*g*).

(*a*) Sajiwan *v.* Gopal, 1 B. L. R., Short Notes, 15.

(*b*) Syud Tuffazal Hossein Khan *v.* Raghunath Prasad, 7 B. L. R., 186, P. C.; S. C, 14 Moo. I. A, 40.

(*c*) Abbott *v.* Abbott and Crump, 5 B L. R., 382, Markby, J.

(*d*) Cowar Rajcoomar Roy *v.* S. M. Kadambini Debi, 4 B. L. R, F. B., 175.

(*e*) Deendyal Lal *v.* Jugdeep Narain Singh, I. L. R., 3 Cal, 198, P. C.

(*f*) Juggernauth Roy Chowdhry *v.* Kishen Pershaud Surmah, 7 Suth. W. R., 266, Loch and Macpherson, JJ.; Dubo Misser *v.* Srinibas Misser, 5 B. L. R, 617, L. S. Jackson and Mitter, JJ.; Kalicharan Girgossain Bangshi *v.* Mohan Das Baboo, 6 *ib.*, 727, E. Jackson and Mookerjee, JJ.

(*g*) Bhoobun Mohun Bannerjee *v.* Thacoordoss Biswas, 2 Ind. Jur., N. S., 277, Norman, J., following Koraj Koonwar *v.* Komul Koonwar, 6 Suth. W. R, 34, Macpherson and Campbell, JJ.; and confirmed by a decision of a Full Bench in Ram Chandra Tantra Das *v.* Dharmo Narayan Chuckerbutty, 7 B. L. R., 346.

Where a mortgage had been made by a judgment-debtor when a minor, the execution-purchaser of his rights was held to have no right to sue to avoid the mortgage. The judgment-debtor, although he had since attained majority had taken no steps either to ratify or to set aside his act done when under age (*a*), the right to sue, which the purchaser claimed under his purchase in the case, is not such a right as can be attached and sold in execution of a decree (*b*).

A certificate to collect the debts due to a deceased person cannot be attached and sold in execution of a decree (*c*).

Although a right to future maintenance cannot be attached, arrears of maintenance may be (*d*). In the case of *Maniswar Das* v. *Baboo Bir Pertab Sahu* (*e*), L. S. Jackson and Ainslie, JJ, recognizing the case of *Kasheshuree Debia* v. *Greesh Chunder Lahoree,* which is the foundation of the prohibition in this Code, issued an order prohibiting the Maharaja of Hutwa from paying maintenance to the defendant, such maintenance being due under a decree. The report of the case does not furnish the particulars of this maintenance or state its nature, and it was held that, under the circumstances of the case, it could be attached. That case, however, is of doubtful authority under the new Code, the words appear to comprehend all rights of future maintenance of whatever nature.

In the case of *Brajanath Kundu Chowdhry* v. *S. M. Gobindmani Dasi* (*f*), Phear, J., expressed an opinion that the attachment sections of Act VIII of 1859 did not apply to such property as an equity of redemption, and stated that Norman, J., had formally expressed the same opinion (*g*), but he himself abstained from deciding the point. In the case of *Abbott* v. *Abbott and Crump* (*h*), however, Markby, J, stated that he should fully concur in that

(*a*) Hari Ram *v.* Jitan Ram, 3 B. L. R, 426.

(*b*) *Ibid*, following Chandra Kant Buttacharji *v.* Jadupati Chatterjei, 1 B L. R., A. C., 177, Phear and Hobhouse, JJ., a decision under Act X of 1859, following a decision of Norman, J, in the case of Chunder Kant Bhuttacharji *v.* Bindabun Chunder Mookerjee, 7 Suth W. R, 277.

(*c*) Syud Medhee Ally Khan *v.* Luchmeeput Baboo, 1 Suth. W. R, Mis., 28, Loch and Seton-Karr, JJ.

(*d*) Kasheshuree Debia *v* Greesh Chunder Lahoree, 6 Suth. W. R, Mis., 64, following Bipro Protap Sahee *v.* Deonarain Roy, 3 *ib.*, Mis., 16.

(*e*) 6 B. L. R., 646.

(*f*) 4 B. L. R., O C., 83.

(*g*) In Ramlochun Sirkar *v.* S. M. Kamini Debi, 5 B. L. R., 460, and in appeal before Peacock, C. J., and Markby, J, 10 *ib.*, 60 note.

(*h*) 5 B. L. R., 385.

doubt, and only surrendered it to the words of s. 271 of Act VIII of 1859, "provided that when property is sold subject to a mortgage, the mortgagee shall not be entitled to share in any surplus "arising from such sale," words which, with slight variation, are repeated in s. 295 of the present enactment (*a*). In an earlier case of a mortgage of a ship, it was held by Peacock, C. J. and Phear, J, that the mortgagor's interest could be attached (*b*). In a subsequent case decided by Macpherson, J, it was held that if a mortgagee attached and sold the equity of redemption and bought it himself, he became a trustee for the mortgagor (*c*); and it has lately been held that a mortgagee "is not entitled, by means of a money-"decree obtained on a collateral security, such as a bond or "covenant, to obtain a sale of the equity of redemption separately, "because by so doing he could deprive the mortgagor of the pri-"vilege, which, upon the principle of considering the estate as a "pledge, a Court of Equity always accords to a mortgagor,—namely, "a fair allowance of time to enable him to discharge the debt "and recover the estate" (*d*).

Where property attached is already encumbered, the attachment is made subject to subsisting encumbrances (*e*), and the owner is not always precluded by law from selling it before attachment, even though he knows that a judgment-creditor is seeking to get process of execution against it (*f*).

The precise effect of an attachment of property in execution has been a point very fully discussed, and upon which various opinions have been expressed by the Courts dealing with the corresponding sections of Act VIII of 1859. With regard to an attachment before decree it has been uniformly considered that it is merely a security, and although the language of the new Code (see s. 483 and the following sections) has been slightly modified, that view will, probably, be still maintained. But with regard to an attachment after decree, or, what is the same thing, (see s. 490),

(*a*) See also Neerunjun Mookerjee *v.* Oopendro Narain Deb, 10 B. L. R., 57.

(*b*) Auhin *v.* Ahmed Mahomed, 1 In. Jur., N. S., 241.

(*c*) Kamini Debi *v.* Ramlochun Sirkar, 5 B. L. R., 450, Macpherson, J.; and Neerunjun Mookerjee *v.* Oopendro Narain Deb, 10 *ib.*, 57, Markby, J.

(*d*) Bhuggobutty Dossee *v.* Shamachurn Bose, I. L. R., 1 Cal., 353, *per* Garth, C. J., and Pontifex, J. See note to s. 254.

(*e*) Chunder Koomar Lahoree *v.* Gopee Kristo Gossamee, 20 Suth. W. R., 204.

(*f*) Ram Burun Singh *v.* Jankee Sahoo, 22 Suth. W. R., 473, Phear and Morris, JJ. But see p. 394, and note to s. 262.

an attachment before decree followed by a decree, although none of the cases have gone so far as to establish that it effects a change in the property in the goods, it has been held in the later decisions that it constitutes a charge upon them. Earlier cases were, however, opposed to this view, and as the subject is one of considerable moment, and one upon which the courts in the various presidencies are not unanimous, and as the question assumes a somewhat different aspect now that the priority enjoyed by the first attaching creditor under s. 271 of Act VIII of 1859, has been done away with, and all judgment-creditors who apply for execution before the realization by sale of the property attached, are entitled (s. 295, *post*) to a rateable distribution of the property, it may be advisable to refer to those cases at some length.

In a case (*a*) decided in the first instance by Macpherson, J., June 25th and 27th, 1866, a rule was obtained calling on the plaintiff to show cause why a writ of attachment before judgment followed by decree should not be set aside, and why the property attached should not be made over to the Official Assignee. The vesting order and the decree in the suit were made on the same day, the 11th of May; but the decree was made before the vesting order; and it was held that the property remained in the debtor, the decree made no difference, and the rule was made absolute.

His Lordship in this case reconsidered his decision in a previous case (*b*), which had been decided on April 26th, 1865, in favor of the judgment-creditor, a case, however, which had been heard *ex parte*. It was a motion for an order for the sale of certain property of an insolvent for the benefit of the execution-creditor, whose suit was filed on the 14th of December, 1864, and who attached the property prior to decree. After he obtained a decree in his suit, the plaintiff himself commenced proceedings in insolvency, on which the defendant was declared an insolvent, and the Official Assignee took possession of the property under the vesting order. It was held that the creditor, by making his debtor insolvent, had not waived his claim to the proceeds of the execution. The subsequent decision of Macpherson, J. (*c*) was afterwards confirmed in appeal by Peacock, C. J., and Norman, J., and it was said that the decree did not vest in the creditor the property in the hands of the sheriff, that

(*a*) Rampersaud Roy *v.* Callachund Doss, 1 In. Jur., N. S., 325.

(*b*) *In re* Ramcomoye Mitter, 1 Bourke, 149.

(*c*) Rampersaud Roy *v.* Callachund Doss, 1 In. Jur., N. S., 373.

a mere attachment without sale will not affect the immediate rights of the assignee. The Chief Justice said :—" Even if there had been " an order for sale, I am not sure that the property would pass " without an actual sale and handing over of the proceeds. Sec- " tion 240 [of Act VIII of 1859, see s. 276, *post*] prevents any " private alienation of property under attachment, and that would " seem to imply that a public alienation, or one by operation of law, " would be valid, notwithstanding the seizure; but whatever be the " construction of s. 240, the obtaining the decree is not sufficient to " prevent the property attached prior to decree from vesting in the " Official Assignee."

Where (*a*) a decree was passed in favor of the plaintiff on the 23rd of August, 1865, and on the 5th of May, 1866, money due to the defendant was attached in the hands of the Administrator-General of Bengal as administrator to the estate of Brown, deceased, to which the defendant Bampton was entitled. The attachment was made by a prohibitory order under s. 232 and the following sections of Act VIII of 1859. On the 23rd of May, before any further steps were taken to carry into execution the decree, the defendant filed his petition in the Insolvent Court, and the usual vesting order was made; and the question was whether the vesting order passed the assets into the hands of the Official Assignee encumbered or not " with any liability to be sold in execution of the decree for which " they were attached, in priority to the rights of the Official As- " signee, as representing the general body of creditors." Mr. Justice Phear referred to ss. 201, 212, 213, 215, and 232 of Act VIII of 1859, relating to attachment in execution of a decree, and said that he was of opinion that no lien or charge upon the property was created by the decree, which was a decree for money, and did not affect the property in any way; that the order for execution " became the inception, so to speak, of a writ of *fi-fa*. " It is certainly not equivalent to a complete writ, for it exhibits " this difference, that the carrying it out is not left to the personal " action of the sheriff, but is effected by the Court itself, in the " successive steps of attachment and sale. When an order for " execution by way of attachment has been given, it is followed " by attachment in one of the modes directed by the Act, accord- " ing to the nature or quality of the property, which is the subject

(*a*) Roy Churn Roy *v.* Bampton, 2 In. Jur., N. S., 188, before Phear, J., Feb. 21st and 25th, 1867.

"of it, and it seems to me that, attachments in these different ways "respectively do not, as regards their operation on the property "attached, differ in the slightest degree from attachments of the "like kind made before judgment pursuant to the 81st and following "sections of the Act." After referring to two cases (*a*) noted below, and to the effect of a writ of *fi-fa*, his Lordship said: that "the "goods which form the subject of the attachment are not bound, "as against a *bonâ fide* alienee, whatever may be the case against "the judgment-debtor or his personal representatives, until the "order for sale is placed in the hands of the sheriff. I see nothing "in Act VIII to indicate that the Indian Legislature intended a "binding effect to be produced at any earlier period." . . . . . "The "property in the goods in question passed to the Official Assignee, "before any order for sale was even made, and I am of opinion, "that the previous order for execution and the attachment do not "entitle the creditor to follow them." Referring to the supposed hardship of the case, his Lordship said:—"I do not know what "hardship there is in any case in the judgment-creditor being "placed on the same footing as all other creditors."

It was held in another case (*b*) by Norman, J., that the property passed to the Official Assignee where the vesting order was made on the 26th of July, and the seizure had been made on the 23rd of the same month, in execution of a decree, dated the 22nd of July, of the Court of Small Causes at Calcutta. In another case (*c*) decided by Loch and Glover, JJ., the attachment was made in execution of a decree in January, 1868, and the property was sold under attachment on the 19th of March. The order vesting the property of the judgment-creditor in the Official Assignee was made on the 6th of March. The Official Assignee, after the sale, petitioned the Court for the removal of the attachment, and asked that the money might be paid to him, which was done; and it was held, in conformity with the decision in the case of *Rampersad* v. *Callachand Das*, and against that in *Gamble* v. *Bholagir* (*d*), that the Court below was right in paying the money to the Official Assignee. In

(*a*) Petumber Mundle *v.* Cochrane, 1 In. Jur., N. S., 11; and Rampershad Roy *v.* Cally Churn Doss, *ib.*, 373; *In re* Gocooldas Soonderjee and Pitumber Mundle *v.* Gocooldass Soonderjee, *ib.*, 327, Norman, J.

(*b*) Cochrane *v.* Gladstone, Wyllie, and Co., 1 In. Jur., N. S., 337.

(*c*) Indra Chandra Dogar *v.* Tara Chand Dogar, 2 B. L. R., A. C, 61.

(*d*) 2 Bom. H. C. Rep., 147. The contrary was, however, rather assumed than decided in this case.

another case (*a*), however, in execution of a decree of a Small Cause Court in the Presidency Town, certain goods of the judgment-debtor, together with a sum of Rs. 227 in cash, were seized on the 22nd of November; and on the 30th, the Rs. 227, together with the proceeds of the goods, were placed to the credit of the decree-holder in the books of the Court. On the 25th November the judgment-debtor was declared an insolvent, and by a vesting order of the same date his estate was transferred to the Official Assignee. It was held that the execution was complete by the seizure of the money, and that the Official Assignee was not entitled to the sum of Rs. 227 as against the execution-creditor. The cases of *Roy Churn Roy* v. *Bampton* (*b*), *Rampersaud Roy* v. *Callachund Doss* (*c*), and *Giles* v. *Grover* (*d*), were relied on for the Official Assignee, and the Court below had acted upon the case of *Cochrane* v. *Gladstone, Wyllie, and Co.* (*e*). These cases were distinguished from the case under discussion (*f*), and it was held that, as regards money, the execution of the decree was complete by the seizure; and the Official Assignee had no right to it. The case turned on the provisions of ss. 69, 70 of the Small Cause Court Act, IX of 1850, the former of which enables the bailiff to seize money, and the latter, *forthwith* to deliver it to the judgment-creditor.

It was afterwards held in the High Court at Calcutta, after argument, that when the attachment was placed upon land after decree, the execution-creditor had priority over the general body of creditors represented by the Official Assignee, when the vesting order was of subsequent date to the attachment after decree (*g*). This case was heard by a Full Bench of Judges, consisting of Couch, C. J., Bayley, Kemp, L. S. Jackson, and Phear, JJ., on a reference sent up by L. S. Jackson and Glover, JJ., in consequence of the conflicting opinions of the Courts in Calcutta and Bombay in the cases noted below (*h*). In *Gamble* v. *Bholagir*,

(*a*) Grish Chandra Roy *v.* Prasanna Kumar China, 4 B. L. R., O. C., 94, Norman and Markby, JJ., March 9, 1870.

(*b*) 2 In. Jur., N. S., 118.

(*c*) 1 *Ibid*, 373.

(*d*) 1 Cl. and F., 72.

(*e*) 1 In. Jur., N. S., 337.

(*f*) 4 B. L. R., 96, 67.

(*g*) Anand Chandra Pal *v.* Panchilal Sarma, 5 B. L. R., F. B., 691.

(*h*) Indra Chandra Dogar *v* Tara Chand Dogar, 2 B. L. R., A. C., 61; and Rampersaud *v.* Callachund Doss, 1 In. Jur., N. S., 325, and on appeal *ib*, 373, decided in Calcutta; and Gamble *v.* Bholagir, 2 Bom. H. C. Rep., 147, decided in Bombay.

however, the question of priority between the Official Assignee and the attaching execution-creditor was not argued or decided, it was assumed that the latter had priority (*a*). The question in the case referred to the Full Bench in Calcutta, was between the purchaser at a sale in execution of a decree, and the purchaser at a sale by the Official Assignee, as assignee of the estate of the judgment-debtor, who had been adjudicated an insolvent; the order vesting the property in the Official Assignee bore date the 6th of March, the sale by the Official Assignee was made on the 24th of July. The plaintiff in the suit in execution of the decree in which the property was sold had obtained his decree in the previous September, and attached the property in January in execution of the decree, but did not bring it to sale until the 17th of April, after the vesting order had been made. The Chief Justice, who delivered the judgment of the majority of the Court, cited the decisions of Lord St. Leonards (*b*) and of Lord Westbury (*c*)—authorities for the proposition that the assignee stood in the place of the insolvent, and took only such interest as he could give, and subject to all the equities by which the insolvent was bound. He referred to a case (*d*) where it was held that a seizure by the sheriff under a *fi-fa*, which had been delivered to the sheriff before the vesting order in insolvency was made, was a proper seizure, and that the vesting order only vested the property in the assignee subject to the right of the execution-creditor. It was there held that the delivering of the writ to the sheriff, or his deputy, does not change the property in the goods; but it does bind them so that, into whosever hands they come afterwards, they are liable to be seized under the writ, but an exception was made in the case of a sale in market overt (*e*). But the Chief Justice stated that the question in *Anandchandra Pal* v. *Panchilal Sarma* depended on the construction of the clauses of the Code of Civil Procedure, and ought not to be decided upon any supposed analogy to the decisions on the English Procedure; and referring to ss. 215 (for which s. 15, Act XXIII of 1861, was substituted) and 216, 232, 240, and 242 (corresponding with ss. 245, 248, 254, 276, and 277 of this Code respectively) held,

(*a*) *Per* Couch, C. J., 5 B. L. R., 693.

(*b*) *In re* Atkinson, 2 De G. M., and G., 140.

(*c*) Fleeming *v.* Howden, L. R., 1 Scotch App., 382.

(*d*) Woodland *v.* Fuller, 11 A. and E., 859.

(*e*) *Ibid*, 876, *per* Patteson, J.

that the purchaser under the sale in execution had a good title as against the purchaser from the Official Assignee. Phear, J., came to the same conclusion, but adhered to his former decisions in the cases of *Petumber Mundle* v. *Cochrane and Roy Chunder Roy* v. *Bampton*, that the attachment, either before or after execution, did not of itself alone create any lien in the property attached in favour of the attaching creditor. His Lordship held that the words "private alienation" in s. 240 of Act VIII of 1859, corresponding to s. 276 of the present Code, did not include an alienation by an order vesting the property in the Official Assignee, even although the insolvency were brought about by the voluntary act of the debtor; nor did it include a sale by the Collector for arrears of revenue, although such a sale is often brought about by the person who holds the property. But that the present case was outside the scope of these decisions; the question was whether the Civil Court had power to make the sale notwithstanding the vesting order. The proceedings in execution of a decree for money by attachment of particular property under the Code of Civil Procedure might, he thought, be regarded as proceedings in a suit in which the judgment would be a judgment *in rem*, in which suit the Official Assignee might come in and be heard, and that the Judge had jurisdiction to continue the execution if, after hearing all parties, he thought right to do so. In the present case the Official Assignee appeared to have been before the Court, and the sale was in his Lordship's opinion proper, so that the plaintiff had a good title as against the purchaser from the Official Assignee.

In a case (*a*) tried by Mr. Justice Phear in 1870, the question again arose with reference to the 49th section of the Insolvent Act. His Lordship said: "I do not think that it was intended by that "section to give the Court power, merely on the occurrence of "insolvency, to set aside a sale which has rightly and duly taken "place upon process of execution. Obviously the rights of the "purchaser come in at that stage, and there is no provision or "suggestion made in s. 49 for bringing the purchaser before "the Court. No doubt, the Court always has power to set aside a "sale which has taken place in execution, if it is satisfied that there "has been any thing like fraud, or any other irregularity in regard "to the sale, such as would vitiate it in the view of a Court of "Equity. But the mere filing of a petition of insolvency by the

(*a*) Aga Mahomed Ali Shiraji *v.* Judah, 7 B. L. R., 50.

"judgment-debtor of course amounts to nothing of this kind. If "this construction be a true one, then it follows that the sale in "execution having taken place, and the money having been paid "into Court, the Official Assignee is in the same position with "regard to the money as any other person who is interested in the "decree. He can only get at the money by the regular course of "proceedings under the execution sections of Act VIII of 1859, and "that seems to have been the view taken in the case of *Winter* v. "*Gartner*. The money has rightly come into Court as the result "of execution-proceedings. There is no ground upon which I can "undo these. The money is therefore in Court, and to be distributed "according to the provisions of Act VIII of 1859. Under these "provisions the debtor himself, had there been no insolvency, "would have been entitled only to the surplus after payment of the "attaching creditors. And clearly, unless s. 49 gives me power "to alter the rights of the parties to this fund, I cannot pay out "to the Official Assignee more than I could have paid to the judg-"ment-debtor himself in the case supposed. But I think the power "to suspend or set aside an execution which is given by s. 49, does "not extend so far as this. I think the true view is, as I have "stated in the Full Bench case of *Anand Chandra Pal* v. *Panchilal* "*Sarma* (a) that proceedings in execution are proceedings by which "the judgment-creditor seeks to establish a right to have his "money paid out of the property of the judgment-debtor. When "he has obtained the order for sale, he has substantially established "a charge on that property to the extent of the judgment-debt; "and although the Court might, no doubt, in some circumstances, "see sufficient reason to recall an order for sale, I think that it "would always be a strong step for the Court to take at that stage "of the proceedings. Generally the rights of all parties may be "said to be finally determined by the order for sale, except so far "as there may be priority of claims to be settled, to be paid out of "the proceeds according to the enactments of the Civil Procedure "Code. So that had the Official Assignee in this case any right to "step in after the order for sale, but before the sale had actually "taken place, and had he done so, the burthen on him necessary to "be discharged before he got a stay of the proceedings under s. 49 "of the Insolvent Act, is, I think, heavier and different in character "from what it would have been if he had come in before the order

(a) 5 B. L. R, 691, F. B.

"for sale. In the case before the Full Bench the judgments which "were delivered were given in contemplation of the interference of "the Official Assignee before the order for sale. None of the Judges "appear to have contemplated his coming in after the order for "sale had been made. In this case not only had the order for sale "been made, but the sale had actually taken place, before he made "his application."

It has been held in the North-Western Provinces (*a*), that the Official Assignee is entitled to priority over the creditor who attaches in execution, notwithstanding an order for sale has been passed and delivered to the Nazir, and executed by him by the sale of the right, title, and interest of the judgment-debtor, who has no rights in property vested in the Official Assignee, unless the sale is before the vesting order, when the property under attachment passes to the purchaser, and the proceeds of sale are primarily charged with the satisfaction of the decree or decrees in execution of which the sale has been made. The learned Judges referred to the 49th section of the Insolvent Act, 11 and 12 Vict., c. 21, which gives power to the Insolvent Courts to stay the proceedings in any action or suit pending after the filing of an insolvent schedule and before certificate in respect of any debt admitted in the schedule, and to set aside or suspend any execution or process sued out, for, or in respect of any such debt. "From this provision it would seem that the "framers of the Insolvent Act regarded the title of the Official "Assignee as higher than that of a judgment-creditor who had "obtained a warrant in execution." Their Lordships added: "We cannot assent to the view which the Judge takes of the "equity of allowing certain creditors to obtain payment in full "rather than to share proportionately in the loss which the "insolvency has brought upon all the creditors. On the contrary, "we conceive that if a person finds himself hopelessly insol-"vent, it is honest in him to secure the fair division of his "assets among his creditors rather than allow some few, and too "often his own connexions, to come in and secure to themselves "the whole of the assets, to the exclusion, it may be, of the most "forbearing and the most honest of the creditors." This view of the equity of the case derives additional force from the fact that the law which gave to the first attaching creditor in execution the

(*a*) Sarkies *v.* Musst. Bundho Baee, 1 H. C. Rep., N. W. P., 81.

right to be paid in full, to the exclusion of the rest of the creditors, has now been done away with, and that the proceeds of sale are to be divided under s. 295 of this Code rateably among all such as have applied for execution.

Where the petition in insolvency is dismissed, all rights that the Official Assignee may have had under it as against the attaching creditor fall to the ground, and are not revived by a fresh adjudication and vesting order, which must stand on their own merits (*a*).

There has thus been considerable difference of opinion in the Courts in India upon the question of the effect of an attachment; the result, however, being that the view of the construction of Act VIII of 1859 preponderates, which gives to the attachment after judgment the effect of a charge or lien upon the property in favour of the attaching creditor. The point has not been directly decided on appeal to the Judicial Committee in a contest between the execution-creditor and an official or other assignee, as to priority. With regard to an attachment of land it was stated, that "a creditor obtaining an attachment under Act VIII had an "inchoate interest in the land; his debtor could not alienate it, and "no judgment-creditor, who obtained subsequent execution, would "have any rights against him" (*b*). Again, referring to Act VIII of 1859, ss. 232—235, and ss. 248—272, it was said: "It is obvious "from these sections that, in the case of lands, the process of "attachment and the order for sale may be distinct and separate, "and that there may be a complete execution of a decree under an "attachment without an order for sale" (*c*). This would be so if the decree ordered the delivery of particular property to the judgment creditor, when there would be no necessity for a sale. In this particular instance the property attached was land, and the amount of the decree might be realized by the mortgage or lease of the land under the provisions at the end of s. 243, corresponding to s. 305 of the present Act.

The decisions in the various High Courts were, however, arrived at during the existence of a state of things which now no longer exists, and to a law which enabled the first attaching creditor

(*a*) Winter *v.* Gartner, 1 B. L. R., O. C. J., 79.

(*b*) Bunwari Lall Sahu *v.* Mohabir Persad Singh, 12 B. L. R., P. C., 302.

(*c*) Saroda Prosaud Mullick *v.* Lutchmeeput Sing Doogur, 10 B. L. R., P. C., 228.

in execution of his decree to sweep off everything, and which left every other creditor unsatisfied, or if there should be a surplus, the first having been paid in full, all the rest of the attaching creditors shared rateably. The effect of this law was to drive creditors to the Courts, and in order that they might not be wholly deprived of the fruits of their litigation, every means was resorted to to obtain the first attachment. The attempt to obtain this advantage resulted in a general scramble and in a great waste of property. There was nothing in the nature of an Insolvency Law, save in the Presidency towns, and latterly in the Punjab and British Burma. And, as it has been seen, the later decisions of the Courts have been in favour of the particular creditor, adverse to the general body of creditors, favouring proceedings of the above nature. The present Code acknowledges different principles, for while s. 295 admits an equality between execution-creditors, chap. xx provides a procedure for the distribution of the property of an insolvent debtor rateably among his creditors, including creditors who have taken proceedings in execution.

Where the wrong property is attached, the attachment does not of course affect the property intended to be attached: thus, where an attachment was issued against two houses, No. 1 and No. 3, and the sheriff, finding that there was no house No. 3, attached No. 1 and No. 2, on his own responsibility as to No. 2, and the plaintiff then applied to have the order amended by inserting No. 2 for No. 3, it was held that his proper course would be to apply for a fresh order as to No. 2, and not to apply to amend the old order (*a*).

Power to summon and examine persons as to property liable to be seized.

267. (S.) The Court may, of its own motion or on the application of the decree-holder, summon any person whom it thinks necessary, and examine him in respect to any property liable to be seized in satisfaction of the decree, and may require the person summoned to produce any document in his possession or power relating to such property, and before issuing the summons of its own motion, shall declare the person on whose behalf the summons is so issued.

This section corresponds with s. 219 of Act VIII of 1859, but

(*a*) Chartered Bank *v.* Raj Chunder Dutt, MSS., Morgan, J., Feb. 28, 1866.

that section referred to applications for the attachment generally of the property of the judgment-debtor. Section 218, which is not repeated in this Code, enabled the Court, on an application for a general attachment, to require the applicant to give security for any injury that might be occasioned by the attachment of property belonging to any other person than the defendant. Now general attachments are done away with, and when an application is made for an attachment, the property must be specified, whether it be moveable (s. 236) or immoveable (s. 237, *ante*). In the latter case the description must be verified. In all cases it must be the property, not the right, title, and interest of the judgment-debtor in the property, which must be attached (*a*). This Code contemplates a particular enquiry in the first instance before process in execution is issued against the property, moveable or immoveable, of the judgment-debtor, see s. 287, *post*.

Attachment of debt, share, and other property not in possession of judgment-debtor.

268. (S.) In the case of (a) a debt not secured by a negotiable instrument, (b) a share in the capital of any public company or corporation, (c) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court, the attachment shall be made by a written order prohibiting,

(*a*) in the case of the debt, the creditor from recovering the debt, and the debtor from making payment thereof, until the further order of the Court:

(*b*) in the case of the share, the person in whose name the share may be standing, from transferring the same or receiving any dividend thereon:

(*c*) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

A copy of such order shall be fixed up in some conspicuous part of the Court-house, and another copy of the same shall be sent in the case of the debt to the debtor, in the case of the share to the proper officer of the company

(*a*) Nga Tha Yah *v.* Burn, 2 B. L. R., F. B., 97; S. C., 11 Suth. W. R., F. B., 8.

or corporation, and in the case of the other moveable property (except as aforesaid) to the person in possession of the same.

A debtor prohibited under clause (*a*) of this section may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

No attachment under this section shall remain in force for more than six months; at the end of which time, if the judgment-debtor has not obeyed the decree, the property attached may be sold, and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and pay the balance, if any, to the judgment-debtor on his application.

This corresponds with s. 236, and that part of s. 239 of Act VIII of 1859 which applies to moveable property. The last clause but one corresponds with s. 241. The last is new.

The notice may be sent to the debtor of the judgment-debtor, when he is out of the jurisdiction, without reference to the Court within whose jurisdiction he may be (*a*); but it should be affixed in the Court; otherwise, if for instance it be fixed merely on the wall of the debtor's dwelling-house, the attachment will be ineffectual (*b*).

A personal decree against one of several partners cannot be executed by the seizure and sale of a part of the partnership property, and the distribution of the proceeds of sale between the execution-creditors and the other partners (*c*). Execution against partnership property in the possession of one partner, when the decree is against the other partner in his individual capacity, should be by prohibitory order, and not by manual seizure (*d*). The books of the partnership cannot be attached (*e*). The

(*a*) *In re* Hollick, 2 B L. R., A. C., 108, Peacock, C. J., and Mitter, J.

(*b*) Gobind Chunder Dutt *v.* Kherode Chunder Mitter, 10 B. L. R., Apx., 12, Macpherson, J.

(*c*) Keshav Gopal Ginde *v.* Rayapa, 12 Bom. H. C. Rep, 165, West and Nanabhai Haridas, JJ.

(*d*) Thama Sing *v.* Kalidas Roy, 5 B. L. R., 386; Abbott *v.* Abbott and Crump, *ib.*, 382.

(*e*) *Ante*, s. 226 (d), following *In re* Pestonji Cursetjee Shroff, 3 Bom. H. C Rep., 42.

Act of 1859, s. 243, provided for the appointment of a manager to collect debts due to the judgment-debtor, and rents and receipts of land, and apply the same in reduction of the debt. That course would be convenient also in the case of partnership property. The matter is dealt with by ss. 503, 504, and 505, *post*, which, however, does not apply to Small Cause Courts. See forms, Nos. 138, 139, 140, under this section. A debtor, until he receives notice of the attachment, can generally pay his creditor without risk (*a*). Questions may arise as to the effect of the concluding paragraph of this section after the six months have expired, and the property has not been sold by the Judge.

Attachment of moveable property in possession of defendant.

269. (S.) If the property be moveable property in the possession of the judgment-debtor, other than the property mentioned in the first proviso to section 266, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody will exceed its value, the proper officer may sell it at once.

Power to make rules for maintenance of attached live-stock.

The Local Government may from time to time make rules for the maintenance and custody, while under attachment, of live-stock and other moveable property, and the officer attaching property under this section shall, notwithstanding the provisions of the former part of this section, act in accordance with such rules.

This corresponds with Act VIII of 1859, s. 233; but the proviso and the last clause are new.

This section makes the nazir responsible for the custody of the property in his hands or in the hands of his subordinates, unlike the nazir of a Revenue Court, whose peons are paid officers of Govern-

(*a*) Thakoor Dass Sing *v.* Luchmeeput Doogur, 7 Suth. W. R., 10; but see note, p. 387.

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ment, and for whose acts such a nazir is not responsible (*a*). Should there be any loss, the proper course is to proceed against the nazir himself. His surety, who has entered into a bond to the Government for the due performance of the nazir's duties, cannot be made responsible in a suit by the person whose property is lost (*b*).

Attachment of negotiable instruments.

270. (S.) If the property be a negotiable instrument not in deposit in a Court, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to the further orders of the Court.

This corresponds with Act VIII of 1859, s. 238.

Seizure of property in house.

271. (S.) If the person executing any process under this Code directing or authorizing seizure of moveable property, has gained access to a house or other building, he may unfasten and open the door of any room in which he has reason to believe any such property to be:

Seizure of property in zenanas.

Provided that if the room be in the actual occupancy of a woman, who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to her that she is at liberty to withdraw; and after allowing a reasonable time for such woman to withdraw, and giving her every reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

This is a new section; the first paragraph being founded on the decision of the Court in the case of *Kondasawmy Pillay* v. *Kistnasawmy Pillay* (*c*). The nazir may remove the locks of the judgment-debtor upon the store-house in which the goods are contained, and put on his own locks (*d*). The proviso is founded on the custom of the country.

(*a*) Kalee Coomar Chatterjee *v.* Siddhessur Mundul, 11 B. L. R., 256, L. S. Jackson and Mitter, JJ.

(*b*) Bocha Gope Chowdhry *v.* Braja Gabind Das, 9 B. L. R., Apx., 26, Couch, C. J., and Bayley, J.

(*c*) 5 Mad. H. C. Rep., 189.

(*d*) Sodamini Dasi *v.* Jageswar Sur, 5 B. L. R., Apx., 27, L. S. Jackson and Glover, JJ.

Attachment of property deposited in Court or with Government officer.

272. (S.) If the property be deposited in, or be in the custody of, any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice issues:

Proviso.

Provided that, if such property is deposited in, or is in custody of, a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

This corresponds with s. 237 of Act VIII of 1859. The word "Court" is substituted for the words "Court of Justice." The Court of a Deputy Collector is a competent Court to enquire into questions of priority, &c. (*a*). It has been held that property in the hands of the Receiver of the High Court cannot be sold in execution of a decree by a Court in the mofussil. The judgment-creditor must apply to the High Court to execute his decree against such property. On such an application the Court ordered that the property be considered as attached, and that the Receiver do sell the interest of the judgment-debtor, who was ordered to join in the conveyance (*b*). The result was practically the same; but it may be questioned whether there is now any distinction between the position of the Receiver of the High Court holding property which has been ascertained to belong to the judgment-debtor and any other Court or public officer holding such property.

Attachment of decree for money.

273. (S.) If the property be a decree for money passed by the Court which passed the decree sought to be executed, the attachment shall be made by an order of the Court directing the

(*a*) See the cases of Cowie *v.* Elias, 10 Suth. W. R., 43, Phear and Hobhouse, JJ.; *In re* Brojonath Mitter, 13 *ib.*, 301, L. S. Jackson and Glover, JJ.

(*b*) Hem Chunder Chunder *v.* Prankisto Chunder, I. L. R., 1 Cal., 403, Pontifex, J.; see also Mackillop *v.* Reed, Morton (by Montriou), 46 note; Abbott *v.* Abbott and Crump, 5 B. L. R., 382, Markby, J.

proceeds of the former decree to be applied in satisfaction of the latter decree.

If the property be a decree for money passed by any other Court, the attachment shall be made by a notice in writing to such Court under the hand of the Judge of the Court which passed the decree sought to be executed, requesting the former Court to stay the execution of its decree until such notice is cancelled by the Court from which it was sent. The Court receiving such notice shall stay execution accordingly, unless and until

(*a*) the Court which passed the decree sought to be executed cancels the notice, or

(*b*) the holder of the decree sought to be executed applies to the Court receiving such notice to execute its own decree.

On receiving such application, the Court shall proceed to execute the decree and apply the proceeds in satisfaction of the decree sought to be executed.

Attachment of other decrees.

In the case of all other decrees the attachment shall be made by a notice in writing, under the hand of the Judge of the Court which passed the decree sought to be executed to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, when such decree has been passed by any other Court, also by sending to such Court a like notice in writing to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent. Every Court receiving such notice shall give effect to the same until it is so cancelled.

Decree-holders to give information.

The holder of any decree attached under this section shall be bound to give the Court executing the same such information and aid as may reasonably be required.

This extends to Mofussil Courts of Small Causes so far as relates to decrees for moveable property.

This section is new; see the rules laid down in ss. 246 and 247 as to execution in cases of cross-decrees. Where the judgment-debtor has not proceeded to decree, those sections would be inapplicable: thus, where A. obtained a decree against B., but execution was stayed pending a cross-suit of B. against A., and B. afterwards sold his right in the cross-suit,—it was held that A. had still a right to attach the whole of B.'s decree in execution of his own decree against B. (*a*). It is apparently not necessary for the holder of the decree sought to be executed to have his decree transferred for execution to the Court in which the decree which has been attached was passed; he can, at any rate when the attached decree has been sold, and he has bought it, execute the attached decree as if he had been the original decree-holder (*b*). This case, however, which has been already referred to in another connexion in the note to s. 224, supposes the decree attached to have been sold in execution. It may be a question whether a decree can be sold in execution at all. The present section does not expressly preclude such a sale, but it points out a mode of realizing the attached decree, namely, by execution on the application of the holder of the decree under which it has been attached.

Attachment of immoveable property.

274. If the property be immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise.

The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed up in a conspicuous part of the property and of the Court house.

When the property is land paying revenue to Government, a copy of the order shall also be fixed up in the office of the Collector of the District in which the land is situate.

This corresponds with s. 235 and the second part of s. 239 of Act VIII of 1859; the proclamation by beat of drum, &c., being

(*a*) Musst. Peeloo Chowdhrain *v.* The Court of Wards, 7 Suth. W. R., 219.

(*b*) Rambaksh Chetlangi *v.* Maharaja Banwari Gobind Bahadur, 2 B. L. R., A. C., 65, Peacock, C. J., and Mitter, J.

substituted for "reading the order aloud" of Act VIII of 1859. It was held formerly that the attachment is not voidable merely if these forms have not been complied with, provided no substantial damage has accrued (*a*); but this case has not been followed in later instances (*b*), and it has been held that the attaching creditor should see that the provisions of law are complied with, and it is his fault if they are not.

Where property is attached under this section, the only further process to bring it to sale is the issue of the proclamation of sale and the actual sale. If the property be not within the jurisdiction of the Court whose duty it is to execute the decree, the course to be followed by the decree-holder is that prescribed by s. 224, &c., *ante*, corresponding with s. 285 and the following sections of Act VIII of 1859 (*c*).

Order for withdrawal of attachment after satisfaction of decree.

275. (S.) If the amount decreed with costs and all charges and expenses resulting from the attachment of any property be paid into Court, or if satisfaction of the decree be otherwise made through the Court, or if the decree is set aside or reversed, an order shall be issued, on the application of any person interested in the property for the withdrawal of the attachment.

This corresponds with the first part of s. 245 of Act VIII of 1859. The words "on the application of any person interested" are inserted. It is thus plainly indicated that it is the duty of such person to see that the order is made, and to apply to have the attachment removed. The second part of that section is not re-enacted; it provided for the notification of the withdrawal of the attachment to be made with the same publicity as the attachment itself, the expense of the application being provided by the defendant. If the Judge "strikes the case off the file," the attachment does not fall to the ground unless the money has been paid or the decree satisfied or reversed or set

(*a*) Musst. Kooranee Bibee *v.* Bhoobun Mohinee Dossee, 5 Suth. W. R., Mis., 52.

(*b*) Indro Chunder Babu *v.* Dunlop, 10 Suth. W. R., 265, Bayley and Macpherson, JJ.; Dwarkanath Biswas *v.* Ramchunder Roy, 13 *ib.*, 136, Glover and Hobhouse, JJ.; and Rameswar Singh *v.* Ramtanu Ghose, 4 B. L. R., A. C., 24.

(*c*) Mookta Keshee Debee *v.* Kunuck Monee Debee, 7 Suth. W. R., 267, Loch and Macpherson, JJ.

aside (*a*). The case may have been struck off improperly, and it cannot be necessary that the whole proceedings should be begun *de novo* (*b*). There is in fact no law authorizing the "striking off the file" at the will of the Judge. It seems that the practice is adopted in order to make up the monthly returns, by striking off all the cases at the end of the month, and putting them on again at the beginning of the ensuing month. This practice is of course quite irregular, and has been the subject of much animadversion on the part of the High Court (*c*). But in cases where this has not apparently been the object, it has been held also that the striking off the file of proceedings in execution may have no effect on the attachment; it depends upon the circumstances, for instance, where it has been done on the ground that the judgment-creditor on whose application the property has been attached has failed to pay the peon's fees for advertizing the notice of sale. The striking off of the case in this manner and for this reason, does not release the property from attachment, but merely affects the files of the Court (*d*). Where an attaching creditor was ordered to find security pending an appeal to the Queen in Council on an application by the appellant that the sale should be stayed until such security was found, and the attaching creditor failing to find security, the proceedings in execution were "struck off the file," it was held that the attachment was not avoided by this striking off, but was operative so as to invalidate a subsequent alienation (*e*). But where the proceedings in execution have been for a long time neglected, and are finally struck off, it may be that they cease to operate, and the title of the judgment-creditor will only date from

(*a*) Stowell *v.* Billings, I. L. R., 1 All., 350.

(*b*) Musst. Zahuran *v.* Tayler, 2 B. L. R., App., 86; and see the note to s. 266, *ante*. See *contra*, Luchmeeput Sing *v.* Lekraj Roy, 4 Wym., 237, and cases there cited; S. C., 8 Suth W. R., 415.

(*c*) Gaur Mohan Bandopadhya *v.* Tarachand Bandopadhya, 3 B. L. R., Apx., 17, Loch and Mitter, J J.

(*d*) Syud Nadir Hossein *v.* Pearoo Thovildarinee, 14 B. L. R., 425 note, Kemp and Pontifex, JJ.

(*e*) Soondur Singh *v.* Musst. Bohooria Alum Bashee Kooer, 24 Suth. W. R, 36, Glover and Mitter, JJ. See also Gunno Sing *v* Baboo Muddun Mohun Sing, Suth W. R, 1864, p. 26; Jatu Sahu *v.* Baboo Ramacharan Lal, 3 B. L. R., Apx., 68; and Sheik Golam Yabeya *v.* Musst. Shama Sundari Kuari, *ib.*, Apx., 135, also the remarks of the Judicial Committee of the Privy Council in the case of Rajah Muhesh Narain Sing *v.* Kishanund Misr, 9 Moo. I. A., 324.

any subsequent attachment that he may obtain. Thus where the creditor had let the proceedings sleep for twelve years, the Judicial Committee expressed a doubt whether he, or any one claiming under him, could say that an alienation pending the attachment was absolutely null and void under the circumstances. "It seems "to their Lordships that generally where the party prosecuting "the decree is compelled to take out another execution, his title "should be presumed to date from the second attachment. Their "Lordships do not mean to lay down broadly that in all cases "in which an execution is struck off the file such consequences "must follow. The reported cases sufficiently show that, in India, "the striking an execution proceeding off the file is an act which "may admit of different interpretations according to the circum-"stances under which it is done, and accordingly their Lordships "do not desire to lay down any general rule which would govern "all cases of that kind; but they are of opinion that when, as in "this case, a very long time has elapsed between the original "execution and the date when it was struck off, it should be "presumed that the execution was abandoned and ceased to be "operative, unless the circumstances are otherwise explained" (*a*). And where the person who has obtained the attachment has notice and does not appear, and in consequence of his non-appearance the case is struck off, the attachment falls with the case; and where it is clear that this is so, a fresh attachment is a new and independent proceeding, and does not relate back so as to give the creditor a title from the date of the first attachment (*b*). The decree is the foundation of the attachment, and when the decree is set aside, the attachment falls with it (*c*). The duration of the attachment by prohibitory order is limited in certain cases by ss. 259, 260, and 268, *ante*.

Private alienation of property after attachment to be void.

276. (S.) When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt or dividend or a deli-

(*a*) Puddomonee Dossee *v.* Roy Muthooranath Chowdhry, 12 B. L. R., 411, P. C.

(*b*) Binda Bibee *v.* Lalla Gopeenath, 14 B.L. R., 323, Phear and Morris, JJ.

(*c*) Lala Jagat Narayan *v.* Tulsiram, 1 B. L. R., A. C., 71, Phear and Hobhouse, JJ.

very of the share to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment.

This section corresponds with s. 240 of Act VIII of 1859. In order to avoid an alienation of property made pending its attachment, it must appear that the attachment was made known in the manner prescribed. It is not enough that the judgment-debtor and judgment-creditor know of it, or arrange between themselves that there shall be an attachment; thus, where the attachment of the property was irregular, and consequently ineffectual, and the parties agreed to treat it as regular and effectual, their arrangement did not bind the property or constitute a charge upon it so as to defeat the rights of a *bonâ fide* mortgagee. The attaching creditor should protect his own interests by seeing that the attachment is properly made as the law requires (*a*). The necessary proceedings to attach the property must have been taken (*b*).

The alienation referred to is a *private* alienation, and on these words Phear, J., observed, that "clearly the legislature intended something in the way of a limiting or qualifying character" (*c*). This case has been more fully cited in the note to s. 266, *ante*, to which the reader is referred.

It was held by Peacock, C J., L. S. Jackson, Macpherson, and Mitter, JJ. (Markby, J., dissenting), that a sale of attached property is void only as against the attaching creditor (*d*); and this view was established by the Judicial Committee of the Privy Council on appeal, who held that the prohibition avoids the alienation only as against the execution-creditor or some one claiming under him (*e*).

The object of the attachment is to levy the money which is actually due under the particular decree; so that where A. obtained a decree against B. for a sum payable by instalments, and B. made default in payment of an instalment, whereupon A. attached certain

(*a*) Rameswar Sing *v.* Ramtanu Ghose, 4 B. L. R, A. C., 24, Norman and E. Jackson, JJ.

(*b*) Indro Chunder Baboo *v.* Dunlop, 10 Suth W. R., 264, Bayley and Macpherson, JJ.

(*c*) Anandchandra Pal *v.* Panchilal Surma, 5 B. L R, 691, 705.

(*d*) Anandalal Doss *v.* Radhamohun Shaw, 2 B. L. R., F. B, 49; S. C., 11 Suth. W. R., Appeals from O. O. C. J., 1.

(*e*) Anundololl Doss *v.* Jullodhur Shaw, 10 B L R., 134, P. C.; S C., 14 Moore's I. A, 542. See also Puddomonee Dossee *v.* Roy Muthooranath Chowdhry, 12 B. L. R., P. C, 411; Gooroo Purshad Sahoo *v.* Musst. Binda Bibee, 18 Suth. W. R, 279; S. C, 9 B. L. R., 180, Couch, C. J, and Ainslie, J.

immoveable property belonging to B. B. sold the property to C., and out of the proceeds paid into Court the full amount then due, and for which the property had been attached. A. took out the money, but applied for and obtained an order from the Moonsiff that the property should remain under attachment, in order to satisfy any future sum which should fall due under the decree and in payment of which B. should make default. B. failed to pay a further instalment when due, and A. obtained an order for the sale of the property. A. himself became the purchaser, and was put into possession by the Court, notwithstanding the claim of C., who had been in possession ever since his purchase. In a suit by C. to recover possession, it was held that the Court had no power to make the order continuing the attachment, the right of attachment being for sums actually due, and the whole amount for which execution issued being satisfied out of the proceeds, the alienation of the property to C. was good as against A. (*a*). And where a judgment-debtor satisfied the decree and reported the fact to the Court, and on the following day mortgaged the property, and the attachment was removed the day after the execution of the mortgage, it was held that the mortgage was not void by reason of the attachment (*b*). But the proper course for the judgment-debtor to take when he satisfies the decree out of Court is to get the fact certified by the judgment-creditor, and if he refuses, to apply under s. 258 for an order directing him to certify; and an order should be made that the attachment be withdrawn under s. 275, when the payment is certified, or made into Court or otherwise through the Court. It is the judgment-debtor's own fault if he does not see that the attachment is withdrawn. When he has paid all that is due from him, he is directed to apply to have the attachment withdrawn Should the debtor alienate, and the purchaser without notice of the attachment afterwards pay the debt on the decree in order to save the property from being sold under the attachment, he can recover the amount in a suit against the judgment-debtor (*c*); and it would be the same if the purchaser had notice of the attachment. unless the purchaser agreed with the judgment-debtor to pay his debt as part of the consideration for the purchase (*d*). A sale of property while under attach-

(*a*) Ramdhan Mitter *v.* Kailas Nath Dutt, 4 B. L R, A. C., 20, Loch and Macpherson, JJ, Prannath Mitter *v.* Shumboo Chunder Nath, 7 Suth W. R, 430, L S. Jackson and Markby, JJ.

(*b*) Buddee Singh *v.* Kanaha, 1 H. C. Rep, N. W. P., Part iv, 71, Ross and Roberts, JJ.

(*c*) Musst. Zahuran *v.* Tayler, 2 B. L R., A. C., 86, Peacock, C. J., and Mitter J

(*d*) *Ibid*, Peacock, C.J.

ment is illegal, and it has been held that the subsequent removal of the attachment does not make it legal (*a*). But in a case where A. obtained a decree against B., and B.'s property was attached in execution; while under attachment the property was sold by B. to C.; afterwards B. obtained an order setting aside the decree,—it was held by Phear, J., that the attachment thereupon became void *ab initio*, and that the sale to C. was consequently good (*b*). In this case the decree had been *ex parte*, and had been set aside under s. 119 of Act VIII of 1859, under which section the order setting aside the decree was final.

Where the execution-proceedings are set aside *in toto*, whereby the order for attachment is set aside also, any subsequent alienation is valid (*c*). In this case, the contention that the subsequent alienation was void, and that an attachment remains in force after the execution-proceedings in which the attachment was ordered have been struck off the file, appears to have been based on certain expressions used by the Privy Council in a case (*d*) referred to in the note to the last section. But in remarking on this case, Markby, J. says: "All that was there decided was, that if, in consequence of a "decree-holder failing in an attempt to execute his decree, the execu-"tion-proceedings are taken off the file, the proceedings in the whole "suit are not thereby nullified, so as to compel the plaintiff, if he "still wishes to enforce his claim, to commence his suit *de novo*."

Court may direct coin or currency-notes attached to be paid to party entitled.

277. (S.) If the property attached is coin or currency-notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

This section corresponds with s. 242 of Act VIII of 1859. The Court can order payment to any party entitled under the

(*a*) Nek Ram *v.* Bahadur Singh, S. D. A., N. W. P., 1863, p. 69; on appeal, *ib.*, 1864, p. 118; Jadubanund Roy *v.* Beejoy Gobind Chowdhry, 7 Suth. W. R., 510, Kemp and Glover, JJ.; Ram Churn Lall *v.* Jhubboo Sahoo, 14 *ib.*, 25, Couch, C. J., and Kemp, J.

(*b*) Lala Jagat Narain *v.* Tulsiram, 1 B. L. R., App., 71; S. C., 10 Suth. W. R., 99.

(*c*) Khadem Hossein Khan *v.* Kally Purshad Singh, 4 Wym. Rep., 57; S. C., 8 Suth. W. R., 49.

(*d*) Rajah Muheshnarain Singh *v.* Kishanund Misr., 9 Moo. I. A. 324, 337.

decree, but it cannot, under this section, dispose of the claim of a stranger to the suit, to the money, &c. (*a*).

Investigation of claims to and objections to attachment of attached property.

278. (S.) If any claim be preferred to, or any objection be made to the attachment of, any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

Postponement of sale.

If the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

This section corresponds with the first part of s. 246 and with s. 247 of Act VIII of 1859; but the objection here is against the attachment of the property; under s. 246, the objection was against its sale. The following sections (to 281 inclusive) and s. 282 correspond with the rest of s. 246 of Act VIII of 1859.

In the first paragraph of this section there is also this alteration, that here the claim is to be investigated as if the claimant was a "party to the suit;" in s 246 it was, as if he "had been originally made a defendant;" and it was held under that section that the claimant must begin by proving his claim, and that the evidence should be confined to evidence of his own title or possession, and not to that of any one else (*b*); that is to say, that his position was more like that of a plaintiff than of a defendant, or, if of a defendant, of one upon whom the *onus probandi* is cast by the state of the pleadings, and who has consequently to begin. So that the procedure in this respect is not changed, the alteration merely removes a difficulty which, in the opinion of Mitter, J., stood in the way of the Court in placing a claimant in the position of a plaintiff

(*a*) *In re* Brojonath Mitter, 13 Suth. W. R., 301, L. S. Jackson and Glover, JJ.

(*b*) Nga Tha Yah *v.* Burn, 2 B. L. R., F. B., 91; S. C., 11 Suth. W. R., F. B., 8, Peacock, C. J., L. S. Jackson, Phear and Macpherson, JJ.; Mitter, J. dissenting.

instead of a defendant (*a*). The next section of the present Code shows that the burthen of proof is upon the claimant.

A Court making an order without taking evidence, where evidence is forthcoming, does not make an investigation under these sections, but acts without jurisdiction (*b*). But where the claimant has an opportunity of adducing his evidence, and fails to do so, his claim may be disposed of under this section (*c*). If the Court decline altogether to make an enquiry, a High Court, by virtue of its general powers of superintendence over lower Courts, can and ought to require it to do so (*d*). This was a case decided under the Charter Act, 24 and 25 Vict., c. 104, s. 15; but s 622 of this Code, *post*, is to the same purport, and Act I of 1868, s. 2 (11), interprets the words "High Court" to mean the highest Civil Court of appeal in any part of British India in which the Code operates, not only the Chartered High Courts.

It has been held that a claim to land attached in execution of a decree against a third party is virtually a suit for land (*e*), and the period of limitation applicable to such a suit applies also to a claim (*f*).

Where A.'s property has been attached, and B. has paid the decree to save A.'s property, B. cannot recover the money by making a claim (*g*). This case seems to have been instituted under a great misapprehension of the effect and the object of this provision of the law. "The proceeding by way of claim is merely "a summary proceeding to enable a man to assert his rights of "property, when that property is roughly seized, and in the "officer's hands awaiting an order for sale or other disposition. "In such a case the summary intervention of the Court may be "sought by the party aggrieved to prevent his property being "further dealt with by the officer of the Court. But the decision

(*a*) See Nathu Sada Shiv *v.* Ram-Chandra Annaji, 5 Bom. H. C. Rep., A. C., 76, Warden and Gibbs, JJ.

(*b*) Jaggabandhu Bose *v.* Sachyi Bibi, 8 B. L R., Apx., 39, E Jackson and Mookerjee, JJ., and cases there cited; *In re* Bhoiharee Dabee, 24 Suth. W. R, 422; Rutnessur Koondoo *v.* Majeda Bibee, 7 Suth W. R., 252, Norman and Seton-Karr, JJ.

(*c*) Nga Tha Yah *v* Burn, 2 B. L. R., F. B., 91, see p. 100; S. C., 11 Suth. W. R., F. B, 8; Sheikh Khoda Buksh *v.* Purmanund Dutt, 1 Wym., 280, Kemp and Seton-Karr, JJ

(*d*) Greesh Chunder Lahooree *v* Kasheessuree Debia, 8 Suth. W. R., 26, L. S. Jackson and Hobhouse, JJ.

(*e*) Sagore Dutt *v.* Ramchunder Mitter, 1 Hyde, 136, Wells, J.

(*f*) Radha Koonwar *v.* Jankee Koonwar, 9 Suth. W. R., 199, E. Jackson and Hobhouse, JJ.

(*g*) Mahomed Beg *v.* Juggernauth Doss, 1 In. Jur, N. S., 248, Phear, J.

"of the Court on such an occasion does not affect an adjudication of "right." The words "roughly seized" here used indicate an actual manual seizure by the officer of the Court, but a claim may be made when there is no actual seizure, and where the attachment is merely symbolical (*a*). The same learned Judge (Phear, J.) considered that s. 246 of the Code of 1859 did not apply to such property as a debt; that there could be no claim under that section when a debt was attached, holding that there could only be a claim in respect of "immoveable property or specific moveable property;" and he pointed out that the proceeding to realize a debt was not by sale; but, under s. 241 of that Code, the debtor might pay the money into Court voluntarily, or under s. 242 might be directed to do so, or under s. 243 might appoint a manager to sue for it (*b*). S. 241 corresponds with the last clause but one of s. 268 of the present Code, under which the debtor may pay the amount of his debt into Court; s. 242 enabled the Court, as s. 277 of the present Code does, to order the payment into Court of money or bank-notes, or as the clause is now worded, coin or currency notes. Section 248, which by the first clause enables the Court to appoint a manager, is not re-enacted. It may perhaps be considered that a claim may now be made in respect of a debt as well as of any other property attached. It has been held generally that there is nothing restrictive in this remedy, and that it applies to all claims (*c*). The claim is now to be made to the property attached, and the objection not to the sale but to the attachment. A debt was not generally the subject of sale, but was to be collected in the manner indicated. It will be observed that a debt is now expressly made the subject of sale. Section 268 directs the Judge to sell the debt when it has been attached for six months and not realized.

Again, where A.'s own property is attached in execution of a decree against B., and A., in order to protect his property, pays the debt, he should not put in a claim for the amount so paid, but he can recover it in a suit against the judgment-creditor (*d*). With regard to payment into Court of money not due under the decree, to avoid arrest, the payment not being a voluntary payment, the

(*a*) Nga Tha Yah *v.* Burn, 2 B. L. R., F. B, 91; S C., 11 Suth. W. R., F. B., 8.

(*b*) Musst. Rambutty Koer *v.* Kamessur Pershad, 22 Suth. W. R., 36, Phear and Morris, JJ.

(*c*) Hurish Chunder Roy *v.* Brojo Soondur Mojoomdar, 6 Suth. W. R., 164.

(*d*) Fatima Khatun *v.* Mahomed Jan Chowdhry, 1 B. L. R., P. C., 21.

money can be recovered in a proceeding by way of objection on behalf of the person who paid the money into Court, to an application of the decree-holder to have it paid out to him (*a*).

A claim can be made to a share in the property, the claimant claiming as a shareholder, although the judgment-debtor is admittedly entitled to a share also, the whole property being attached (*b*). This case overrules some earlier decisions, in which it had been held that where the judgment-debtor had *some* interest, the Court could not investigate a claim of a third person. L. S. Jackson, J., was, however, of opinion that where the judgment-debtor had an undivided share, another undivided shareholder could make a claim. The Court, in adjudicating upon such a claim, should define the rights of the claimant and of the judgment-debtor (*c*).

Where distinct orders are made for the payment of costs against different defendants, and the property of one defendant is taken in execution of the order against another, the defendant whose property has been attached can make a claim for its release from attachment (*d*). Where property is seized as belonging to A, the judgment-debtor, as representative of B., deceased, A. can make a claim to the property as his own, and as not belonging to B's estate (*e*). In like manner the judgment-debtor may himself put in a claim, where the decree is against him in his own right, and the property attached is property which he does not hold in his own right (*f*). In the former of these two cases a decree-holder having obtained a decree against B. as representative of her mother for a debt contracted by the mother, attached property in execution; the judgment-debtor objected that the property should not be sold under this decree, inasmuch as it was inherited by her from her father, and that the original decree being passed for a debt incurred by her mother, and against herself

(*a*) Paresnath Mookerjee *v.* Binadiram Sen, 4 B. L R., Apx., 25, L. S. Jackson and Markby, JJ.

(*b*) Cowar Rajkumar Roy *v.* S. M. Kadambini Debi, 4 B. L. R., F. B., 175.

(*c*) Monohur Khan *v.* Troyluckonath Ghose, 4 Suth. W. R., 35, Sumbhoonath Pundit and Campbell, JJ.

(*d*) Binode Lall Pakrashee *v.* Gireedhur Chuckerbutty, 22 Suth. W. R., 392, Markby and Mitter, JJ.

(*e*) Maharajah Dheraj Mahtab Chund Bahadoor *v.* Musst. Pearee Dossee, 6 Suth. W. R., Mis., 61, Campbell and Macpherson, JJ.

(*f*) Harischandra Gupto *v.* S. M. Shashi Mala Gupti, 6 B. L. R., 721, E. Jackson and Mitter, JJ. See also Rainey, petitioner, 6 B. L. R., 725 note, Bayley and Hobhouse, JJ.

only as her mother's representative, properties inherited from the mother only were liable to be attached. The lower Court, however, did not try this objection, but dismissed it on the ground that the right, title, and interest only of the mother was attached. This decision was set aside by the Zillah Judge on appeal. The judgment-creditor appealed to the High Court against the decision of the Zillah Judge, on the ground that the order of the Moonsiff was not appealable. It was held by the Judges of the High Court, that the judgment-debtor, in her capacity of representative of her father, was a third party, and could not appeal. But as the decision of the Judge of the appeal Court had been passed without jurisdiction, the High Court set it aside under 24 and 25 Vict., c. 104, s. 15, and remanded the case to the lower Court to try the question as a claim between the parties. The attachment of the "the right, title, and interest of the mother" was quite irregular; the attachment should have been of specific property (*a*).

Where the judgment-debtor holds the property as trustee of a religious endowment, he can make a claim as trustee (*b*). A mortgagee in possession may make a claim when the property mortgaged is attached in execution of a decree against his mortgagor (*c*).

Evidence to be adduced by claimant.

279. (S.) The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

This section, which is new, is in accordance with the decision of the Full Bench at Calcutta referred to in the last section. The burthen of proof is on the claimant; if he does not produce his evidence, the claim will, as noticed in the note to the last section, be decided against him; and if he withdraws his claim, there is an end of it; he cannot revive it (*d*).

Release of property from attachment.

280. (S.) If upon the said investigation the Court is satisfied that, for the reason stated in the claim or objection, such property

(*a*) Nga Tha Yah *v.* Burn, 2 B. L. R., F. B., 97; S. C., 11 Suth. W. R., F. B., 8.

(*b*) Kali Charan Gir Gossain *v.* Bangshi Mohun Dass Baboo, 6 B. L. R., 727, E Jackson and Mookerjee, JJ.; Nimaye Churn Puteetundee *v.* Jogendro Nath Bonnerjee, 21 Suth. W. R., 365, L. S Jackson and Ainslie, JJ.

(*c*) Kassirav R. Saheb Holkar *v.* Vithaldas Mangalji, 10 Bom. H. C. Rep., 100, Sargent, J.

(*d*) Gooroo Dass Roy *v.* Kamala Kant Sen, 20 Suth. W. R., 456, Kemp and Glover, JJ.

was not when attached in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall pass an order for releasing the property wholly or to such extent as it thinks fit, from attachment.

This corresponds with the second paragraph of s. 246 of Act VIII of 1859, the words "or partly on his own account and partly on account of some other person" after "in trust for some other person," are added; and the Court, which was directed by the old Act to release the property, may now release it "wholly or to such extent as it thinks fit from attachment." Where a purchaser bought the right of the defendant in the suit pending litigation directed against the very property which he bought, and the plaintiff subsequently obtained a decree against the defendant, his vendor, which established a charge upon the property, and it was ordered to be sold in execution of that decree, it was held that the purchaser could not come in and make a claim; he was a purchaser *pendente lite* (*a*). When the property is ordered to be released, the order has reference merely to the particular claimant (*b*). A purchaser from the judgment-debtor cannot take advantage of an order made in a proceeding to which he was a stranger (*c*).

Disallowance of claim to release of property attached.

281. If the Court is satisfied that the property was, at the time it was attached, in possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

This corresponds with the third paragraph of s. 246, Act VIII of 1859.

(*a*) Ram Kishen *v.* Doolee Chand, 22 Suth. W. R., 547, Phear and Morris, JJ.; see *ante*, note to s. 263.

(*b*) Musst. Imam Bandee Begum *v.* Mirza Mahomed Tukee Khan, 8 Suth. W. R., 27.

(*c*) Gunga Narain Ghose *v.* Haradhun Ghose, 6 Suth. W. R., 157.

The question is not simply whether the property attached was in the possession of the claimant, but whether it was in his possession as his property; the question of possession is not apart from that of title, although the fact of possession is some evidence of title (*a*). Hence it follows, and so it was stated (*b*), that the claim must be brought in a Court having jurisdiction over a suit relating to the property claimed; where, for instance, the property is land, it must be instituted (see s. 16, *ante*), in the Court within the local limits of whose jurisdiction the property is situate,—that is, not necessarily the Court in which the proceedings in execution have in the first instance taken place (*c*). That was a suit "to establish a right" to the property instituted under the last paragraph of s. 246, Act VIII of 1859, corresponding with s. 283 of the present Act. The Court executing the decree, whether it were the Court which passed it or the Court to which it was sent under s. 223, *ante*, might not be the Court of the lowest grade competent to try the claim (see s. 15, *ante*), as where the claimant only laid claim to a part or share of the property.

Where a claim is disallowed, the order disallowing it does not determine the title absolutely; it is merely *quoad* the particular claimant who has obtained the order (*d*).

Continuance of attachment subject to claim of incumbrancer.

282. If the Court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or lien.

This provision is new. It was held under Act VIII of 1859 that if a mortgagee object to the sale of the attached property on the ground that he has a mortgage, he must, in order to get the attachment removed, pay the amount of the decree against the mortgagor (*e*). Now, if he make an objection or claim, the same course may be followed, or the attachment may be continued under this section subject to the mortgage.

(*a*) Nga Tha Yah *v.* Burn, 2 B. L. R., F. B., 97; S. C., 11 Suth. W. R., F. B., 8; Sagore Dutt *v.* Ramchunder Mitter, 1 Hyde, 136, Wells, J; Mathura Pandey *v.* Ramrucha Tewari, 3 B. L. R., 108, Glover and Mitter, JJ.

(*b*) 1 Hyde, 140.

(*c*) Woomeschunder Bose *v.* Muddun Mohun Sircar, 2 Suth. W. R., 44, Steer and E. Jackson, JJ.

(*d*) Booleroonissa Bibee *v.* Kurreemoonissa Khatoon, 21 Suth. W. R., 230, Kemp and Ainslie, JJ.

(*e*) Kishen Kishore Ghose *v.* S. M. Gaetree Debia, 7 Suth. W. R., 493, Loch and Macpherson, JJ.

Saving of suits to establish right to attached property.

283. (S.) The party against whom an order under section 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute; but subject to the result of such suit, if any, the order shall be conclusive.

The provisions of this section, so far as they relate to moveable property, extend to Mofussil Courts of Small Causes.

This section corresponds with the last paragraph of s. 246 of Act VIII of 1859. The order upon the claim was, under that section, not open to appeal, but it had been considered that it might be reviewed (*a*). The present section goes further and would prevent a review as well as an appeal, and although the Court wrongly tried the claim and omitted to enquire whether the right of the claimant arose before or after the attachment, still the order was held to be an order made upon the claim and not to be open to appeal,—that is, it is now conclusive (*b*); and it is conclusive where the claimant makes default, and the claim is decided against him (*c*).

The suit to establish the right of the claimant must be brought in the Court having jurisdiction to try it, not necessarily that in which the proceedings have taken place (*d*). But a suit "to establish a right" to land is not cognizable by a Small Cause Court (*e*).

With regard to the stamp upon the plaint in a suit to establish the right of the claimant, it has been held more than once in Lower Bengal that it must be the full *ad valorem* stamp (*f*). But in the North-Western Provinces it has been held that a 10-rupee stamp may be used under Act VII of 1870 (Court Fees Act), sched. ii, art. 17, No. iii, treating the suit as a suit to obtain a declaratory decree where no consequential relief is prayed (*g*).

(*a*) Cochrane *v* Heera Lal Seal, 7 Suth. W. R., 79.

(*b*) Musst. Bibee Sahebjehan *v.* Syud Shah Asadoollah, 1 Wym., 168, Bayley and Sumbhoonath Pundit, JJ.; Narain Acharjee Chowdhry *v.* Gregory, 8 Suth. W. R., 304.

(*c*) *Ex parte* Sheik Khoda Buxsh *v.* Purmanund Dutt, 1 Wym., 280, Kemp and Seton-Karr, JJ.

(*d*) Woomesh Chunder Bose *v.* Muddun Mohun Sircar, 2 Suth. W. R., 44, Steer and E. Jackson, JJ.

(*e*) Ram Dhun Biswas *v.* Kefal Biswas, 10 Suth. W. R., 141, Peacock, C. J., and Mitter, J.; and see s. 6 of Act XI of 1865, and this section.

(*f*) Bohuroonissa Bibee *v.* Kureemonissa Khatoon, 9 Suth. W. R., 18, Kemp and Glover, JJ.; Mufti Jalaludeen Mahomed *v.* Shohorullah, 15 B. L. R., Apx., 1, Couch, C. J., and Morris, J.; S. C., 22 Suth. W. R., 422.

(*g*) Chunia *v.* Ramdial, I. L. R., 1 All., 360, Pearson and Turner, JJ.

But the successful plaintiff in such a suit does obtain relief, for the suit is a suit to prevent the sale of the property (*a*), and the question of title, not merely that of possession, is to be tried (*b*) although the right which the plaintiff sues to establish must be substantially the same as that which he sought to establish by his claim (*c*).

The concluding portion of s. 246 of Act VIII of 1859, which limited the period within which the suit to establish a right was to be brought, is not repeated here; but the Limitation Act, XV of 1877, sched. ii, 1st division, No. 11, prescribes a similar period, namely, one year from the date of the order, after which no such suit can be brought by a person against whom an order is passed under s. 280, 281, or 282 of this Code, to establish his right to, or the present possession of, the property comprised in the order. He may, however, take advantage of any extension of time which the Limitation Act confers upon him by reason of any disability to sue (*d*). The Judicial Committee distinguished this case from that of *Mohamed Bahadur Khan* v. *The Collector of Bareilly* (*e*), which was a decision under a special enactment containing no saving clause as to minors, &c. The day on which the order was made is excluded (Act XV of 1877, s. 12) and as to other exemptions see the following sections of that Act. But these are the only extensions of time which can be allowed: thus where land was attached under a decree against a third party, and the plaintiff objected to the attachment and sale of the land, his objection was disallowed. He then brought a regular suit to establish his right to the property in which he asked that the sale might be stayed. The sale, however, was effected notwithstanding the pendency of this suit, which was ultimately dismissed with costs. The plaintiff then instituted a suit for a declaration that the property of which he was still in possession was his, and that it was not affected by the sale. It was held, that the time which was consumed in the first suit instituted by the plaintiff could not be deducted in calculating the period of limitation, and that a period of more than one year

(*a*) Bank of Hindustan *v.* Premchand Raichand, 5 Bom. H. C., O. J., 93, Couch, C. J., and Sargent, J.

(*b*) Mathura Pandey *v.* Ramrucha Tewari, 3 B. L. R., A. C., 108, Glover and Mitter, JJ.

(*c*) Colvin, Cowie, & Co. *v.* Elias, 2 B. L. R., A. C., 212, L S. Jackson and Hobhouse, JJ.

(*d*) Musst. Phoolbas Koonwar *v.* Lalla Jogeshur Sahoy, L. R., 3 I. A., 7; S. C., I. L. R., 1 Calc., 226, P. C.

(*e*) 13 B. L. R., P. C., 292.

having elapsed from the time of the rejection of the plaintiffs' claim, the second suit was barred (*a*).

If the person who makes the claim is in actual possession, the order disallowing his claim is only a declaration that his claim is without title, and should he sue to establish his title, he must do so within the year (*b*); but if he be in possession, and can prove no hostile act on the part of his opponent, it has been held that he has no cause of action (*c*). A person who has failed in establishing a claim, whether he gave any evidence or not, must bring a suit to establish his right within one year, otherwise he will be barred (*d*); but when the property has been released from attachment without any proceeding to examine the claim, the suit is not barred by reason of its not having been brought within the year (*e*); and if the Court does not define the rights of the debtor and the claimant, it appears that there is no decision of the claim, and the claimant is not restricted in bringing his suit, to the shorter period of limitation (*f*). So, where the claim is not investigated at all (*g*), or where it is rejected as not coming within this provision (*h*). The shorter period of limitation is applicable only to a case in which the procedure prescribed by these sections has been adopted (*i*). For instance, two judgment-creditors attached certain property, which was afterwards released from attachment upon the claim of D. One of the judgment-creditors then brought his suit within the time, and got a decree declaring the judgment-

(*a*) Rughoonath Pershad *v.* Surjoo Pershad Singh, 22 Suth. W. R., 162, Phear and Morris, JJ.

(*b*) Brijo Kishore Nag *v.* Ram Dyal Bhudra, 21 Suth. W. R., 133, Couch, C. J., and Glover, J.

(*c*) Gooroo Dass Roy *v.* Kamala Kant Sen, 20 Suth. W. R., 456, Kemp and Glover, JJ.

(*d*) Kaminee Debia *v.* Issur Chunder Roy Chowdhry, 22 Suth. W. R., 39, L. S. Jackson and McDonell, JJ.; Sreemunto Hajraj *v.* Syud Tajooddeen, 21 *ib.*, 409, Markby and Mitter, JJ.

(*e*) Jaggabandhu Bose *v.* S. M. Sachyi Bibi, 8 B. L. R., Apx., 39, E. Jackson and Mookerjee, JJ.; and see Goorodoss Roy *v.* Sona Monee Dossia, 20 *ib.*, 345.

(*f*) Monohur Khan *v.* Troylucknath Ghose, 4 Suth. W. R., 35, Sumbhoonath Pundit and Campbell, JJ.

(*g*) Rutnessar Koondoo *v.* Majeda Bebee, 7 Suth. W. R., 252, Norman and Seton-Karr, JJ.

(*h*) Radhanath Bannerjee *v.* Jodonath Singh, 7 Suth. W. R., 441, L. S. Jackson and Markby, JJ.

(*i*) Venkatanaru *v.* Akkamma, 3 Mad. H. C. Rep., 139, Holloway and Innes, JJ. See also Kalee Mohun Paul *v.* Bholanath Chakladar, 7 Suth. W. R., 138, Bayley and Sumbhoonath Pundit, JJ.; Jaggabandhu Bose *v.* S. M. Sachyi Bibi, 8 B. L. R., Apx., 39, L. S. Jackson and Mookerjee, JJ.

debtor to be owner of the property, and he caused it to be sold, and bought it himself. The assignee of the other judgment-creditor thereupon sued the first judgment-creditor, and sought to establish a prior encumbrance in his own favor on the property. It was held that his suit was not barred (*a*). Certain property having been mortgaged by B. D. to L., the mortgagee obtained a decree for its sale, had it sold in execution, and purchased it himself subject to any right which certain parties (B. and G.) who had objected under Act VIII of 1859, s. 246, might be able to establish. After this L. sold the property to plaintiff, who, not being able to get possession, brought a suit against defendants in whose hands some or all of the property seemed to be, and who set up that they had purchased it from B., G., and B. D. It was held that the suit was not barred, on the ground that it had not been instituted within twelve months of the date when the objections of B. and G. were allowed (*b*). Where A. made a claim which was rejected, and then sued to establish his right, making three persons, one of whom was not a party to the claim, defendants, it was held that, as regarded that person who alone appealed against the decision, the plaintiff was not prevented from suing after the lapse of one year (*c*). And where A. and B. both made claim, and A.'s claim was rejected and B.'s allowed, it was held that A. could sue B. for the recovery of the property, and was not subject to the shorter term of limitation (*d*). Where A., on behalf of a minor, but without being properly appointed his guardian, or having permission to sue under s. 3 of Act XI of 1858, made a claim on the minor's behalf, which was rejected, the minor was held not to be tied to the shorter period of limitation in bringing his subsequent suit (*e*). A Small Cause Court made a decree which it had no jurisdiction to make, and land was sold in execution. To this land the plaintiff preferred a claim, which was registered and

(*a*) Chintamoni Sen *v.* Iswar Chandra, 3 B. L. R, Apx., 122, L. S. Jackson and Markby, JJ.

(*b*) Kamessur Pershad *v.* Kadir Khan, 20 Suth. W. R., 393, Phear and Morris, JJ.

(*c*) Syud Ally Hossein *v.* Syud Enayet Hossein, 4 Wym., 201, Loch and Dwarkanath Mitter, JJ. There is clearly a misprint in the report. For "against this decree *an* appeal, &c.," should be read "against this decree *no* appeal."

(*d*) Dugaram Roy *v.* Raja Narsing Deb, 2 B. L. R., 254. See also Raja Bishen Perkash Narain Singh *v.* Baboon Misser, 8 Suth. W. R., 73; Bhyrub Lall Bhukut *v.* Meer Abdool Hossein, *ib.*, 93.

(*e*) Sreenath Koondoo *v.* Haree Narain Mudduck, 7 Suth. W. R., 399, Kemp and Markby, JJ.

heard under s. 246 of Act VIII of 1859. It was held, that as the case was founded on a decree passed without jurisdiction, the plaintiff was not restricted in his subsequent suit to the terms of limitation prescribed (*a*).

The words "suit to establish his right" in this section mean a suit to establish his right to present possession; but where there is a subsisting right, which is contradicted by the summary order under that section, and which is to be properly asserted by such a suit, the suit by the person dispossessed or refused possession to establish his right must be brought within one year from the date of the order, failing which he cannot sue afterwards on any portion of such right. It is otherwise where his right is consistent with the order and the possession given under it (*b*).

Suits to "establish a right" must be in respect of rights still existing, not for prospective or past rights or for compensation for the injury sustained, nor necessarily for possession (*c*). But where the plaintiff, after making an unsuccessful claim, seeks to get possession or damages, not having brought a suit and established his right within the year, and not having, where he seeks damages, obtained possession, it would appear that he would be barred by limitation if his suit for possession or damages were not brought within that period, for the establishment of his right is a necessary part of his suit for possession or damages; and he could not avoid the Limitation Act by joining a claim which is barred to a claim which is not barred.

Where, under s. 246 of Act VIII of 1859, a claim was made to attached property, and the attachment was thereupon released, and the attaching creditor then brought his suit within the year, and established his right to attach the property,—it was held by Couch, C. J., and Ainslie, J., that the effect of this decree was not to revive the attachment merely, but to set aside the order of release which had been made, and to make the property still subject to the attachment and restore the state of things that had been disturbed by the order of release (*d*). A

(*a*) Lala Gundar Lal *v.* Habibannissa, 7 B. L. R., 235, Ainslie and Paul, JJ.

(*b*) Rango Vithal *v.* Rikhivadas bin Rayachand, 11 Bom. H. C., 174, West and Nánábhai Haridas, JJ.

(*c*) Amjad Ali *v.* Kunku Shaw, 6 B. L. R., Apx., 28, Bayley and Markby, JJ.

(*d*) Mahomed Warris *v.* Pitambur Sen, 21 Suth. W. R., 435. See also Bank of Hindustan *v.* Premchand Raichand, 5 Bom. H. C. Rep., O. J., 93, *per* Sargent, J., p. 96.

question will arise whether an alienation by the judgment-debtor when the attachment was withdrawn is good, or whether it is avoided by the subsequent imposition of the attachment. It would seem to follow from the above decision that the purchaser would be considered at any rate to have purchased *pendente lite*, and although the alienation may not be held to be void within the term of s. 276, it might be considered to be subject to the rights of the attaching creditor. It was stated by Phear, J., that "it has "been held more than once that an order for sale of a judgment-"debtor's goods, made to enforce execution of a decree, whatever its "shape, and whether preceded by actual attachment or not, has the "effect of binding the debtor's property as against any alienations "which the debtor himself may make after its date. The proceed-"ings in execution taken for the purpose of effecting a sale are in "a sense proceedings in the suit against property, and all persons "who purchase from the judgment-debtor pending those proceed-"ings, come into the position of purchasers *pendente lite*" (*a*).

A person whose property is wrongly attached may have a remedy in damages against the attaching creditor. Every person who directs, orders, or procures the commission of a trespass is liable as a wrong-doer and trespasser. If a decree-holder, having obtained a warrant authorizing the attachment of the goods of A., points out to the officer of the Court and causes him to attach goods belonging to B. as the goods of A., the decree-holder is a wrong-doer, and cannot in any way justify his proceedings under the warrant, even although he act innocently or mistakenly (*b*). In the first of these cases, in execution of a decree against his judgment-debtor, the defendant caused the cattle of the plaintiff, a stranger, to be seized and taken; it was held that the defendant was liable to the plaintiff for the damages sustained by him in consequence of the seizure and detention of the cattle. The seizure was the act of the party, not of the Court.

The party is liable for his own acts, but he is not liable for the acts of the Court which he sets in motion, unless he put it in motion maliciously and without reasonable cause. Thus, in another case, cattle were attached and sold which were the

(*a*) Bhuggobutty Dossee *v.* Shamachurn Bose, I. L. R., 1 Cal., 337, see p. 341.

(*b*) Musst. Subjan Bibi *v.* Sheikh Sariatulla, 3 B. L. R., A. C., 413, Norman and E. Jackson, JJ.; and see Inder Chand Dogare *v.* Nundeeram Sing, 1 Coryton, 3; Kanai Prasad Bose *v.* Hirachand Manu, 5 B. L. R., Apx., 71.

joint property of the judgment-debtor and a third person, and it was held that the third person could not sue the judgment-debtor for damages (*a*); and where an execution creditor, in good faith, attached a decree obtained by his judgment-debtor in ignorance that the judgment-debtor had transferred the decree to a third person, it was held that he was not liable in damages at the suit of the purchaser (*b*). And the judgment-creditor is not liable for damages to property attached and in the hands of the officer of the Court, who is not his servant (*c*).

Power to order property attached to be sold, and proceeds be paid to person entitled.

284. (S.) Any Court may order that any property which has been attached, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

The provisions of this section, so far as they relate to moveable property, extend to Mofussil Courts of Small Causes.

This section is new. The proviso at the end of s. 245, directs that the value of the property attached shall as nearly as may be correspond with the amount for which the decree has been made. This section further protects the property of the judgment-debtor from unnecessary sale.

Property attached in execution of decrees of several Courts.

285. (S.) Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

This section, which is new, and the following sections up to and including s. 293, so far as they relate to re-sales under s. 297, extend to Mofussil Courts of Small Causes.

(*a*) Rajbullub Gope *v.* Issur Chunder Hazrah, 3 Wym., 238, Peacock, C. J., and L S. Jackson, J.

(*b*) Joykalee Dassee *v.* Representative of Chandmallah, 5 Wym., S C. C. Ref., 3, Peacock, C. J., and Hobhouse, J.

(*c*) Doolar Chand Sahoo *v.* Ram Sahoy Bhuggut, 24 Suth. W. R, 139.

G—Of Sale and Delivery of Property.

(a) General Rules.

Sales by whom conducted and how made.

286. (S.) Sales in execution of decrees shall be conducted by an officer of the Court or by any other person whom the Court may appoint, and, except as provided in section 296, shall be made by public auction in manner hereinafter mentioned.

This corresponds with the first paragraph of s. 248 of Act VIII of 1859, the exception being added. Section 296 relates to sales by brokers of negotiable instruments and shares.

Proclamation of sales by public auction.

287. (S.) When any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall state the time and place of sale; and shall specify as fairly and accurately as possible—

(*a*) the property to be sold ;

(*b*) the revenue assessed upon the estate or part of the estate, when the property to be sold is an interest in an estate or a part of an estate paying revenue to Government ;

(*c*) any incumbrance to which the property is liable ;

(*d*) the amount for the recovery of which the sale is ordered ; and

(*e*) every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property.

For the purpose of ascertaining the matters so to be specified, the Court may summon any person whom it thinks necessary, and examine him in respect to any such matters, and require him to produce any document in his possession or power relating thereto.

Rules to be made by High Court.

The High Court shall, as soon as may be after this Code comes into force, make rules for the guidance of the Courts in exercise

of their duties under this section. The High Court may from time to time alter any rules so made. All such rules shall be published in the local official Gazette, and shall thereupon have the force of law. As regards his own Court and the Court of Small Causes at Rangoon, the Recorder of Rangoon shall be deemed to be a 'High Court' within the meaning of this paragraph.

Nothing in this section shall apply to cases in which the execution of the decree has been transferred to the Collector.

This section corresponds with the first paragraph of s. 249 of Act VIII of 1859. But paragraph (c) and the provisions after paragraph (e) are new, and are substituted for "together with any other particulars that the Court may think necessary;" and the proclamation is now to be made in the language of the Court, not necessarily in the current language of the district, for the Local Government may, from time to time, declare what language shall be the language of any Court subordinate to a High Court (s. 641, *post*). A mis-statement in the proclamation of sale has been held to be an irregularity which, on proof of substantial damage, warrants the Court in setting aside a sale made in pursuance of the execution (L. R., 3 I. A., 230); that was the case under the Act of 1859, which required the "right, title, and interest" of the judgment-debtor to be advertized. The question will arise whether a proclamation which omits to state that there is an encumbrance of which the Court had no notice will have the same effect. The Court may, however, summon the decree-holder, and examine him under s. 267, *ante*, in which case *he* could not object that he has been damaged by his property selling for an inadequate price, if it has been advertized as subject to an encumbrance which he had disclosed. The Court is to enquire into the incumbrances on the property, and is not to advertize the "right, title, and interest" of the judgment-debtor, as was prescribed by the above named section, although the "right, title, and interest" was not to be attached, but the specific property. This section proceeds on the assumption of the property to be sold being already attached (*a*); although there is to be an enquiry as to incumbrances, nothing but the right, title, and interest of the judgment-debtor of course can be sold;

(*a*) Denonath Ruckit *v.* Mutty Lall Paul, 1 Hyde, 158, Wells, J.

nor can any order or declaration upon the enquiry affect any person who is not a party to it. This is apparent from a consideration of s. 315, *post*, which enables the purchaser to recover his purchase-money if the property sold, being land, does not belong to the execution-debtor, and the sale is consequently set aside. Where the judgment-debtor is only interested in the property, having an undivided share jointly with others, his undivided rights alone can be sold (*a*), and the determination of his right, &c., was, under Act VIII, left for adjudication between the purchaser and the other shareholders (*b*); and so apparently it still would be, if he does not happen to be brought in on the investigation. The lien of a mortgagee will not be extinguished by the sale of the property in execution of a decree against the mortgagor, whether or not there was any notification of the mortgage at the time of the sale (*c*). Where the encumbrance had been made by the judgment-debtor when a minor, and attained majority before the suit, and had taken no steps either to ratify or set aside his encumbrance when he came of age, his act as a minor being only voidable, but not void, the purchaser at the auction-sale was held to have taken the minor's rights subject to the mortgage, and that he could not sue to get the mortgage set aside.

Where the decree has been passed without jurisdiction, the sale in execution is a nullity (*d*), even although the decree was set aside for want of jurisdiction after the sale; but where the decree was unobjectionable at the time of sale, but was afterwards reversed or set aside, the sale continues valid (*e*).

The following rules, passed by the High Court of Judicature at Fort William in Bengal on its Original Side, were published in the Gazette of India, February 2nd, 1878—

It is ordered that the following rules be read and passed as Rules of the High Court of Judicature at Fort William in Bengal

(*a*) Mathuradas Govardhandas *v.* Fatma Ulka Begam, 5 Bom. H. C. Rep., A. C., 63, Newton and Tucker, JJ.

(*b*) Atmaram Kaliandas *v.* Fatma Begam, 5 Bom. H. C. Rep., A. C., 67, Newton and Tucker, JJ.

(*c*) Jungee Lall Mahajun *v.* Brijo Beharee Singh, 2 Suth. W. R., Mis., 21. See also Hari Ram *v.* Jitan Ram, 3 B. L. R., 426. See note to s. 254.

(*d*) Jadunath Kundu Chowdhry *v.* Braja Nath Kundu, 6 B. L. R., Apx., 90, Kemp and Paul, JJ.

(*e*) Jan Ali *v.* Jan Ali Chowdhry, 1 B. L. R., App., 56; S. C., 10 Suth. W. R., 154, Peacock, C. J., and Mitter, J.; Chunder Kant Surmah Talookdar *v.* Bissessur Surmah Chuckerbutty, 7 Suth. W. R., 312; Mackintosh *v.* Kally Doss Mullick, 11 B. L. R., 7.

in its Original Jurisdiction, to take effect from the 1st day of February, 1878:—

1st.—When any property is ordered to be sold by public auction in execution of a decree or order of the High Court, on its Original Side, the ascertainment of the matters required by s. 287 of the Civil Procedure Code to be specified in the proclamation issuing under that section shall be deemed to be a quasi-judicial act within the meaning of the 637th section of the Code; and the same shall be done by the Registrar of the Court or such other officer as shall be named in the order of sale, and the Registrar or such other officer as the case may be shall, for that purpose, have power to summon any person whom he may think necessary, and examine him in respect of any such matter, and require him to produce any document in his possession or power relating thereto.

2nd.—Every order for sale shall direct a proclamation to be made under the provisions of s. 287 of the Code of Civil Procedure.

3rd.—Unless otherwise ordered by the Court or a Judge, every proclamation of an intended sale shall be settled and approved by the Registrar or such other officer as may be named in the order for sale.

4th.—When immoveable property is under attachment in execution, the party at whose instance the same may be attached shall, before applying for an order for the sale of such property, cause search to be made in the office of the Registrar of Deeds with the object of ascertaining whether such property is subject to any and what incumbrances.

5th.—Every application for an order for the sale of property in execution, whether moveable or immoveable, shall be supported by an affidavit stating all that is known to the party at whose instance the same has been attached respecting the title to such property, and also, whenever the application is for the sale of immoveable property, stating the result of the search made with respect thereto pursuant to the last preceding rule.

Indemnity of Judges.

288. (S.) No Judge or other public officer shall be answerable for any error, mis-statement, or omission in any proclamation under section 287, unless the same has been committed or made dishonestly.

This is a new section.

289. (S.) The proclamation shall be made in manner prescribed by section 274, on the spot where the property is attached.

Mode of making proclamation.

If the Court so direct, such proclamation shall also be published in the local official Gazette and in some local newspaper, and the costs of such publication shall be deemed to be costs of the sale.

This section corresponds with paragraphs 3 and 4 of s. 249 of Act VIII of 1859, with the additional clause regarding the publication of the proclamation in the local Gazette and in some local newspaper.

290. (S.) Except in the case of property mentioned in the proviso to section 269, no sale under this chapter shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the notification has been affixed in the Court-house of the Judge ordering the sale.

Time of sale.

This section corresponds with the last paragraph of s. 249 of Act VIII of 1859. It differs, however, from that section in that it applies to sales of all property except moveable property in the possession of the judgment-debtor (other than property exempted from attachment and sale under s. 266), and which is subject to speedy and natural decay, or the expense of keeping which in custody for the fifteen days will exceed its value. Under the old law it had been considered that such articles ought not to be taken in execution (*a*).

This section also contains a new provision enabling the judgment-debtor, by his consent in writing, to dispense expressly with the rule as to the time of the sale. Without such consent the sale at an earlier date is irregular. If the consent is to a postponement for a definite period, no fresh notice is necessary (*b*); but if it is for an indefinite period, a fresh notice is necessary (*c*).

(*a*) Sadáshiv Morishvar *v.* Hansovin Sharvan, 5 Bom. H. C. Rep., A. C., 156, Couch, C. J., Newton and Gibbs, JJ.

(*b*) Okhoy Chunder Dutt *v.* Erskine, 3 Suth. W. R., Mis., 11; Shoshee Mookhee Burmonya *v.* Dwarkanath Biswas, 6 *ib.*, Mis., 84.

(*c*) Tekait Het Narain Singh *v.* Gossain Luchmee Narain Pooree, 23 Suth. W. R., 256; Jhoomuck Chowdhry *v.* Rajah Radha Pershad Singh, 25 *ib.*, 328.

291. (S.) The officer conducting any sale under this chapter may in his discretion adjourn the sale, recording his reasons for such adjournment: Provided that when the sale is made in or within the precincts of the Court-house, no such adjournment shall be made without the leave of the Court. Every such sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to such officer, or proof is given to his satisfaction that the amount or such debt and costs has been paid into the Court that ordered the sale.

Power to adjourn sale.

Stoppage of sale on tender of debt and costs, or on proof of payment.

This is a new proviso.

It would appear that when a sale has been postponed, a fresh proclamation ought to be issued (*a*). If the sale is made after default of payment of purchase-money, this is expressly so, see s. 309, *post*.

292. (S.) No officer having any duty to perform in connection with any sale under this chapter shall either directly or indirectly bid for, acquire, or attempt to acquire, any interest in any property sold at such sale.

Officers concerned in execution-sales not to bid for or buy property sold.

This section is new.

293. (S.) The deficiency of price (if any) which may happen on a re-sale under this Code by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court by the officer holding the sale,

and shall, at the instance of either the judgment-creditor or the judgment-debtor, be recoverable from the defaulter under the rules contained in this chapter for the execution of a decree for money.

Defaulting purchaser answerable for loss by re-sale.

This section corresponds with the last paragraph of s. 254 of

(*a*) Okhoy Chunder Dutt *v.* Erskine, 3 Suth. W. R., Mis., 11; Shoshee Mookhee Burmonya *v.* Dwarkanath Biswas, 6 Suth. W. R., Mis., 84, Loch and Macpherson, JJ.

Act VIII of 1859 It enables the expenses attending the sale as well as the deficiency in price to be recovered; but the difference payable by the defaulting purchaser does not carry interest (*a*). A.'s property was sold in execution of B.'s decree to C. for more than the amount of the decree. C. made default in paying the purchase-money, and the property was put up for sale again, and other property of the judgment-debtors was also sold. The first property did not sell for the amount of the decree. It was held, by Markby, J., that the sale of the other property was quite regular (*b*). The case of *Joobraj Singh* v. *Gour Buksh Lal* (*c*) was relied on as opposed to this view, on the ground that it decided that the judgment-debtor was entitled to credit for what was bid at the first sale, and if so, he was entitled to credit for the full amount, and the judgment-creditor would have his remedy against the defaulting purchaser. In that case, no doubt, it was so held, but the judgment-creditor there was himself the defaulting purchaser.

Where an auction-purchaser refused to pay and was made liable for the deficiency, it was held that he and the decree-holder were parties to the suit within the meaning of s. 11 of Act XXIII of 1861, and that the case was appealable. This was on the ground that s. 254 of Act VIII directed, as this section does, that the deficiency be recoverable in the same manner as money due under a decree (*d*). The effect of ss. 244 and 588 of this Code appears to be to do away with an appeal in such a case, because orders under s. 244 are only appealable when they are of the same nature with appealable orders made in the course of a suit.

A default in payment of the purchase-money is not an "irregularity" under s. 311, corresponding with Act VIII of 1859, s. 256 (*e*).

Decree-holder not to bid for or buy property without permission.

294. (S.) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

(*a*) Baboo Soorj Buksh Singh *v.* Sreekissen Dass, 5 Wym., 290; S. C., 9 Suth. W. R., 500, L. S. Jackson and Mitter, JJ.

(*b*) Kheroda Mayi Dasi *v.* Golam Abardari, 13 B. L. R., 114.

(*c*) 7 Suth. W. R., 110, Loch and Macpherson, JJ.

(*d*) Baboo Soorjoo Buksh Singh *v.* Sreekissen Dass, 3 Wym. Rep., 5; S. C., 6 Suth. W. R., Mis., 126, Loch and Macpherson, JJ.

(*e*) Brinda Dabee Dossee *v.* Gopee Soonderee Dossia, 6 Suth. W. R., Mis., 82.

When a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, if he so desires, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

If decree-holder purchase, amount of decree may be taken as payment.

This section is new, but follows the decision of Norman, J., in *Bandhu Roy v. Hanuman Sing* (*a*), although the mere fact of his bidding without leave did not vitiate the sale (*b*), as it would now under this express prohibition. This clause is more particularly directed against those cases in which a mortgagee puts up the mortgaged property for sale in execution of a decree. In such a case permission to bid ought not to be given except upon terms, see note to s. 254, *ante*, and see the next section. Where the judgment-creditor had, under Mahomedan law, a right of pre-emption, and bid himself at the sale, it was held that he could not take advantage of the right of pre-emption, but must take his chance with other bidders (*c*).

295. (S.) Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons:

Proceeds of execution-sale to be divided rateably among decree-holders.

Provided that, when any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale:

Proviso where property is sold subject to mortgage.

Provided also that when any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the

(*a*) 3 B. L. R., Ap. Civ., 320.

(*b*) *In re* Verapa Chetty, 6 B. L. R., Apx, 37, Norman and Loch, JJ.

(*c*) Sheikh Nuzmoodeen *v.* Kanye Jha, Marsh., 555, Raikes and Sumbhoonath Pundit, JJ.

mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold.

If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

Nothing in this section affects any right of the Government.

This section corresponds with ss. 270 and 271 of Act VIII of 1859, but the rule as to the distribution is essentially different. Under that clause the first attaching creditor was to be paid in full, and the others rateably. Now, any decree-holder who applies to the Court by which the assets are held for execution before they are realized, is entitled to participate.

It was held that the rule as to distribution prescribed by s. 270 did not apply except where property had been *sold* in execution of a decree (*a*). This section applies to the realization by sale *or otherwise.*

If the Judge excludes a creditor in the distribution, he acts without jurisdiction, and his action can be corrected by the High Court under 24 and 25 Vict., c. 104, s. 15 (*b*), or s. 622, *post.*

In a case (*c*) where the plaintiff, a mortgagee, who had obtained a decree for the money due on his mortgage, applied for and obtained the surplus proceeds of sale after all the attaching creditor's had been satisfied, the Court (Kemp and Glover, JJ.) upheld this distribution, considering that s. 271 of Act VIII of 1859 did not apply to the case. This decision, however, conflicts with the decision of Peacock, C. J., in another case (*d*), where it was stated that the proviso "being annexed to an enactment which gives rights "to execution-creditors, must be intended to refer to a mortgagee "being an execution-creditor," hence the mortgagee, execution-creditor, is not entitled to be paid out of the surplus proceeds of sale of the mortgaged property. Where the Court had erroneously paid him, he was ordered, on appeal, to refund the money. In that case

(*a*) Bishen Chunder Surma Chowdhry *v.* Man Mohini Dabee, 8 Suth. W. R., 501.

(*b*) Maharajah of Burdwan, petitioner, 2 B. L. R., A. C., 217, Bayley and Hobhouse, JJ.

(*c*) Bolakee Lal *v.* Chowdhry Bungsee Sing, 7 Suth. W. R., 309.

(*d*) Mirza Futteh Ali *v.* Gregory, 6 Suth. W. R., Mis., 13; S. C., 2 Wym., 48.

the mortgagee was ordered to return the surplus proceeds which had been paid to him, and to proceed with the execution of his decree by the sale of his interest in the property mortgaged to him. In the meantime the money which he was ordered to refund was to remain in Court until after his execution had been executed. In the event of the sale under the execution not producing sufficient to satisfy his decree, he was to be at liberty to apply to attach the money in Court in execution for any balance which might remain unsatisfied. In case the mortgagee's execution were not executed within a month, the judgment-debtors, who were the appellants, were to be at liberty to apply to the Court of Appeal that the money refunded be paid out to them; and the Chief Justice expressed a doubt whether, if the mortgagee is satisfied out of the sale proceeds, his lien is not altogether destroyed, and thus the purchaser of the right, title, and interest of the mortgagor would get the property free of the encumbrance, which would be inequitable.

The object of this proviso is to prevent the mortgagee being paid twice, and to prevent his selling the property in execution and at the same time retaining his security. He is also, having a power of sale, a trustee for sale on account of the mortgagor, and he must sell at the best advantage for the mortgagor. See numerous cases cited by Norman, J., in the case of *Ramlochun Sirkar* v. *Srimati Kamini Debi* (*a*). The mortgagee is, therefore, in a different position from a stranger, who may attach and sell in execution an equity of redemption like any other property of the judgment-debtor (*b*); and "Courts of Equity will watch very "closely to prevent a mortgagee from making any unfair use of his "position to the prejudice of his debtor; they will not allow a person, "standing in the relation of mortgagee, to take advantage of the "necessities of the debtor to obtain any collateral advantages beyond "the payment of principal, interest, and costs. They will even let a "man loose from an express agreement made by him to render a "mortgage irredeemable," (*b*); and an injunction was granted restraining the sale. This order was appealed against, but was upheld by Sir B. Peacock, C. J., and Mr. Justice Markby (*c*). The Chief Justice, in his judgment on the case on appeal, states: "It is un-"necessary to determine whether the Court, in the exercise of a "sound discretion, would have allowed the plaintiff to sell the

(*a*) 5 B. L. R., 460 note.
(*b*) *Ibid.*
(*c*) See 10 B. L. R., 60 note.

"interest of the defendant in that decree, if there had been no mort-"gage. I think it clear that the Court ought not to allow a mere "equity of redemption in that decree to be sold. There can be no "doubt that, if that equity of redemption were exposed for sale, and "the plaintiff were to give notice in the auction-room of his mort-"gage, the equity of redemption would sell for nothing; and the "Court ought not, in my opinion, to allow the defendant's interests "to be jeopardized by allowing the plaintiff to proceed to sell the "equity of redemption."

In an early case (*a*) Peacock, C. J., and Phear, J. (affirming the decision of Morgan, J.) had held, that a mortgagor of a ship (to which the provisions of the Merchant Shipping Act, 1854, applied) had still an interest which might be sold in execution of a decree. The attachment was made at the instance of a shipwright for money due to him for repairing the ship, and for which he had obtained a decree, and was opposed unsuccessfully by the mortgagee, who had sold under his mortgage after the seizure; the sale, however, appeared to have been a colorable transaction to defeat the execution-creditor, and money that had been paid into Court by the mortgagee was ordered to be paid to the execution-creditor, such money being considered by both parties an equivalent to the unencumbered rights of the mortgagor. In the case of *Brajanath Kundu Chowdhry* v. *S. M. Gobindmani Dasi* (*b*), Phear, J., after consulting with Macpherson, J., expressed an opinion, without, however, deciding the point, that an equity of redemption could not be sold in execution of a decree for money, and said that Norman, J., had decided in the same manner (*c*) referring to a case (*d*) in which Wells, J., had held, that an equity of redemption might be sold by the sheriff under Act VI of 1865, which decision, however, Norman, J., said, had been overruled. This observation applied, however, it would seem, to an attachment and sale by the mortgagee, as he afterwards stated, that a stranger might attach and sell an equity of redemption. In one case (*e*), Markby, J., said, that he fully concurred in the doubt, and surrendered it on the words of s. 271, similar to those which occur in this section, depriving the mortgagee of any portion of the surplus. But for these words he

(*a*) Auhim *v.* Ahmed Mahomed, I In. Jur., N. S., 241.

(*b*) 4 B. L. R., O. C., 83.

(*c*) See Ramlochun Sirkar *v.* Kamini Debi, 5 B. L. R., 460 note.

(*d*) Toyluck Mohun Tagore *v.* Gobind Chunder Sen, 1 Hyde, 289.

(*e*) Abbott *v.* Abbott and Crump, 5 B. L. R., 385.

would have been inclined to hold that an equity of redemption was not liable to attachment; and in another (*a*) he granted an attachment after consulting with Phear, J.; the attaching creditor was a stranger, not the mortgagee, and he was required to put in an affidavit as to the value of the equity of redemption. In *Kamini Debi* v. *Ramlochun Sircar* (*b*) Macpherson, J., expressed the same doubt. "Without saying that an equity of "redemption can never be seized and sold, I have no doubt that a "mortgagee cannot properly, in execution of a simple decree for a "sum of money, attach and sell the mortgagor's equity of redemp-"tion in the property mortgaged; and that a mortgagee who attaches "and sells his mortgagor's equity of redemption, and purchases it "(directly or indirectly) himself, is a trustee for the mortgagor, and "cannot acquire an irredeemable title against him."

"It is true that the Court of Chancery will not, as a rule, "prevent a mortgagee from pursuing all his remedies at once. But "in England an equity of redemption cannot be seized and sold, and "the collateral remedies open to the mortgagee can only be proceed-"ings against securities, or against the persons, or against the proper-"ty other than the equity of redemption of the mortgagor. The "fact, therefore, that, according to English law, all the remedies may "be pursued at once does not show that, if there were in England "a general power of attaching and selling an equity of redemption, "such as there is in this country, a mortgagee could, in the exercise "of that power, sell and purchase his mortgagor's equity of redemp-"tion. On the contrary, the whole tendency of the English law "is against such an inference. It is undoubted law that, when a "mortgagee has a power of sale, if he sells in exercise of that power, "he cannot himself purchase,—that is to say, if he does purchase, he "will be declared to be merely a trustee for the mortgagor. The "mortgagee who sells (except where in judicial sales he obtains "leave to bid as his trustee), is not allowed to purchase the mort-"gaged estate (*c*). . . . I have myself repeatedly refused to permit "a mortgagee to sell the equity of redemption of his mortgagor in "satisfaction of a simple money-decree for the amount secured by "his mortgage; and I have seen, on the Appellate Side, very striking "practical examples of the evil consequences of allowing such sales.

(*a*) Saraswate Debi *v.* Nabadwip Chandra Gosain, 5 B. L. R., 380.

(*b*) 5 B. L. R., 450, at p. 458.

(*c*) Downes *v.* Grazebrook, 3 Mer., 200.

"It is, in fact, a not uncommon trick to deprive the mortgagor of "his property through the means of such sales. No one will ever "give a fair price for an equity of redemption, when the mortgagee "is present himself as a bidder and giving notice of his claims as a "mortgagee. The equity of redemption in such a case is knocked "down to the mortgagee for a small sum, which is carried to the "mortgagor's account, in part satisfaction of the decree, and the "property vests absolutely in the mortgagee, who then, at his "leisure, proceeds to further execution of his decree, in order to "realize the balance due under it."

"One view of the matter is, that when the mortgagee pur-"chases, the mortgage debt is satisfied. But I think that the more "correct view is, that the mortgagee purchasing is a trustee for the "mortgagor, who still has a right to redeem."

Where the mortgagee puts the property up to sale under a decree for sale upon his mortgage security, and not upon a mere money-decree, the purchaser buys the rights of the debtor and also what the mortgagee brings to sale in execution of his decree (*a*); and if another judgment-creditor attached the property, he would do so subject to the prior encumbrance, if he had a money-decree (*b*), for if the mortgagee obtained a decree ordering the sale of the property in satisfaction of his mortgage, the question would not be who attached first, but whose encumbrance had priority (*c*).

In the case of *Neerunjun Mookerjee* v. *Oopendro Narain Deb* (*d*), the plaintiff had sued on his mortgage, praying, in default of payment of the money secured thereby, for a foreclosure and sale of the mortgaged premises. Believing, however, that the defendant was possessed of other property which he could immediately attach and thereby obtain satisfaction of his debt, he elected to take a simple money-decree, which was drawn up as follows: After decreeing the amount with interest and costs, it was ordered "that execution of this decree do not issue until the "mortgage deed in the plaint mentioned is brought into Court. "(*Note.*—The equity of redemption in the property comprised in the

(*a*) Proladh Misser *v.* Oodit Narain Singh, 10 Suth W. R., 291, Peacock, C.J., and Mitter, J.; see also the note to s. 254, *ante*, pp. 357—368.

(*b*) Musst. Moona *v.* Chand Monee Gossain, 7 Suth. W. R., 206; Sheo Prosun Singh *v.* Brojoo Sahoo, *ib.*, 232; Achumbit Thakoor *v.* Choonee Lall Chowdhry, 10 *ib.*, 27.

(*c*) Proladh Misser *v.* Oodit Narain Singh, *ante*.

(*d*) 10 B. L. R., 57.

"mortgage is not liable to attachment and sale under this de-
"cree)." The plaintiff having failed to realize the debt by execution against other property, applied to the Court for leave to have the mortgaged property sold by the Court, and that further directions might be given for that purpose. He was directed to give notice to the other side, and to renew his application, which, after argument, was ultimately dismissed. He then took further steps to execute his money-decree, and having failed in them presented a fresh plaint on his mortgage, praying for an account and foreclosure. This plaint was rejected, on the ground that the claim had been already adjudicated, and from this decision the plaintiff appealed. The appeal was, however, ordered to stand over in order that the plaintiff might apply for special leave to attach the mortgaged property on notice to the defendant. This he accordingly did, and an order for sale of the equity of redemption upon terms was made, the plaintiff being permitted to bid at the sale; the note in the original decree being treated as merely a direction and guide to the Court, and not as absolutely prohibitory.

The proviso is intended to apply to a case where the property is sold subject to a mortgage, and where the transaction is such that the purchaser is buying the equity of redemption which remains in the judgment-debtor, and if the mortgagee elects to waive his rights as mortgagee and obtains a simple decree for the money due to him, he may get a share of the surplus proceeds under this section notwithstanding this proviso (*a*). The report of this case appears as a note to a case (*b*) decided by Couch, C. J.. and Pontifex, J., on appeal from the judgment of Macpherson, J., The plaintiffs in that case had, on July 29th, 1872, obtained a decree against N., the drawer, and A. the acceptor, of a bill of exchange. Before decree, but after suit, A. deposited with the plaintiffs, as security for what was due on the bill, the title-deeds of certain property which belonged to himself (A.) and N. jointly. On 31st July, 1872, S., in execution of a decree against A. and N., attached this mortgaged property as well as other properties of A. and N. On the 9th August the plaintiffs (the Bank) also attached the mortgaged properties and other properties of A. and N. under their decree on the bill of exchange of the 29th July.

(*a*) *Per* Couch, C. J., and Hobhouse, J., in Sheikh Fakeer Bux *v.* Chutturdaree Chowdry, 12 B. L. R., 513 note; see also Purmessuree Dossee *v.* Nobin Chunder Tarun, 24 Suth. W. R, 305, Markby and Morris, JJ.

(*b*) The Bank of Bengal *v.* Nundolall Dass, 12 B. L. R., 509.

On September 3rd, N. ratified the equitable mortgage made to the Bank by A. In December, S. caused the properties he had attached to be sold, and the surplus proceeds, after satisfying his decree, amounting to Rs. 2,679-3-5, were paid into Court to the credit of his suit. Before the sale the Bank gave notice of the equitable mortgage to the sheriff, and it was stated, but denied by the Bank, and not proved, that this notice was read aloud at the sale. On 14th January, 1873, the Bank sued N., A., and the purchasers of the mortgaged property at the sheriff's sale for foreclosure or sale thereof, and on the 14th May obtained a decree, which declared that the Bank had a good equitable mortgage of A.'s share of the property, and for an account and sale in default of payment. On 26th May the Bank got an *ex parte* order in its suit on the bill of exchange for payment to it out of Court of the Rs. 2,679-3-5, which had been lodged to the credit of the suit of S., and for the sale of certain of the properties attached by it on the 9th August other than the mortgaged property. The money was paid to the Bank, and the property was advertized for sale. Thereupon, and before the decree in the mortgage suit had been drawn up, A. applied for an order directing the Bank to repay the money into Court, and restraining it from selling the property which had been advertized for sale. This application was opposed by the Bank, but was granted on the 26th August, 1872, by Macpherson, J., on the ground that as the practice of the High Court in its Original Side was similar to that laid down by s. 271, the Bank should show, before asking that the money should be paid to it, that it was not money produced by the sale of the mortgage premises. This order was set aside on appeal. Couch, C. J., who delivered the judgment of the Court, stated, that if the Bank, instead of applying for the order it had applied for on the 26th of May, 1873, had attached the surplus which was in Court, its proceedings would have been quite regular. The equity of redemption having been sold in execution of decree obtained by other persons, the Bank might execute its decree on the surplus remaining after satisfying those decrees, that being the property of the defendants in the suit on the bill of exchange, but the Bank was put upon terms, namely, if it received the mortgage money and interest from the defendants in the foreclosure suit, it was to pay the money into Court, and it was also to pay the money it might receive in respect of the attachment of the unencumbered property, and this was to be done whether the

money was received by actual sale of the properties or by payment of the judgment-debtor. The money was then to be dealt with according to the respective rights of the Bank, A., and N.

A., in execution of his decree, attached and sold the property of B., and C., at the sale in execution, bought the right, title, and interest of B. D., to whom the property had been mortgaged, sued B. for the mortgage money, and got a simple decree for the money. Under these circumstances it was held that D. could not attach the property in C.'s possession in execution of his money-decree, but should bring a fresh suit to enforce his lien upon the property (*a*). Here, all that D. was entitled to attach was some property belonging to B., his judgment-debtor; but B. had no interest in the property in question; it had been sold to C.; and the plaintiff D. could not attach C.'s property in execution of a decree against B. But D. still held his security as mortgagee, and might enforce them in proceedings independent of his claim and suit against B. Following a previous decision (*b*), it was held that the words "subject to a mortgage" in Act VIII of 1859, s. 271, must be taken to mean "sold with notice of the mortgage," and do not refer merely to properties the subject of an undischarged mortgage which are sold in execution (*c*).

(*b*).—*Rules as to Moveable Property.*

Rules as to negotiable securities and shares in public Companies.

296. (S) If the property to be sold be a negotiable instrument or a share in any public Company or Corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker at the market-rate of the day.

This corresponds with Act VIII of 1859, s. 248.

See *post*, ss. 301 and 302, as to the transfer of shares sold in execution.

Payment for moveable property sold.

297. (S.) In the case of other moveable property, the price of each lot shall be paid for at the time of sale, or as soon after as the

(*a*) Goluck Monee Debia *v.* Ram Soondur Chuckerbutty, 9 Suth. W. R., 82, Loch and Mitter, JJ.

(*b*) Fukeer Buksh *v.* Chutturdharee Chowdhry, 14 Suth. W. R., 209; 12 B. L. R., 513 note, Couch, C. J., and Hobhouse J.

(*c*) Joy Chunder Ghose *v.* Ram Narain Poddar, 21 Suth. W. R., 43, Kemp and Ainslie, JJ.

officer holding the sale directs, and in default of payment, the property shall forthwith be again put up and sold.

On payment of the purchase-money, the officer holding the sale shall grant a receipt for the same, and the sale shall become absolute.

This corresponds with Act VIII of 1859, s. 251.

Irregularity not to vitiate sale of moveable property, but any person injured may sue.

298. (S.) No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such other person be the purchaser) for the recovery of the specific property, and for compensation in default of such recovery.

This corresponds with Act VIII of 1859, s. 252; but in addition gives to the person sustaining an injury by the irregularity power to sue the purchaser in the alternative for the specific property or for compensation. A. obtained a decree in the lower Court, which was set aside on appeal, and on appeal to the Sudder Court there was a remand to and re-trial by the District Court who confirmed the decree of the lower Court. Another appeal and the same proceeding over again. A. executed his decree by sale of the judgment-debtor's property, but in framing his application he named the wrong decree in point of date. The judgment-debtor could not show that he was prejudiced by this, but sued the purchaser in execution, seeking to set aside the sale for irregularity. It was held that he could not maintain his suit (*a*).

If A.'s property is sold in execution of a decree against B. and possession is given to the purchaser, A. can of course sue the purchaser to recover it, or for compensation if it cannot be returned; but such a sale is not an "irregularity" within the meaning of this section. This suit is maintainable irrespective of this clause (*b*).

(*a*) Ghazi *v.* Kadir Baksh: I. L. R., 1 All., 212, F. B.

(*b*) Mohanund Haldar *v.* Akial Mehaldar, 5 Wym. S. C. Ref., 2, Peacock, C. J., and Hobhouse, J.; S. C., 9 Suth. W. R., 118.

Delivery of moveable property belonging to defendant actually seized.

299. (S.) When the property sold is a negotiable instrument or other moveable property of which actual seizure has been made, the property shall be delivered to the purchaser.

See Act VIII of 1859, ss. 261 and 266.

Delivery of moveable property to which judgment-debtor is entitled subject to lien.

300. (S.) When the property sold is any moveable property to which the judgment-debtor is entitled subject to the possession of some other person, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

See Act VIII of 1859, s. 262.

Delivery of debts and of shares in public Companies.

301. (S.) When the property sold is a debt not secured by a negotiable instrument, or is a share in any public Company, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except to purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the Manager, Secretary or other proper officer of the Company from permitting any such transfer or making any such payment to any person except the purchaser.

This corresponds with Act VIII of 1859, s. 265.

Transfer of negotiable instruments and shares.

302. (S.) If the endorsement or conveyance of the party in whose name a negotiable instrument or a share in any public Company is standing, is required to transfer such instrument or share, the Judge may endorse the instru-

ment or the certificate of the share, or may execute such other document as may be necessary.

The endorsement or execution shall be in the following form or to the like effect:—"*A. B.* by *C. D.*, Judge of the Court of (*or as the case may be*); in a suit by *E. F.* against *A. B.*"

Until the transfer of such instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon, and to sign a receipt for the same; and any endorsement made or document executed or receipt signed as aforesaid shall be as valid and effectual for all purposes as if the same had been made or executed or signed by the party himself.

This section corresponds with s. 267 of Act VIII of 1859; and it appears that the company must register the transfer notwithstanding that, by the deed of settlement, the directors may have an option of approval or disapproval of intending shareholders (*a*).

Vesting order in case of other property.

303. (S.) In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.

This is new.

(*c.*)—*Rules as to Immoveable Property.*

Sales of land by Court not inferior to a District Court.

304. Sales of immoveable property in execution of a decree may be ordered by any Court other than a Court of Small Causes.

This is new in terms, but the Small Cause Courts could not, under Act XI of 1865, sell immoveable property in execution of their decree. Where landed property—a whole and undivided estate—was situated partly in the jurisdiction of one Court and partly in the jurisdiction of another, it was held that the whole might be sold in execution by one of the Courts (*b*). This

(*a*) R v. E I. R Co., 1 In. Jur, N. S, 258.

(*b*) Kally Prosono Bose v. Dinonath Mullick, 11 B. L R, 56, Couch, C. J., L. S Jackson and Mitter, JJ.

seems to conflict with a case (*a*) decided by Wells, J., also with the opinions of Phear, J., in another case (*b*). The sale of a decree charging land for its satisfaction in the course of execution-proceedings against a judgment-creditor is a sale of an interest in immoveable property, and therefore the provisions of the Code relating to sales of immoveable property will apply to such a sale (*c*).

Postponement of sale of land to enable defendant to raise amount of decree.

305. When an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by mortgage or lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment-debtor, the Court may on his application postpone the sale of property comprised in the order for sale for such period as it thinks proper, to enable him to raise the amount.

Certificate to judgment-debtor.

In such case the Court shall grant a certificate to the judgment-debtor authorizing him, within a period to be mentioned therein, to make the proposed mortgage, lease or sale: provided that all moneys payable under such mortgage, lease or sale, shall be paid into Court and not to the judgment-debtor.

Where such certificate has been granted, and so long as it remains in force, the provisions of section 248 shall not apply.

This corresponds with the 2nd paragraph of s. 243 of Act VIII of 1859; the second and third paragraphs being added.

The Court has a discretion as to the appointment of a manager (*d*). It should do so when the property to be realized is a decree (*e*). The Court should not appoint a manager for an indefinite period, the decree should be realized within a reasonable

(*a*) Sagore Dutt *v.* Ram Chunder Mitter, 1 Hyde, 136.

(*b*) Balaram Mullick *v.* Solano, 8 B. L. R., 335.

(*c*) Musst. Bhawani Kuar *v.* Golab Raj, I. L R., 1 All., 343, Stuart, C. J., and Oldfield, J.

(*d*) Brojender Narain Roy *v.* Kassessur Roy, 1 Suth. W. R., Mis., 15, Loch and Seton-Karr, JJ.

(*e*) Ramchunder Roy *v.* Ramchurn Bukshee, 9 Suth. W. R., 372, Phear and Bayley, JJ.

time (*a*); but ss. 320, 321 and 322, *post*, give the Local Government very considerable power in this respect.

A manager appointed under this section, so far as he is an officer of the Court, is at most the hand of the Court for the purpose of gathering in, on behalf of the judgment-debtor, the moneys due to him in order that they may be immediately applied to the satisfaction of the decree. If he does more than this, and deals with the subject of the property itself, he must do so as the agent of the judgment-debtor, and not properly as an officer of the Court (*b*).

Where attached property is mortgaged by the judgment-debtor with the consent of all parties concerned, yet so as to leave some proprietary interest in the judgment-debtor, any judgment-creditor coming after the appointment of the manager and the making of the mortgage has a right, notwithstanding, to attach and sell what remains of the judgment-debtor's interest in the property, and an application for such second attachment cannot properly be refused by a Court on the ground of the property being under the management of the District Court pursuant to this section, even if the Judge's precept forbids such attachment (*c*).

The appointment of a manager proving to be useless as regards execution, and the case not proceeding under his management, the Court can order execution to proceed in some other way (*d*).

Deposit by purchaser of immoveable property.

306. On every sale of immoveable property under this chapter, the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per centum on the amount of his purchase-money to the officer conducting the sale, and, in default of such deposit, the property shall forthwith be put up again and sold.

This corresponds with Act VIII of 1859, s. 253.

If the purchaser does not make the required deposit, and the property is in consequence put up again and sold at a loss, he is responsible, and may be sued for the difference (*e*).

(*a*) Rednum Atchutaramayya *v.* Kajah Mahomed Aminkhan, 5 Mad. H. C. Rep., 272, Scotland, C. J., and Collett, J.

(*b*) Tiel *v.* Abdool Hye, 19 Suth. W. R., 37, Phear and Ainslie, JJ.

(*c*) *Ibid.*

(*d*) Baboo Doorga Dutt Singh *v.* Baboo Bunwaree Lal Sahoo, 25 Suth. W. R., 33.

(*e*) Sree Narain Mitter *v.* Maharajah Mahtab Chund Bahadoor, 3 Suth. W. R., 3, Morgan and Sumbhoonath Pundit, JJ.

Time for payment in full.

307. The full amount of purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of property, exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day.

This corresponds with the first part of s. 254 of Act VIII of 1859.

Procedure in default of payment.

308. In default of payment within the period mentioned in the last preceding section, the deposit, after defraying the expenses of the sale, shall be forfeited to Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

This corresponds with Act VIII of 1859, s. 254, second part.

The defaulting purchaser is liable to the decree-holder for the difference between his bid and the amount for which the property is re-sold (*a*). The judgment-debtor is entitled to credit for the full amount bid for his property at the time of the first sale, and if he pay up any balance due to the decree-holder in excess of the sum so bid, he must be considered as having liquidated his debt and cannot be held responsible for any further sum. The difference between the first and second sale must be realized, not from the judgment-debtor, but from the defaulting purchaser (*b*); if the defaulting purchaser is a man of straw, the judgment-creditor must lose his money, and the deposited moneygoes into the Government treasury.

Notification on re-sale of immoveable property.

309. Every re-sale of immoveable property in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh notification in the manner and for the period hereinbefore prescribed for the sale.

This section corresponds with Act VIII of 1859, s. 255.

(*a*) Baboo Soorjo Buksh Singh *v.* Sreekishen Dass. 3 Wym., 5; S. C., 6 Suth. W. R., Mis., 126, Loch and Macpherson, JJ.

(*b*) Joobraj Singh *v.* Gour Buksh Lal, 7 Suth. W. R., 110, Loch and Macpherson, JJ.

Co-sharer of a share of undivided estate sold in execution to have preference in bidding.

310. When the property sold in execution of a decree is a share of undivided immoveable property, and two or more persons, of whom one is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer.

The corresponding section (Act XXIII of 1861, s. 14) of the old Code gave a co-sharer in a putteedaree estate paying revenue to Government as defined in Act II of 1841, not being the judgment-debtor, a right of pre-emption; he might come in after the property had been knocked down to a stranger and claim it at the price he bid, provided he made the claim on the day of sale and fulfilled the conditions of the sale. This section enables any co-sharer to bid, and gives him a preference over another bidder to an equal amount.

Sale of land not set aside on ground of irregularity unless in case of substantial injury.

311. The decree-holder or any person whose immoveable property has been sold under this chapter may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it;

but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.

This corresponds with the second part of s. 256 of Act VIII of 1859. The time limited for the application is now regulated by the Limitation Act XV of 1877, 2nd sched., 3rd div., No. 166, and is thirty days from the date of sale (*a*); if the application is made after time, it must be rejected (*b*). The application may now be made by the decree-holder or any person whose immoveable property has been sold, &c.; the old Code had been held to apply only to the judgment-debtor, it does not apply to third persons such as the purchasers (*c*). On the application being made, a day

(*a*) Musst. Parbutty *v.* Girdharee Lall, 6 Suth. W. R., Mis., 125.

(*b*) Ishan Chunder Dutt *v.* Mothooranauth Doss, 6 Suth. W. R., Mis., 122.

(*c*) Rai Seetaram *v.* Balkissen Tewaree, S. D. A., N. W. P., 1862, p. 377; Lutchmeeput Sing Doogur *v.* Mooktakashee Debia, 9 Suth. W. R., 388, Kemp and E. Jackson, JJ.

should be fixed for the hearing, and notices issued to all the parties (*a*).

The irregularity must have been committed in the publishing and conducting the sale, which terminates when the lot is knocked down. A delay which may occur afterwards in the payment of the purchase-money is not an irregularity that can be taken advantage of under this section (*b*). The issue of a notice of sale after the death of the original decree-holder, and before any person had applied to be registered as the substituted decree-holder, has been held not an irregularity which would warrant the setting aside of a sale under this section (*c*). The mere fact that the price realized at the sale is inadequate, there being no material irregularity in the proceedings, is not of itself sufficient to warrant the Court in setting aside the sale (*d*). In order to make out a case, which will justify the Court in setting aside a sale under the provisions of this section, the judgment-debtor must prove not only that the irregularities in the conduct of the sale of which he complains took place, but also that they were such as to lead naturally to diminution in the price given for the property (*e*).

This section does not refer to a case of fraud. In such a case a suit is the proper remedy (*f*); but where the facts connected with an execution-sale fall far short of establishing fraud, and merely amount to irregularity resulting in detriment to the judgment-debtor, his remedy lies in an application under this section to set aside the sale. Should such application fail, it is not open to him to resort to a regular suit on the same ground (*g*).

Effect of objection being disallowed and of its being allowed.

312. If no such application as is mentioned in the last preceding section be made, or if such application be made and the objection be disallowed, the Court shall pass

(*a*) *In re* Brojo Mohun Tagore, 20 Suth. W. R., 424, Phear and Morris, JJ.

(*b*) Brinda Debee Dassee *v.* Gopeesoondery Dassee, 2 Wyn., 219; S. C., 6 Suth. W. R., Mis., 82.

(*c*) Gobind Chunder Aooch *v.* Bamun Dass Mookerjee, 22 Suth. W. R., 481, Ainslie and McDonell, JJ.

(*d*) Sukhai *v.* Daryai, I. L. R., 1 All., 374, Spankie and Oldfield, JJ.

(*e*) Sheo Prokash Misser *v.* Hurdui Narain, 22 Suth. W. R., 550, Phear and Morris, JJ.

(*f*) Umbika Churn Chuckerbutty *v.* Dwarkanath Ghose, 8 Suth. W. R., 506, Kemp and Glover, JJ.; Nund Lal Doss *v.* Delawur Ali, 11 *ib.*, 244, same Judges.

(*g*) Gobind Singh *v.* Mohunt Munno Ram Doss, 19 Suth. W. R., 414, Phear and Ainslie, JJ.

an order confirming the sale as regards the parties to the suit and the purchaser.

If such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale.

No suit to set aside on the ground of such irregularity an order passed under this section shall be brought by the party against whom such order has been made.

This corresponds with Act VIII of 1859, s. 257, the words "as regards the parties to the suit and the purchaser" being added in the first paragraph. If the Court disallows the objection, it should pass an order confirming the sale and grant a certificate to the purchaser under s. 316 (*a*). Any order made under this section for confirming or setting aside a sale is appealable; see s. 588 (m), *post*.

The last paragaraph is substituted for "and the party against whom the same" (*i. e.*, an order passed on appeal from an order confirming the sale) "has been given shall be precluded from bringing a suit for establishing his claim." A suit to recover property alleged to have been sold in execution by a Court which had no jurisdiction is not barred by Act VIII, s. 257 (*b*).

Power to apply to set aside the sale.

313. The purchaser at any such sale may apply to the Court to set aside the sale, on the ground that the person whose property purported to be sold had no saleable interest therein, and the Court may make such order as it thinks fit: provided that no order to set aside a sale shall be made, unless the judgment-debtor and the decree-holder have had opportunity of being heard against such order.

This is new (*c*). Under the old Code the right, title, and interest of the judgment-debtor was proclaimed to be sold, and the purchaser took the risk. Under the present Code, s. 287, the property and its incumbrances must be advertized for sale. It may be that the Court has failed to discover some encumbrance; in that this clause enables the purchaser to apply to have the sale set

(*a*) Baboo Hurdeo Narain Sahoo *v.* Ardharee Singh, 19 Suth. W. R., 227, Kemp and Pontifex, JJ.

(*b*) Kanhaye Singh *v.* Oomadhur Bhutt, 21 Suth. W. R., 291, Phear and Morris, JJ.

(*c*) See the case of the Bank of Hindustan *v.* Premchand Raichand, 5 Bom. H. C. Rep., 83.

aside, and then under s. 315 to recover back his purchase-money, or he may apply at once under s. 315.

Confirmation of sale.

314. No sale of immoveable property shall become absolute until it has been confirmed by the Court.

This corresponds with the first paragraph of s. 256 of Act VIII of 1859. The Judge has a discretion as to confirming a sale of immoveable property, from which there is no appeal (*a*); see s. 588, *post*.

If sale set aside, price to be returned to purchaser.

315. When a sale of immoveable property is set aside under section 312 or 313,

or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it,

the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid.

The repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money.

This section corresponds with Act VIII of 1859, s. 258. There, however, the refund of the purchase-money could be claimed only, in the opinion of the High Court in Bengal, where the sale was set aside for irregularity (*b*); in the opinion of the High Court at Bombay, where set aside for any cause (*c*). Under the present law a purchaser at a sale in execution of immoveable property has been placed in a better position than a purchaser by private sale, and where the judgment-debtor had no saleable interest, the purchaser can obtain a refund of the purchase-money under this section. It does not appear, however, that any refund can be obtai-

(*a*) Doorga Churn Sircar *v.* Doorga Churn Ghosal, 11 Suth. W. R., 23, Bayley and Markby, JJ.; *In re* Kallee Mohun Sircar, 24 Suth. W. R., 311.

(*b*) Sowdamini Chowdrain *v.* Krishna Kishor Poddar, 4 B. L. R., -, 11.

(*c*) Bank of Hindustan *v.* Premchand Raichand, 5 Bom. H. C. Rep., O. J., 96, Couch, C. J.

when the debtor had some interest at the time of the sale in execution, but which interest is defeated by the happening of some subsequent event. A writ of *fi-fa* was, on the 18th of June, 1866, issued to the sheriff of Calcutta at the instance of a judgment-creditor, by which the sheriff was directed to levy the judgment-debt by seizure or sale of the property of the judgment-debtor in Bengal, Behar, and Orissa. The sheriff, purporting to execute this writ, seized and sold the property of the judgment-debtor in Lucknow, and A was the purchaser for Rs. 26,000 of the property put up for sale. Of this sum Rs. 5,000 was paid to the judgment-creditor in satisfaction of his decree, and the rest was paid to the execution-debtor. A bill of sale was executed to A. Subsequently this bill of sale was set aside by the Courts in Oudh, and rightly, for the writ did not run at Lucknow, and A. was deprived of his possession. A. sued the judgment-creditor to recover the purchase-money. It was held that he had no cause of action, (1) because there was no covenant for title in the bill of sale; (2) because there was no privity between him and the judgment-creditor, the sheriff was not his agent; and (3) because he had made some profit out of the land, and there was, therefore, no total failure of consideration (*a*).

In the case of *Ram Tuhal Singh* v. *Biseswar Lall Sahoo* (*b*), the Judicial Committee, reversing the decision of Couch, C. J., Phear and Ainslie, JJ., held, that no suit could be maintained to recover back the purchase-money, where the purchaser, with notice, bought right, title, and interest of the debtor in the property at an execution-sale, that right, &c., being subject to a contingency which eventually happened, and made the purchase worthless. In that case the estate, in which R., the appellant, was a shareholder, having been sold for arrears of revenue, the appellant's share of the surplus proceeds of sale (Rs. 35,000) lying in the collectorate, was attached and sold to the plaintiff by an execution-creditor of the appellant for 8,000 rupees, and the attaching creditor and other judgment-creditors of the appellant applied the 8,000 rupees in paying off their decrees. Before the sale to the plaintiff was confirmed, the appellant had instituted a suit to have the sale for

(*a*) Dorab Ally Khan v. Khajah Moheeooddeen, I. L R., 1 Calc., 55, Garth, C J, and Markby, J, in appeal, affirming the decision of Phear, J., dated 23rd August, 1875. See also Sowdamini Chowdhrain v. Krishna Kishor Poddar, 4 B. L R., F. B, 11, Peacock, C. J.

(*b*) 15 B. L. R., 208; S. C., L. R., 2 I. A., 131.

arrears of revenue set aside, and he succeeded in doing so, and the Collector, therefore, refused to pay the 35,000 rupees to the plaintiff, the execution-purchaser, who thereupon sued R. to recover back his purchase-money. The Court of first instance dismissed the suit, but the High Court on appeal (*a*) decreed the recovery of the amount claimed from the appellant. This decision was again reversed by Her Majesty in Council. When a sale of immoveable property is set aside, the right of the purchaser to recover his money under this section is not affected by the circumstance that he himself caused the property to be sold, unless he was guilty of fraud or misrepresention (*b*).

Certificate to purchaser of immoveable property.

Certificate to state name of actual purchaser.

316. When a sale of immoveable property has become absolute in manner aforesaid, the Court shall grant a certificate stating the name of the person who, at the time of sale, is declared to be the purchaser and the date of such sale.

This corresponds with s. 259 and the first part of s. 260 of Act VIII of 1859; but it only requires the Court to state the name of the purchaser; not as in s. 259, that the right, title, and interest of the defendant has been sold; nor is the certificate, as in that section, declared to operate as a valid transfer of such right, title, and interest. Mere inaccuracy of language or misdescription will not vitiate a certificate (*c*). Where the certificate by mistake refers to B.'s property, while the property of A. only was sold in execution, B. can proceed, under s. 335, by application within a month from the date of his dispossession (*d*), and if this application is decided against him, he may bring a suit under s. 335 to establish his right, and it must be brought within a year of the date of the order (*e*). But he is not bound to complain under s. 335, and if he does not do so, these periods of limitation do not apply to the case; he can sue at any time within twelve years from the date of the adverse possession as prescribed by Act XV of 1877, sched. ii, 1st div., No. 144 (*f*).

(*a*) 11 B. L. R., 121.

(*b*) Brojendur Roy Chowdhry *v.* Juggernath Roy, 6 Suth. W. R., 147.

(*c*) Sheikh Moula Buksh *v.* Moonshee Kuruck Lall, 7 Suth. W. R., 245, Norman and Seton-Karr, JJ.

(*d*) Act XV of 1877, sched. ii, 3rd div., No. 165.

(*e*) Act XV of 1877, sched. ii, 1st div., No. 11.

(*f*) Jodoonath Chowdry *v.* Radhamonee Dossee, B. L. R., F. B., 643; S. C., 7 Suth. W. R., F. B., 256; Protab Chunder Chowdhry *v.* Brojo Loll Shaha, B. L. R., F. B., 638; S. C., 7 Suth. W. R., F. B., 253.

A. had the larger share in a whole estate. B. had a smaller share. B.'s share was sold in execution, and bought by C. The confirmation of the sale was not made, and the certificate was not given for several months after the purchase at the sale. In the interval the Government rent became due, and the estate being whole and so registered in the Collector's books, the whole would be liable to be sold for default of payment of revenue in case such default were made. A., therefore, to save the estate, in which he had the preponderating share, paid the whole revenue. He afterwards, and subsequent to the confirmation of the sale in execution to C., sued C. for his share. It was contended by C. that the property did not vest in her until her purchase in execution was confirmed, and therefore that she ought not to be called upon to pay any of the Government revenue which accrued prior to the confirmation of her purchase. It was held, however, that, for the purposes of the case, the property ceased to be in the judgment-debtor from the date of the sale in execution, and therefore that C. was liable for her portion of the Government revenue accruing between the date of the sale in execution and the date of the confirmation of the sale (*a*). The case was referred to a Full Bench, because the decisions were conflicting upon the point, whether the title of the auction-purchaser under a decree relates back to the date of sale (*b*), or merely takes effect from the date of confirmation (*c*), and it will be observed that this was not decided except for the purpose of the particular suit.

A Court cannot, on an *ex parte* application, amend a certificate of sale (*d*). Where there is a difference between the notification of what is to be sold and the certificate of what has been sold, the notification, and not the certificate, is to be regarded in dealing with the claims of third parties (*e*).

Benami purchaser not recognized.

317. No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims.

(*a*) Bhyrub Chunder Bundopadhya *v.* Soudamini Dabee, I. L. R., 2 Calc., 141, F. B.

(*b*) Kalee Dass Neogee *v.* Hur Nath Roy Chowdhry, Suth. W. R., 1864, 279.

(*c*) Beepin Beharee Biswas *v.* Judoonath Hazrah, 21 Suth. W. R., 367.

(*d*) Rajah Rugoo Nundun *v.* Wilson, 23 Suth. W. R., 301.

(*e*) Uma Churn Sen *v.* Gobind Chunder Mozumdar, 1 Cal. Rep., 460.

Nothing in this section shall bar a suit to obtain a declaration that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser.

The first paragraph of this section corresponds with the latter part of s. 260 of Act VIII of 1859, under which such a suit was to be dismissed with costs: the second paragraph is new.

The section must be construed as confined to a suit brought *against* the certified purchaser; and where a purchaser of immoveable property sold in execution having obtained a certificate brings a suit to recover possession of the property, which was defended on the ground that the plaintiff did not purchase the property on his own account, but *benami* for somebody else,—it was held that this enquiry was not precluded by the words of s. 260 of Act VIII of 1859 (*a*). A person purchased property at a sale in execution of a decree against R., and afterwards B. brought a suit against this purchaser, alleging that the property was not R.'s only, but the joint property of himself and R., as members of a Hindu family. The case went to trial, and there evidence was given on this point; but it was contended by the defendant that whatever might be the result of that enquiry, he was protected by s. 260 of the Code of 1859; but the Judicial Committee was of opinion that this section did not apply to such a case. It was designed "to check the practice of making what are known as "*benami* purchases at execution sales,—*i. e.*, transactions in which "A. secretly purchases on his own account in the name of B. "They cannot be taken to affect the right of members of a joint "Hindu family, who by the operation of law, and not by virtue of "any private agreement or understanding, are entitled to treat as "part of their common property an acquisition, howsoever made, "by a member of the family in his sole name, if made by the use of "the family funds" (*b*). This section must be construed strictly: if

(*a*) Musst. Buhuns Koonwur *v.* Lalla Buhoree Lall, 14 Moo. I. A., 496; S. C., 10 B. L. R., P. C., 159 (reversing the decision of the Full Bench, Calcutta—from which L. S. Jackson, J., dissented—reported in 3 B. L. R., 15, and in 11 Suth. W. R., F. B., 17), see also Lukhee Narain Roy Chowdhry *v.* Kalypuddo Bandopadhya, L. R., 2 Ind. App., 154; Jan Muhammad *v.* Ilahi Baksh, I. L. R., 1 All., 290; Mirza Khyrat Ali *v.* Mirza Shyfoollah Khan, 8 Suth. W. R., 130; Muthoora Nath Dass *v.* Raickomul Dossee, 24 Suth. W. R., 278; Musst. Shorosutty Dossee *v.* Gopeesoondary Dossee, Marsh., 423.

(*b*) Bodh Singh Doodhooria *v.* Gunesh Chunder Sen, 12 B. L R., P. C., 330; S. C., 19 Suth. W. R., P. C., 356.

the certified purchaser sues, the defendant may show that he is a mere trustee for him (*a*). The protection of the certified purchaser does not extend to a case of fraud (*b*); and it has been held that,—where A. sued for a declaration that P, the certified auction-purchaser of certain immoveable property, was merely a trustee for R., A.'s judgment-debtor; that the purchase in P.'s name was made with the intent of defeating or delaying him in the execution of his decree; and that he was at liberty to apply for execution against the property as the property of his judgment-debtor,—he was not barred by s. 260 of Act VIII of 1859 (*c*). The principle of these decisions is now embodied in the second paragraph of this section, which is an addition. A suit against a certified purchaser to whom the Court had directed that a sale certificate should be given, but who did not get it made out until after the suit had been instituted, comes within these sections (*d*).

Delivery of immoveable property in occupancy of judgment-debtor.

318. When the property sold is in the occupancy of the judgment-debtor or of some person on his behalf, or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property, and a certificate in respect thereof has been granted under section 316, the Court shall, on application by the purchaser, order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

This section corresponds with s. 263 of Act VIII of 1859. The words "and a certificate in respect thereof has been granted under s. 316" being introduced, the words "shall consist of a house, land or other immoveable property" are left out; but the section only applies to immoveable property, and those words were unnecessary.

(*a*) Lokhee Narain Roy Chowdhry *v.* Kalypoddo Bandopadhya, L. R., 2 I. A., 154.

(*b*) Musst. Gormiah *v* Taffuzul Hossein, 4 B L R, Apx, 32, Macpherson and E Jackson, JJ.; see Tara Soondaree Dabee *v.* Oojul Moneel Dossee, 14 Suth. W. R., 111, Loch and Glover, JJ.

(*c*) Puran Mal *v* Ali Khan, I. L. R., 1 All., 235, Turner and Spankie, JJ., June 1, 1876, following Sohun Lall *v.* Gya Parshad, H. C. R., N. W. P., 1874, p. 265.

(*d*) Bunda Ali Khan *v* Musst. Bibee Ameerun, 25 Suth. W. R., 493.

Delivery of immoveable property in the occupancy of tenant.

319. When the property sold is in the occupancy of a tenant or other person entitled to occupy the same, and a certificate in respect thereof has been granted under section 316, the Court shall order delivery thereof to be made by fixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or in such other mode as may be customary, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

This corresponds with Act VIII of 1859, s. 264, with the same omission as in s. 318, and for the same reason; and the same addition being made. The word "tenant" is substituted for "ryot."

It would appear that a mere proceeding under this clause giving only symbolical possession has no effect as regards limitation (*a*); but the receipt of rent from the tenant would constitute actual possession (*b*). There is nothing in this section to prevent the purchaser at an execution sale from obtaining possession, if he can, without the assistance of the Court (*c*).

Power to prescribe rules for transferring to Collector execution of certain decrees.

320. The Local Government may, with the sanction of the Governor-General in Council, declare by notification in the official Gazette that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold,

or the execution of any particular kind of such decrees,

or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property,

shall be transferred to the Collector;

and rescind or modify any such declaration.

(*a*) Mahomed Hossein *v.* Moshun Ali, 7 Suth W. R, 195, Loch and Macpherson, JJ; and see Joogul Kishore *v.* Musst Edun, S. D A, N. W. P., 1864, p 296; Peatee Mohun Poddar *v.* Jugobundho Sen, 24 Suth. W. R, 418.

(*b*) Asudoolah *v.* Shaik Akbur Ali, 7 Suth. W. R., 60.

(*c*) Obhoya Churn Dey *v.* Rajendro Coomar Ghose, 22 Suth. W. R., 406, L. S. Jackson and McDonell, JJ.

Power to prescribe rules as to transmission, execution and re-transmission of decrees.

The Local Government may also from time to time prescribe rules for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for re-transmitting the decree from the Collector to the Court.

This is new.

Power of Collector as to sale of land in execution of decree.

321. Whenever the execution of a decree has been so transferred, the Collector may—

(*a*) sell the property comprised in the decree by public auction and either in one or more lots as he thinks fit:

(*b*) fix a reasonable reserved price for each lot:

(*c*) adjourn the sale for a reasonable time, whenever he deems the adjournment necessary for the purpose of obtaining a fair price for the property, recording his reasons for such adjournment:

(*d*) buy in the property offered for sale and re-sell the same.

This is new.

Powers of Collector as to execution of certain money-decrees so transferred.

322. Whenever the execution of a decree not being a decree directing the sale of immoveable property in pursuance of a contract specifically affecting the same, but being a decree for money in satisfaction of which the Court has ordered the sale of immoveable property, has been so transferred, the Collector may either proceed as the Court would proceed under section 305, or if he has reason to believe that the judgment-debts of the judgment-debtor can be discharged without a sale of the whole of such property, the Collector may (notwithstanding any order under section 303, but subject to such rules as may from time to time be made in this behalf by the chief controlling revenue authority) raise the amount necessary to discharge such debts with interest thereon according to the decree, or, if

the decree makes no provision as to interest, then with interest (if any) at such rate as he thinks fit—

(*a*) by letting in perpetuity, or for a term, on payment of a premium equivalent to such amount, the whole or any part of the judgment-debtor's immoveable property: or

(*b*) by mortgaging the whole or any part of such property: or

(*c*) by selling part of such property: or

(*d*) by letting on farm or managing by himself or another the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale; or

(*e*) partly by one of such modes and partly by another or others of them.

For the purpose of managing under this section the whole or any part of such property, the Collector may exercise all the powers of its owner.

This is new.

Procedure of Collector.

323. In the case of a decree for money, if the Collector proposes to proceed under section 322, he shall publish a notice in the language of the district, calling upon all persons holding decrees against the judgment-debtor to notify the same in writing to the Collector within sixty days from the date of such publication.

Such notice shall be published by being posted in the court-house of the Court which made the order under section 304, and at such other places (if any) as the Collector thinks fit.

So long as any letting or management under section 322 continues, the judgment-debtor and his representative in interest shall be incompetent to mortgage, charge, lease or alienate the property so let or managed, or any part thereof.

This is new.

Sale by Collector.

324. If, on the expiration of the letting or management, the amount necessary to discharge such debts in full with the interest (if any) payable thereon has not been raised, the Collector shall notify the fact in writing to the judgment-debtor or his representative, stating at the same time that, if the balance necessary to discharge such debts and interest is not paid to the Collector within six weeks of the date of such notice, the Collector will proceed to sell the said property; and if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property accordingly.

This is new.

Sale, &c., to be reported to Court by Collector.

325. Whenever the Collector sells any property pursuant to the said order of sale or exercises any of the powers conferred upon him by section 321 or 322, he shall inform the Court which made such order of the fact of such sale or exercise, and shall render accounts to such Court of his receipts and payments in respect of the said property, and shall hold the balance at the disposal of such Court.

Application of balance.

Such balance (after deducting therefrom any debts due or liabilities incurred to Government by the judgment-debtor) shall be applied rateably in discharging the claims of all the decree-holders who have complied with the said notice; and no other person making any claim against the property so let or managed, or against such proceeds, shall be entitled to be paid thereout.

This is new.

When Court may authorize Collector to stay public sale of land.

326. When, in any local area in which no declaration under section 320 is in force, the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable, and that satisfaction of the decree

may be made within a reasonable period by a temporary alienation or management of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him, instead of proceeding to a sale of the land or share. The provisions of sections 322 to 325 (both inclusive) shall in such case apply to the Collector.

This corresponds with s. 244 of Act VIII of 1859. The Court executing the decree is not authorized to vary its terms. The alteration that can be made under this section must be strictly limited to the term of its provision (*a*).

Local rules as to sales of land in execution of decrees for money.

327. The Local Government may from time to time, with the sanction of the Governor-General in Council, make special rules for any local area imposing conditions in respect of sale of any class of interests in land in execution of decrees for money, where such interests are so uncertain or undetermined as in the opinion of the Local Government to make it impossible to fix their value:

and if, when this Code comes into operation in any local area, any special rules as to sale of land in execution of decrees are in force therein, the Local Government may continue such rules in force, or may from time time, with the sanction of the Governor-General in Council, modify the same.

All rules so made or continued, and all such modifications of the same, shall be published in the Local Official Gazette, and shall thereupon have the force of law.

This is new.

H.—Of Resistance to Execution.

Procedure in case of obstruction to execution of decree.

328. (S.*) If in the execution of a decree for the possession of property, the officer charged with the execution of the warrant is resisted or obstructed by any person,

(*a*) Sheo Proshad *v.* Shiva Ram, 2 H. C. Rep., All., 59, Morgan, C. J., and Ross, J.; Kassee Lall *v.* Ameer Jan, *ib*, 347, Spankie and Turnbull, JJ.

the decree-holder may complain to the Court at any time within one month from the time of such resistance or obstruction.

The Court shall fix a day for investigating the complaint, and shall summon the party against whom the complaint is made to answer the same.

* Sections 328 to 333 extend to Mofussil Courts of Small Causes, so far as they relate to moveable property.

This section corresponds with Act VIII of 1859, s. 226; but that section was confined to the case of resistance or obstruction to the execution of a decree for land or other immoveable property. The Court cannot be put in motion under this section without an application from the decree-holder (*a*).

Procedure in case of obstruction by judgment-debtor or at his instigation.

329. (S.) If the Court is satisfied that the obstruction or resistance was occasioned by the judgment-debtor or by some person at his instigation, the Court shall inquire into the matter of the complaint, and pass such order as it thinks fit.

This corresponds with Act VIII of 1859, s. 227.

Procedure when obstruction continues.

330. (S.) If the Court is satisfied that the resistance or obstruction was without any just cause, and that the complainant is still resisted or obstructed in obtaining possession of the property by the judgment-debtor or some other person at his instigation, the Court may, at the instance of the decree-holder, and without prejudice to any penalty to which such judgment-debtor or other person may be liable, under the Indian Penal Code or any other law, for such resistance or obstruction, commit the judgment-debtor or such other person to jail for a term which may extend to thirty days, and direct that the decree-holder be put into possession of the property.

This corresponds with Act VIII cf 1859, s. 228. See the form of the order for Committal, No. 153, *post*. Nothing in this

(*a*) *In re* Bibee Mahtab Koomaree, 19 Suth. W. R., 62, Kemp and Pontifex, JJ.

section applies to a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree is made, see s. 332 and note.

Procedure in case of obstruction by claimant in good faith, other than judgment-debtor.

331. (S.) If the resistance or obstruction has been occasioned by any person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the claim shall be numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant;

and the Court shall, without prejudice to any proceedings to which the claimant may be liable under the Indian Penal Code or any other law for the punishment of such resistance or obstruction, proceed to investigate the claim in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of the Specific Relief Act, 1877, section 9,

and shall pass such order as it thinks fit for executing or staying execution of the decree.

This section corresponds with s 229 of Act VIII of 1859. The investigation is to be conducted in the same way as a suit under the Specific Relief Act, s 9: that section contemplates, however, a suit brought by a plaintiff who has been dispossessed, and does not appear to be applicable to a plaintiff who has never been in possession.

The Court has not jurisdiction to make a summary investigation under this clause, except where the decree-holder complains that the officer of the Court has been obstructed or resisted, not necessarily, with physical force. The questions between the parties must, in such a case, be determined by a regular suit (*a*). On the other hand, where there has been obstruction, the matter should be dealt with summarily, and the parties should not be referred to

(*a*) Omesh Chunder Roy *v.* Bibee Asrufoonissa, 6 Suth W. R., Mis., 122, Loch and Macpherson, JJ.; Buhal Singh Chowdhry *v.* Behari Lal, 1 B. L. R., A. C, 206, L. S. Jackson, J., Mitter, J., dissenting.

a suit (*a*). In an investigation under this section the burthen of proof lies on the decree-holder, and he must begin (*b*). L. purchased certain land known as lakheraj from F., on whose refusal to register the kobalah or to give possession, he brought a suit, which was decreed. The right, title, and interest in that decree were purchased by T. Intermediately the land was relinquished by F., as if it were mâl land, to the zemindar, under an istifa, and on T.'s going to execute the decree, he was obstructed by the zemindar, and thereupon the claim was investigated under Act VIII of 1859, s. 229. It was held, that the plaintiff was entitled to possession, but as regards the question whether the land was lakheraj or mâl, that would be for decision if the zemindar should bring a suit to assess or resume (*c*). If the claim be not numbered and registered and tried as a suit, the procedure is erroneous, and can be corrected on an appeal (*d*). An order made under this section is appealable, see s. 333.

Procedure in case of person dispossessed of property disputing right of decree-holder to be put into possession.

332. (S.) If any person other than the defendant is dispossessed of any property in execution of a decree, and such person disputes the right of the decree-holder to dispossess him of such property under the decree, on the ground that the property was *bonâ fide* in his possession on his own account or on account of some person other than the judgment-debtor, and that it was not comprised in the decree, or that, if it was comprised in the decree, he was not a party to the suit in which the decree was passed, he may apply to the Court.

If, after examining the applicant, it appears to the Court that there is probable cause for making the application, the application shall be numbered and registered as a suit between the applicant as plaintiff, and the decree-holder as defendant, and the Court shall proceed to investigate the matter in dispute in the same manner and

(*a*) Maharajah Dheraj Mahatab Chunder Bahadoor *v.* Musst. Nadurunnissa Bibee, 1 Wym, 25; S. C, 4 Suth. W. R., 82, Loch and Glover, JJ.

(*b*) Nga Tha Yah *v.* Burn, 2 B. L. R., F. B., 91.

(*c*) Taleb Hossein Khan *v.* Gooro Pershad Roy, 20 Suth. W. R, 57.

(*d*) Mushabi *v.* Shamuddin Hismuddin, 4 Bom. H. C. Rep., 35, Couch, C. J, and Newton and Warden, JJ.

with the like power as if a suit for the property had been instituted by the applicant against the decree-holder under the provisions of the Specific Relief Act, 1877, section 9,

and shall pass such order as it thinks fit for executing or staying execution of the decree.

In hearing applications under this section, the Court shall confine itself to the grounds of dispute above specified.

Nothing in this section or section 330 applies to a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree is made.

This section corresponds with s. 230 of Act VIII of 1859, and the investigation is, as in the last section, to be conducted in the same way as a suit under the Specific Relief Act, s. 9; but the position of the parties is reversed, and the person dispossessed is, as in the Specific Relief Act, made plaintiff. The last three paragraphs are new. The last paragraph follows a construction of s. 230 of Act VIII of 1859 (*a*). In that case the judgment-debtor had sold to the claimant after decree. This clause excludes a claim in this form by a purchaser from the judgment-debtor at any time *pendente lite;* he must bring a regular suit (*b*).

A case under this section is to be treated in all respects as a regular suit (*c*); but it cannot be tried as a regular suit without a proper plaint and stamp, unless the plaintiffs, or petitioners, complain of actual ouster (*d*). In an investigation under this section the applicant must, in the first instance, prove his case, and has the right to begin (*e*). It was held that a merely formal defendant, if he has been in possession and has been dispossessed, might come in and make a claim under s. 230 of Act VIII of 1859, when proceedings in execution were being taken against his co-defendants, and for that purpose might be treated as one who is "other than a defendant," and that the case could be tried as effectually as if a plaint on a full stamp had been filed (*f*). Where

(*a*) Hurropershad Roy *v* Puddolochun Mundul, 2 Wym., 154; S. C., 6 Suth. W. R., 148.

(*b*) See note to s 263, *ante*, p. 379.

(*c*) Banee Madhub Dutt *v*. Nund Lall Mojoomdar, 22 Suth. W. R., 123.

(*d*) Rutton Koer *v*. Syud Tussuduck Hossein, 22 Suth. W. R, 103, Phear and Morris, JJ.

(*e*) Nga Tha Yah *v*. Burn, 2 B. L R., F. B., 91.

(*f*) Neel Madub Dutt *v*. Radha Mohun, 3 Suth. W. R., 205, Bayley and E Jackson, JJ.

an applicant can prove his title to more than that part of the property from which he can show that he has been ousted, he cannot take advantage of this section to recover the whole, but can only be restored to possession of that part from which he has been ousted; but his proceeding under this section will not prejudice his right to bring a regular suit for the remainder (*a*). The Court has in fact no jurisdiction to try the larger question on the application.

Where a case is remanded to be tried with reference to a matter of this nature, and the remand order apparently only applies to the question of *bonâ fide* possession, proof of *bonâ fide* possession will enable the party making the allegation to claim to have his title investigated (*b*).

A third party having petitioned the Court below, stating that she was in possession of certain property, which a decree-holder had attempted to take in execution, and that the judgment-debtor had no title to it, the Court passed an order that the application must remain in the serishtah as the decree-holder had given a receipt for possession. It was held that the lower Court ought to have made some inquiry, but the High Court could not interfere, as the third party had not applied under the corresponding section (230) of Act VIII of 1859 (*c*).

A sale in execution of a decree against some of the members of a joint Hindu family subject to the law of the Mitakshara of the interest of those persons in family property, does not give the purchaser a right to recover possession of a definite quantity of land (*d*).

It was held that the corresponding section of Act VIII of 1859 did not limit the applicant to any particular manner of obtaining possession (*e*). Where one or two of several decree-holders apply for execution, the Court can, in granting their application, impose terms upon them (*f*). Where an application for the remedy provided in Act VIII of 1859, s. 230, and in this section, is refused by the Court in the exercise of its discretion, no appeal lies against the order of refusal; but where the application is admitted and filed, the opposite side called upon to meet it, and the

(*a*) Sreenath Dass *v.* Gopinath Dass, MSS., Macpherson, J., Nov. 26, 27, 1865.

(*b*) Womesh Chunder Roy *v.* Beharee Lall Palit, 18 Suth. W. R., 395, Kemp and Glover, JJ.

(*c*) *In re* Bibee Mahtab Koomaree, 19 Suth. W. R., 62, Kemp and Pontifex, JJ.

(*d*) Kale Pudo Banerjee *v.* Choitun Pandah, 22 Suth. W. R., 214, Couch, C. J., and Ainslie, J.

(*e*) Obhoya Churn Dey *v.* Rajendro Coomar Ghose, 22 Suth. W. R., 406, L. S. Jackson and McDonell, JJ.

(*f*) Ajoodhya Doss *v.* Muthoora Doss, 23 Suth. W. R., 14.

claim subsequently rejected, the order of rejection is a decision between the parties on the merits of the application within the scope of the next section, from which an appeal lies to the Judge (*a*).

A party who has parted with the actual occupation of land to another is not thereby, as on an absolute sale without restriction, barred from taking the advantage of this section. A landlord is in possession of land held by his tenants, who pay rent to him, and if symbolical possession be given to any one else, it is a "dispossession," upon which a summary application under this section may be founded (*b*). A mortgagee's possession is not adverse to the mortgagor; and possession through a mortgagee is sufficient for the purpose of bringing a claim (*c*). A mortgagee whose mortgage was registered, was held entitled to recover, under the corresponding section of Act VIII of 1859, possession of the mortgaged land, of which he had been dispossessed under a decree obtained against his mortgagor by another mortgagee, whose mortgage was subsequently registered, on condition that he satisfied the claim of the decree-holder, otherwise the decree-holder was held to be entitled to possession on his satisfying the claim of the first mortgagee (*d*).

Where A. had been dispossessed of certain lands in execution of a decree obtained by B. in a suit against C. under Act XIV of 1859, s. 15, it was held, that an application could properly be made by A. (*e*). Act XIV of 1859, s. 15, is now repealed by the Specific Relief Act, I of 1877, and s. 9 of that Act is substituted.

In a case in which several persons came in claiming to have been in possession of the same property, the Judge, seeing that they were at conflict among themselves, dismissed all their applications, and referred them to regular suits. It was held by Norman, J. (Jackson, J., concurring), that the Judge was wrong; that he ought to have investigated each case separately (*f*), and they differed

(*a*) Mookundee Misrain *v.* Sheo Lochun Pattuck, 21 W. R., 39, Phear and Morris, JJ.

(*b*) Collector of Bogra *v.* Krishna Indra Roy, 2 B. L. R., App., 301; S. C., 11 Suth. W. R., 191, Norman and E. Jackson, JJ.

(*c*) Asgur Ali *v.* Asgur Ali and others, 20 Suth. W. R., 373, Glover, J.

(*d*) Bhikasi *v.* Vallabhadas, 2 Bom. H. C. Rep., 209, Arnould and Newton, JJ.

(*e*) Brahma Mayi Debi *v.* Barkat Sirdar, 4 B. L. R., F. B., 94; overruling the decision in Gobind Chunder Bagdee *v.* Gobind Ghose Mundul, 7 Suth. W. R., 71.

(*f*) Sarada Mayi Chowdhrain *v.* Nabin Chandra Roy Chowdhry, 2 B. L. R., A. C., 333; S. C., 11 Suth. W. R., 255.

with Mr. Justice Mitter, who considered in another case (*a*) that the question of title arose; but it was subsequently decided that a regular suit to try the title could not be brought after an investigation of this nature under the old Code, s. 231, barring such a suit, and that the question of title, not merely the question of possession, should be investigated (*b*). In the last case it was doubted whether the facts of *bonâ fide* possession, dispossession, and that the applicant was not a party to the suit, could entitle the party dispossessed to be restored to possession, or do more than put the opposite party to proof of his title. The last clause but one of this section, however, puts a new limit upon the investigation, while s. 333 of this Code, which takes the place of s. 231 of the old Code, contains no clause barring a fresh suit to try the title; and s. 9 of the Specific Relief Act, which is to govern proceedings of this nature, expressly enacts, that "nothing in this section shall bar any person "from suing to establish his title to such property and to recover "possession thereof." The 13th and 333rd sections of the present Code might, perhaps, be held to bar such a suit, as the proceeding under this section is to be conducted in the same manner as a suit, notwithstanding s. 9 of the Specific Relief Act; but the question is not free from doubt.

It was held under the old Code that if the property was in one jurisdiction at the time of the passing of the decree, but had been transferred to another jurisdiction before the application of the party dispossessed, the proper course would be for the Judge to transfer the case to the Court having jurisdiction (*c*); and in such a case it appears that the Court should now return the application under s. 57, *ante*, p. 167, unless relief can be obtained under s. 16. The time within which an application under this section must be made is thirty days from the date of the dispossession (*d*), excluding the first day (*e*), and the Court has no power to extend the time (*f*), subject of course to the allowances in Part iii of Act XV of 1877.

(*a*) Ajookhan *v.* Kristo Pershad Lahoory, 8 Suth. W. R., 477.

(*b*) Radha Pyari Debi Chowdhrain *v.* Nabin Chandra Chowdhry, 5 B. L. R., F. B, 709; Baboo Judunath Sing *v.* Kaliprasad, 6 *ib.*, Apx., 55; Musst. Yusan Khatun *v.* Ramnath Sen, 7 *ib.*, Apx., 26; Brindabun Chunder Roy *v.* Tarachand Bundopadhya, 11 *ib.*, 237.

(*c*) Kalee Doss Neogy *v.* Huronath Roy Chowdhry, 3 Suth. W. R., 5, E. Jackson and Glover, JJ.

(*d*) Act XV of 1877, sched. ii, div. 3, No. 165.

(*e*) Acts I of 1868, s. 3 (2), and XV of 1877, s. 12.

(*f*) Dewan Ali *v* Munsoor Ali, 11 Suth. W. R., 259, Bayley and Hobhouse, JJ.

In the case last referred to, the Court was closed during the whole period. Act XV of 1877, s. 5, would now enable the applicant to apply on the day the Court re-opens. If the Court refuses to exercise its jurisdiction in an application of this nature, the High Court can interfere under 24 and 25 Vict., c. 104, s. 15 (*a*), or under s. 622 of this Code.

Orders passed under sections 331 and 332 to have force of decrees, and to be subject to appeal.

333. (S.) The order passed under either of sections 331 and 332 shall be in the nature of, and shall have the same force as, a decree in a suit, and shall be subject to the same conditions as to appeal or otherwise.

This section corresponds with Act VIII of 1859, s. 231; but contains no words barring a fresh suit. See note to last section. As to an appeal, see some cases noted below (*b*).

Resisting or obstructing purchasers in obtaining possession of immoveable property.

334. If the purchaser of any immoveable property sold in execution of a decree be resisted or obstructed by the judgment-debtor or any one on his behalf in obtaining possession of the property, the provisions of this chapter relating to resistance or obstruction to a decree-holder in obtaining possession of the property adjudged to him, shall be applicable.

This corresponds with Act VIII of 1859, s. 268; but it applies the provisions of the whole chapter to such cases; s. 268 only applied to them those of ss. 226, 227, and 228 of that Act, corresponding with ss. 328, 329, and 330 of this Act.

Obstruction by claimant other than defendant.

335. If it appear that the resistance or obstruction was occasioned by any person other than the judgment-debtor, not in possession of the property sold, but claiming a right thereto as proprietor, mortgagee, lessee or under any other title, the Court, on the complaint of the purchaser, shall enquire into the matter of the resistance or obstruction, and pass such order thereon as it thinks fit.

(*a*) Collector of Bogra *v* Krishna Indra Roy, 2 B. L. R., App., 301; S. C., 11 Suth. W. R., 191.

(*b*) Motee Singh *v.* Rajah Neclanund Singh, 2 Suth. W. R., Mis., 6; Musabhi *v.* Shaunuddin Hismuddin, 4 Bom. H. C. Rep., A. C., 35; Brohmo Moyee Dabee *v.* Burkut Sirdar, 13 Suth. W. R., 264.

The party against whom such order is passed may institute a suit to establish the right which he claims to the present possession of the property, but subject to the result of such suit, if any, the order shall be conclusive.

This corresponds with Act VIII of 1859, s. 269.

The time for the purchaser to make his complaint is thirty days from the date of the resistance or obstruction, exclusive of such day (*a*). If the Court makes an order, the person against whom it is made must bring his suit within one year from the date of the order, exclusive of the day of such date (*b*). But when the party is dispossessed under a sale in execution, and no order has been made, he can sue within the ordinary period of limitation (*c*). This section does not include an investigation at the instance of any one other than the purchaser, the words "or such person claiming as aforesaid," which were in the Act of 1859, are here omitted. It contemplates a party out of possession, not in possession, resisting or obstructing, &c.; the latter is not bound to the shorter term of limitation (*d*).

There is no provision in this Code for a summary enquiry on resistance or obstruction to the possession of an auction-purchaser caused by a stranger claiming to be in actual possession on an independent title. Section 331 provides for such a case, but only where possession is being given to a decree-holder in execution of a decree, and this does not apply to an execution-purchaser (*e*). A plaintiff in a suit to establish her right, alleging that she held possession, had put in her claim and had failed. It was held that, although her statement that she had been turned out of possession by the auction-purchaser, made in the former proceedings, was strong evidence against her, it was not conclusive (*f*).

(*a*) Act XV of 1877, sched. ii, div. 3, No. 167.

(*b*) Act XV of 1877, sched. ii, div. 1, No. 11, &c.

(*c*) *Ibid*, No. 144; and Jodoonath Chowdhry *v.* Radhomonee Dassee, B. L. R., F. B., 643; S. C., 7 Suth. W. R, F. B., 256.

(*d*) Fidaye Shikdar *v.* Ozeeooddeen, 7 Suth. W. R., 87, Bayley and Sumbhoonath Pundit, JJ.

(*e*) Shaik Harastoollah *v.* Brojo Nath Ghose, 1 Cal. Rep., 517, Markby and Prinsep, JJ.

(*f*) Musst. Bibee Khanum Jan *v.* Ruttun Lal, 8 Suth. W. R., 95, Bayley and Loch, JJ.

I.—Of Arrest and Imprisonment.

Place of judgment-debtor's imprisonment.

336. (S.) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his imprisonment may be in the Civil jail of the district in which the Court ordering the imprisonment is situate, or, when such jail does not afford suitable accommodation, in any other place which the Local Government may appoint for the confinement of persons ordered to be imprisoned by the Courts of such district:

Arrest in houses.

Provided that no house shall be entered after sunset and before sunrise for the purpose of making an arrest under this section:

Proviso.

Provided also that when the decree in execution of which a judgment-debtor is arrested is a decree for money, and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

The Local Government may, by notification published in the official Gazette, direct that whenever a judgment-debtor is arrested in execution of a decree for money and brought before the Court under this section, the Court shall inform him that he may apply under Chapter XX to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of his application, and if he places all his property in possession of a receiver appointed by the Court.

If after such publication the judgment-debtor express his intention so to apply, and if he furnish sufficient security that he will appear when called upon, and that he will within one month apply under s. 344 to be declared an insolvent, the Court shall release him from arrest:

But if he fails so to apply, the Court may either direct

the security to be realized, or commit him to jail in execution of the decree.

This clause is new. It must be read with chap. xx of the Code relating to insolvent judgment-debtors. There can be no appeal against an order for the imprisonment of a person in execution of a decree; see s. 588 (u), *post*.

The general intention of the legislature appears to be as described by Phear, J., under the old Code, *viz.*, "that if the prisoner "is brought up on arrest at the instance of the execution-creditor, "he should be committed to prison. If, however, he should have "been proved to have been perfectly honest, to have put no obs-"tacle in the way of his creditors taking possession of his property, "but, on the contrary, to be willing to give every facility for getting "it, and that it should be apparent that his being kept in prison "would be mere useless oppression, and could lead to no good result, "the legislature intended that he should be discharged" (*a*). But a definition has been given in s. 356 to the words "bad faith," which must be regarding the matter of the application as was held in the case of *The Oriental Bank* v. *Manimadhab Sen* (*b*) and later cases. As to the discharge of the prisoner on security, see the note to s. 349, *post*. Arrest in execution of process might be made always on a Sunday in the mofussil (*c*), and as the Lord's Day Act (29 Charles II, c. 7) is now repealed (see *post*, sched. i), an arrest may be effected on Sunday anywhere in India.

Warrant for arrest to direct judgment-debtor to be brought up.

337. (S.) Every warrant for the arrest of the judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs, if any, to which he is liable, be sooner paid.

The form of the warrant is given in the fourth schedule, No. 154. It directs the bailiff simply to bring the defendant before the Court; it is subject to such variations as the circumstances of the case require (s. 644).

(*a*) Cheyt Ram *v.* Ramchunder Dutt, 1 Bourke, 101.

(*b*) 3 B. L. R., Apx., 14.

(*c*) Mad. H. C. Rul. lxii, and see Abraham *v.* R., 1 B. L. R., A. Cr., 17, where it was held that an arrest in a quasi criminal case could be made on a Sunday.

338. (S.) The Local Government may, from time to time, prescribe scales, graduated according to rank, race, and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

Scales of subsistence allowances.

This is new.

339. (S.) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as, having regard to the scales so fixed, the Judge thinks sufficient for the subsistence of the judgment-debtor from his arrest until he can be brought before the Court.

Judgment-debtor's subsistence-money.

When a judgment-debtor is committed to jail in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the said scales, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

The monthly allowance fixed by the Court shall be supplied by the party on whose application the decree has been executed, to the proper officer of the Court by monthly payments in advance before the first day of each month.

The first payment shall be made for such portion of the current month as remains unexpired before the judgment-debtor is committed to jail.

The first clause of this section is new. It makes the payment of the subsistence-money into Court, as the Judge may think sufficient in amount, a condition precedent to the arrest, and consequently the warrant should not be issued until the payment has been made; the money must be sufficient, having regard to the scale to be fixed by the last section. The second clause corresponds with Act VIII of 1859, s. 276.

If a defendant be arrested prior to decree under s. 481, and in custody when a decree is passed against him, the judgment-creditor, should he wish to detain him in prison in execution of the decree, must apply to have him brought up and get his subsistence-

money fixed (*a*). It was held by Morgan and Phear, JJ., that it is not enough for the judgment-creditor to pay the subsistence-money, even at the highest rate; he must bring the debtor before the Court (*b*). But Peacock, C. J., dissented from this, thinking that if any wrong was suffered by the debtor, he had his remedy, and if his subsistence-money was not ordered, he could apply himself to have the amount fixed. In another case (*c*) it had been held that if the highest amount of subsistence-money allowed were paid, there would be no necessity for bringing the debtor before the Court. The majority of the Court in the former of these cases considered that the object of bringing the debtor before the Court was not merely that his allowance might be fixed, but also that he might have an opportunity of giving up his property, and applying for his discharge, as he may now also do under chap. xx, and that the Court might enquire into the matter.

The subsistence-money is to be paid to the proper officer of the Court, not to the officer of the gaol, as was the case under the 276th section of Act VIII; and if it is not paid in advance, the debtor can claim his discharge. He is entitled to it at once, and there is no form of application necessary to be complied with in case of the failure of any of the conditions requisite to be performed for his detention in custody (*d*). Where there is money in hand on the last day of the month, it is enough if the creditor then pays the balance of the allowance to make up the proper sum for the ensuing month (*e*).

A prisoner was arrested on the 4th of August, and committed to prison on the evening of the same day. Before the committal, the execution-creditor paid into the hands of the officer 27 days' subsistence-money. It was held that this was not enough; there were 27 days and some hours in the month unexpired. On the 5th of August application was made to bring him up and discharge him from prison. And on the 6th of August the creditor deposited another day's subsistence-money. It was held, that this was not

(*a*) *In re* Callachand Doss, 1 In Jur., N. S., 327, Phear, J.

(*b*) Sumboochunder Halder and others, 1 Bourke, 59; *In re* Bholanath Mullick, *ib.*, 96, Phear, J.

(*c*) Aga Ali Khan *v.* Joydolal Pershad, 1 Bourke, 52.

(*d*) Spyers *v.* Jansen, 1 Bourke, 28; Konoylall Dass, *ib.*, 51; Sumboochunder Halder, *ib.*, 69; Callachand Doss, 1 In. Jur., N. S., 327.

(*e*) Haladhar Dey *v.* Ambika Charan Bose, 5 B. L. R., Apx., 80, Markby, J.

in time; the prisoner was entitled to be discharged; that the Act was to be construed strictly; the Court would not enquire into other matters (*a*).

A formal warrant for the detention of the debtor must be drawn up and given to the person who is to detain him. It is not enough that there is a warrant for his arrest; that only directs that he is to be brought before the Court; nor is it enough that the Judge has ordered a warrant for his detention in custody, and fixed his subsistence allowance; if the warrant for his detention itself be not in the hands of his jailor, his custody is illegal, and he is entitled to his discharge (*b*).

Although native women, who, according to the custom and manners of the country, do not appear in public, are not exempt from arrest in execution of civil process (s. 640, *post*), the Courts would, probably, exercise a discretion as to ordering their arrest, and would see that there was no other means of obtaining satisfaction of the decree before doing so. It might be considered that the absence of any attempt to execute the decree in some other way was a sufficient cause for the Court to refuse in its discretion the execution of the warrant (*c*). Generally speaking, the judgment-creditor has a right to have his decree executed by imprisonment of the person, or by attachment of the property at his option (*d*); the Court must issue its warrant on a proper application, unless it see cause to the contrary (s. 250, *ante*). In the case of the native lady, there may be cause to the contrary; this depends upon circumstances. Where a defendant has been already arrested, prior to decree, under s. 481, *post*, and a decree is passed against him, he must be brought up before the Court to have his subsistence-money fixed, and to have the opportunity of applying for his discharge under chap. xx (*e*).

In the *Gazette of India*, February 2, 1878, the following rules of the High Court at Fort William are published, to take effect from the 1st day of February, 1878:—

1. Subsistence-money payable into Court under s. 339 of Act X of 1877 shall be paid to the sheriff of Calcutta.

(*a*) Dutt *v.* Cornelius, 5 B. L. R., Apx., 79, Markby, J

(*b*) In the matter of Shah Sahib, 1 In. Jur., N. S., 19.

(*c*) See s. 250, corresponding with ss. 221, 222 of Act VIII; Maharani of Burdwan *v.* S M. Baradasundari Debi, 1 B. L. R., F. B., 31, Rokinee Soonduree Deoee *v.* Heramottee Debee, 2 Suth. W. R, Mis., 33.

(*d*) Davis *v.* Middleton, 4 Wym. S. C. C. Ref, 7, Peacock, C. J., and Markby, J.; S. C., 8 Suth. W. R., 283.

(*e*) *In re* Kallachand Doss, 1 In. Jur, N. S., 327, Norman, J.

2. Subsistence-money paid to the sheriff prior to the arrest of a judgment-debtor shall be accounted for to the judgment-creditor if the judgment-debtor shall not be arrested, or having been arrested, shall be released without being committed to jail.

3. When a judgment-debtor is committed to jail, if there shall remain any balance of the subsistence-money paid prior to his arrest, such balance shall be deemed to be a payment in part of the first payment of the monthly allowance payable for his subsistence in jail.

4. All sums paid to the sheriff for the subsistence of the judgment-debtor in jail shall be forthwith forwarded by him to the superintendent of the Presidency Jail.

5. An account shall be kept by the sheriff of all subsistence-monies paid to him, and such account may be inspected during office hours by any person having an interest.

Subsistence-money to be added to amount of decree.

340. (S.) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in jail shall be deemed to be costs on the suit:

Provided that the judgment-debtor shall not be detained in jail or arrested on account of any sum so disbursed.

This corresponds with Act VIII of 1859, s. 279.

Release of judgment-debtor.

341. (S.) The judgment-debtor shall be discharged from jail,

(*a*) on the decree being fully satisfied, or

(*b*) at the request of the person on whose application he has been imprisoned, or

(*c*) on such person omitting to pay the allowance as hereinbefore directed, or

(*d*) if the judgment-debtor be declared an insolvent, as hereinafter provided, or

(*e*) when the term of his imprisonment, as limited by section 342, is fulfilled:

Provided that, in the first, second, third, and fourth cases mentioned in this section, the judgment-debtor shall not be discharged without the order of the Court.

A judgment-debtor discharged under this section is not thereby discharged from his debt, but he cannot be re-arrested under the decree in execution of which he was imprisoned.

This section corresponds with the first part of s. 278 of Act VIII of 1859, paragraphs (d) and (e) being added. The last paragraph corresponds with s. 282 (*a*). The debtor's property may be taken in execution after his discharge, following *Janoki Singh Roy* v. *Kaloo Mundul* (*b*).

Imprisonment not to exceed six months.

342. (S.) No person shall be imprisoned in execution of a decree for a longer period than six months:

When not to exceed six weeks.

or for a longer period than six weeks if the decree be for the payment of a sum of money not exceeding fifty rupees.

This section corresponds with s. 278 of Act VIII of 1859. Under that law the term of imprisonment was not to exceed two years. Where a prisoner had been in prison for more than two years, it was held that there was authority for saying that the provisions of that section of Act VIII entitled him to his discharge, notwithstanding that his imprisonment was originally under a law which permitted his detention for a longer period (*c*). But it has been decided by a majority of Judges in Bombay, in a case very fully argued before them, that a prisoner in execution, under Act VIII of 1859, who had been committed to prison before this Code came into force, and had been imprisoned for a longer period than six months, is not entitled to his discharge under the new Procedure; but that the judgment-creditor has a right to detain him for the full two years allowed by the Code of 1859; it was thought that the matter was one of right, and that the right was not taken away; but even if it were a matter of mere procedure, the provisions of this chapter (xix) are essentially prospective, and this section must, therefore, be construed as applicable only to future arrests. It was further considered that, notwithstanding the repeal of Act VIII of 1859 by this Act (s. 3, *ante*), the effect of Act I of 1868

(*a*) Following also *In re* Dwarkaloll Mitter, 1 Bourke, 109, Peacock, C. J., and Morgan and Phear, JJ.

(*b*) 5 Wym. S. C. C. Ref., 33, F. B.; S. C., 9 Suth. W. R., 178.

(*c*) *In re* Muddoosoodun Doss, 2 Hyde, 215, Phear, J.; but see Sumboochunder Halder, 1 Bourke, 59.

(General Clauses Act), s. 6, taken in connection with s. 3 of the Act, is to remove from the scope of this Code of Procedure all proceedings after decree initiated before it came into force, and then still pending, but to leave within its range all proceedings after decree initiated after its coming into force, although the suits and decrees in and under which such last proceedings may be taken were commenced and made before this Code came into force (*a*).

Endorsement on warrant.

343. (S.) The officer entrusted with the execution of the warrant shall endorse thereupon the day on and the manner in which it was executed; and if the latest day specified in the warrant for the return thereof has been exceeded, the reason of the delay, or if it was not executed, the reason why it was not executed, and shall return the warrant with such endorsement to the Court.

If the endorsement is to the effect that such officer is unable to execute the warrant, the Court shall examine him on oath touching his alleged inability, and may, if it think fit, summon and examine witnesses as to such inability and shall record the result.

This corresponds with the second part of s. 222 of Act VIII of 1859. The proviso at the end of the clause is new, and is applicable to all Courts, whether established by Royal Charter or otherwise. It appears to be founded on the decision (*b*) of the Full Bench as to the Nazir's return not being evidence, but it will include the sheriff's return.

CHAPTER XX.

OF INSOLVENT JUDGMENT-DEBTORS.

Power to apply to be declared an insolvent.

344. Any person arrested or imprisoned in execution of a decree for money, may apply in writing to be declared an insolvent.

Such application shall be made to the District Court which ordered his arrest or imprisonment, or when the

(*a*) Ratansi Kalianji and others, petitioners, Oct. 15, 1877, Westropp, C. J., and Green and West, JJ., Sargent and Bayley, JJ., dissenting, I. L. R., 2 Bomb., 148.

(*b*) Okhoy Chunder Dutt *v.* Erskine, 3 Suth. W. R., Mis., 11.

District Court did not make such order, then to the District Court to which the Court that made the order is subordinate.

This chapter does not apply to the High Courts in the exercise of their jurisdiction as Insolvent Courts (s. 638, *post*), or to the Recorder of Rangoon sitting as an Insolvent Court (s. 6, *ante*); and it has been held that a Court of independent original jurisdiction in Burma can apply these sections in a place where the Recorder might sit as an Insolvent Commissioner; but in that case, should the Recorder act in the case as an Insolvent Court, probably it might be considered that the other Court should stay its hand (*a*). But there appears to be no reason why the High Courts and Recorder's Court should not apply it in the exercise of their original jurisdiction, unless when the debtor has become an insolvent, and Official Assignee holds his property, so that it cannot be handed over to the Court (*b*). This chapter is based chiefly on the provisions of Act VIII of 1859, enabling judgment-debtors to apply for their discharge from custody on surrendering their property, if they have acted in good faith. It relates only to applications at the instance of the debtor himself, not of a creditor. If the matter is within the jurisdiction of an Insolvent Court, in the Presidency-town, a judgment-debtor who had been in prison for the extreme limit of his term of imprisonment under the Code of Procedure, is liable to be adjudged an insolvent in respect of the same debt, when the petition for adjudication is presented before he is released from prison (*c*).

It was thought doubtful whether the provisions of Act VIII of 1859 relating to the release of prisoners in execution applied to a plaintiff in custody for nonpayment of costs of a suit in which he has been unsuccessful, notwithstanding that the Act, like the present, applied to any person arrested in execution of a decree (*d*).

The application must be made to a District Court, unless the Local Government invest some other Court with powers conferred on District Courts under these sections (*e*).

(*a*) Abdul Hamed, petitioner, Markby and Prinsep, JJ., on a reference from the Judicial Commissioner of British Burma, dated 11th May, 1878.

(*b*) Kissoree Mohun Chatterjee *v.* Konnoyloll Dutt, 1 In. Jur., N. S., 247; *In re* Soopersaud, 2 *ib.*, 91; Kristo Lall Gossain *v.* Joy Gopal Bysack, 21 Suth. W. R., 185.

(*c*) *In re* Ragubhai Ramchandra, 6 Bom. H. C. Rep., O. J., 87, Couch, C. J.

(*d*) *In re* Eduljee Ruttonjee, 10 B. L. R., Apx., 27, following *In re* Beenarussee Dossee, Coryton, 123.

(*e*) See s. 360, *post*.

Contents of application.

345. The application shall set forth—

(*a*) the fact of such person's arrest or imprisonment, the Court by whose order he was arrested or imprisoned, and the place in which he is in custody;

(*b*) the amount, kind, and particulars of his property, and the value of any such property not consisting of money;

(*c*) the place or places in which such property is to be found;

(*d*) his willingness to put it at the disposal of the Court;

(*e*) the amount and particulars of all pecuniary claims against him; and

(*f*) the names and residences of his creditors, so far as they are known to or can be ascertained by him.

This corresponds with the second paragraphs of ss. 273 and 280 of Act VIII of 1859. The three last clauses are, however, new; this chapter contemplating a distribution among the general body of creditors.

The applicant must strictly comply with these provisions, or he will not be discharged, as for instance, where he does not fully disclose where his property is to be found (*a*); and it has been held that although the property of the judgment-debtor may not be liable to attachment in execution, he should place all facts before the Court, claiming that any articles he may indicate may be treated as excepted articles. Thus, where a judgment-debtor, who was entitled to a stipend which could not be attached in execution, did not offer to place it at the disposal of the Court, it was held that, having omitted to do so, he could not claim his discharge (*b*). But where he offers to place his salary or stipend at the disposal of the Court, the fact of his having such a provision is not a bar to his obtaining his discharge, even although this property be not subject to attachment in execution of a decree (*c*). Although s. 354

(*a*) Watkins *v.* Rajah Roheenee Bullub, 10 B. L. R., Apx., 11, Macpherson, J.; Gunga Gobind Mundul *v.* Bonomalee Paul, 14 Suth. W. R., 55, L. S. Jackson and Glover, JJ.

(*b*) Nawab Asdutdowla *v.* Haminsaddowla, 6 B. L. R., 575.

(*c*) Coombe *v.* Caw, 13 B. L. R., 268, Couch, C. J., and Macpherson and Pontifex, JJ.

excepts excepted articles from the operation of the vesting order, that section does not render it the less necessary that the applicant should inform the Court that he has this property. And where a person is arrested under a decree of a Small Cause Court, which can not order the sale of land in execution, he may and must place the land at the disposal of the District Court. If he do so, the judgment-creditor should be called on to show cause why he should not proceed against the land (*a*).

Subscription and verification of application.

346. The application shall be subscribed and verified by the applicant in manner hereinbefore prescribed for subscribing and verifying plaints.

This corresponds with the last paragraphs of ss. 273 and 280 of Act VIII of 1859.

Service on decree-holder of copy of application and notice.

347. The Court shall fix a day for hearing the application, and shall cause a copy thereof, with a notice in writing of the time and place at which it will be heard, to be stuck up in Court and served at the applicant's expense on the holder of the decree in execution of which he was arrested or imprisoned, or on the pleader of such decree-holder, and on the other creditors (if any) mentioned in the application.

The Court may, if it thinks fit, publish, at the applicant's expense, the application in such official Gazettes and public newspapers as it thinks fit.

This corresponds with the first paragraphs of s. 281 of Act VIII of 1859, and s. 8 of Act XXIII of 1861. The judgment-creditor is not, however, now, as he was before, permitted to realize the amount of his decree by execution; but the property of the debtor is to be vested in a receiver under s. 354, on an order for the appointment of the receiver being made under s. 351. The provision for the service of notice upon the other creditors and concluding portion relating to the publication in the Gazette, is new. Notices must be given, but the publication is left to the discretion of the Court.

(*a*) Shaw *v.* Lubmersuz, 5 Mad. H. C. Rep., 108, Scotland, C. J., and Innes, J.

348. The Court may also, if it thinks fit, cause a like copy and notice to be served on any other person alleging himself to be a creditor of the applicant and applying for leave to be heard on the application.

Power to serve other creditors.

This is also new.

349. Where the applicant is under arrest, the Court may, pending the hearing under section 350, order him to be immediately committed to jail; or leave him in the custody of the officer to whom the service of the warrant was entrusted.

Powers of Court as to applicant under arrest.

This corresponds with Act XXIII of 1861, s. 8; but it does not, like that section, permit of the judgment-debtor being discharged on security pending the enquiry; he must remain in custody. A prisoner when arrested, but not after committal (*a*), might, under that section, have been released on security; and now, under s. 336, he may be released on security under somewhat similar circumstances if the Local Government think fit to make the notification described in that section. It was considered that such surety bond given to the Court could be executed as a decree under s. 204 of Act VIII of 1859 (*b*). But the corresponding section of this Code (s. 253) would clearly not enable the Court to take this summary mode of realization, for it relates only to sureties prior to decree. The discretionary power vested in the Judge to detain a defendant in custody otherwise than by committing him to prison, exists only when the defendant asks for his discharge and submits to the provisions of the Code. The Judge cannot detain him in custody in this way on his mere request and statement of his inability to pay (*c*).

350. On the day so fixed, or on any subsequent day to which the Court may adjourn the hearing, the Court shall examine the applicant, in the presence of the persons on whom such

Procedure at hearing.

(*a*) Smith *v.* Boggs, 5 B. L R., Apx., 21, Norman, J.

(*b*) Abdool Kureem *v.* Abdool Huq Kazee, 15 Suth. W. R., 21.

(*c*) Sahib Rautan *v.* Ibrahim Rautan, 1 Mad, 441, Scotland, C. J., and Holloway, J.

notice has been served or their pleaders, as to his then circumstances and as to his future means of payment, and shall hear the said decree-holder, the other creditors mentioned in the application and the other persons (if any) alleging themselves to be creditors, in opposition to the applicant's discharge ; and may, if it thinks fit, grant time to the said decree-holder and other creditors or persons to adduce evidence showing that the applicant is not entitled to be declared an insolvent.

This corresponds in part with Act VIII of 1859, s. 281.

Declaration of insolvency and appointment of receiver.

351. If the Court is satisfied—

(*a*) that the statements in the application are substantially true;

(*b*) that the applicant has not, with intent to defraud his creditors, concealed, transferred, or removed any part of his property since the institution of the suit in which was passed the decree in execution of which he was arrested or imprisoned or at any subsequent time ;

(*c*) that he has not, knowing himself to be unable to pay his debts in full, recklessly contracted debts or given an unfair preference to any of his creditors by any payment or disposition of his property;

(*d*) that he has not committed any other act of bad faith regarding the matter of the application,

the Court may declare him to be an insolvent, and may also, if it think fit, make an order appointing a receiver of his property, or if it does not appoint such receiver, may discharge the insolvent.

This corresponds to some extent with Act VIII of 1859, s. 281. The fraudulent transfer spoken of in cl. (b) must now have been made after the institution of the suit; the words "or at any subsequent time" would seem to be superfluous. Cl. (c) is new; and the "bad faith" referred to in cl. (d) is limited to bad faith regarding the matter of the application. It will be noticed that the insolvent is not to be discharged at once. When a receiver is appointed, he must first satisfy the receiver that he has placed

all his property, except the excepted articles, in his hands, or has done his best to do so and obtain the receiver's certificate to that effect; then he may be discharged under s. 355, *post*. Where a plaintiff examines a defendant with a view to make out a case of bad faith, he must pay any fees there may be for swearing the witness (*a*). An appeal lies against an order made under this section, see s. 588 (n), *post*.

Creditors to prove their debts.

352. The creditors mentioned in the application and the other persons (if any) alleging themselves to be creditors of the insolvent, shall then produce evidence of the amount and particulars of their respective pecuniary claims against him; and the Court shall by order determine the persons who have proved themselves to be the insolvent's creditors and their respective debts; and shall frame a schedule of such persons and debts; and the declaration under section 351 shall be deemed to be a decree in favour of each of the said creditors for their said respective debts.

Schedule to be framed.

A copy of every such schedule shall be stuck up in the court-house.

Nothing in this section shall be deemed to entitle a partner in an insolvent firm or, when he has died before the insolvency, his legal representative, to prove in competition with the creditors of the firm.

This is new. An appeal lies from an order made under this section, see s. 588 (n), *post*.

This section seems to point to creditors whose debts are actually due, and would not include a creditor who had given credit to the insolvent for value, but whose debt is not due. Such a creditor might petition under s. 10, and prove under s. 40 of the Indian Insolvent Act, 11 and 12 Vict., c. 21.

Applications by creditors.

353. Any creditor of the insolvent who is not mentioned in such schedule may, within three months from its publication, apply to the Court for permission to produce evidence of the amount and particulars of his pecuniary claims against the insol-

(*a*) Edmond *v.* Nierses, 8 B. L. R., Apx., 42.

vent, and in case the applicant proves himself to be a creditor of the insolvent, for an order directing his name to be inserted in the schedule as a creditor for the debt so proved.

Any creditor mentioned in the schedule may, within three months from the publication of the schedule, apply to the Court for an order altering the schedule so far as regards the amount, nature, or particulars of his own debt, or to strike out the name of another creditor, or to alter the schedule so far as regards the amount, nature, or particulars of the debt of another creditor.

In the case of any application under this section, the Court, after causing such notices as it thinks fit to be served, at the applicant's expense, on the insolvent and the other creditors, and hearing their objections, if any, may comply with or reject the application.

This is new. An appeal lies from an order made under this section, see s. 588 (n), *post*. The period of limitation for the application of the creditor, here stated to be three months, is slightly altered by the Limitation Act, XV of 1877, which prescribes ninety days from the date of the publication of the schedule; see sched. ii, div. 3, No. 174.

Effect of order appointing receiver.

354. Every order under section 351 shall be published in the local official Gazette, and shall operate to vest in the receiver all the insolvent's property (except the particulars specified in the first proviso to section 266), whether set forth in his application or not.

This is new. The list of excepted property is much larger than in the case of an insolvent under 11 and 12 Vict., c. 21, which, by s. 7, only excepts the wearing apparel, bedding, and other such necessaries of the petitioner and his family, and the working tools and implements of the petitioner and his family, not exceeding in the whole the value of 300 rupees.

Receiver to give security and collect assets.

355. The receiver so appointed shall give such security as the Court may direct and shall possess himself of all such property, except as aforesaid;

and on his certifying that the insolvent has placed him in possession thereof, or has done everything in his power for that purpose, the Court may discharge the insolvent from arrest or imprisonment, as the case may be, upon such conditions (if any) as the Court thinks fit.

Discharge of insolvent.

This is new.

356. The receiver shall proceed under the direction of the Court—

Duty of receiver.

(*a*) to convert the property into money :

(*b*) to pay thereout debts, fines and penalties (if any) due by the insolvent to Government:

(*c*) to pay the said decree-holder's costs :

(*d*) to distribute the balance among the scheduled creditors rateably according to the amounts of their respective debts, and without any preference,

and such receiver may retain as a remuneration for the performance of his duties a commission, to be fixed by the Court, not exceeding the rate of five per centum upon the amount of the balance so distributed (the amount of the commission so retained being deemed a distribution), and shall deliver the surplus, if any, to the insolvent or his legal representative.

His right to remuneration.

Delivery of surplus.

This is new.

357. An insolvent discharged under section 355 shall not be arrested or imprisoned on account of any of the scheduled debts. But (subject to the provisions of section 358) his property, whether previously or subsequently acquired (except the particulars specified in the first proviso to section 266 and except the property vested in the receiver), shall, by order of the Court, be liable to attachment and sale until the decrees against him held by the scheduled creditors are fully satisfied or become incapable of being executed.

Effect of discharge.

This corresponds with the first clause of s. 282 of Act VIII

of 1859. In that section the words were—"a defendant once discharged shall not again," &c.; and it was held (*a*) that where he is discharged at the request of the judgment-creditor, his property may be afterwards taken in execution. An appeal lies against an order made under this section, see s. 588 (n), *post*.

When Court may declare insolvent absolved from further liability.

358. If the aggregate amount of the scheduled debts is two hundred rupees or a less sum, the Court may declare the insolvent discharged as aforesaid absolved from further liability in respect of such debts.

This corresponds with the second portion of s. 282 of Act VIII of 1859, but the amount is raised from Rs. 100 to Rs. 200.

Procedure in case of dishonest applicant.

359. Whenever at the hearing under section 350, it is proved that the applicant has

(*a*) been guilty, in his application, of any concealment or of wilfully making any false statement as to the debts due by him, or respecting the property belonging to him, whether in possession or in expectancy, or held for him in trust;

(*b*) fraudulently concealed, transferred or removed any property; or

(*c*) committed any other act of bad faith regarding the matter of the application.

the Court shall, at the instance of any of his creditors, sentence him to imprisonment for a term which may extend to one year from the date of committal.

Or the Court may, if it think fit, send him to the Magistrate to be dealt with according to law.

This corresponds with the last clause of s. 281 of Act VIII of 1859. The concealment, &c, must be a concealment, &c., in his application; it does not apply to any prior concealment, &c. The term of imprisonment is reduced from two years to one.

(*a*) See Janoki Singh Roy *v* Kaloo Mundul, 5 Wym. S. C. C Ref., 33 (a decision by a Full Bench); S. C., 9 Suth. W. R., 178.

360. The Local Government may, by notification in the official Gazette, invest any Court other than a District Court with the powers conferred on District Courts by sections 344 to 359 (both inclusive), and the District Judge may transfer to any Court situate in his district and so invested any case instituted under section 344.

Investment of other Courts with powers of District Courts.

Transfer of cases.

Any Court so invested may entertain any application under section 344 by any person arrested in execution of decree of such Court.

This section is new.

PART II.

OF INCIDENTAL PROCEEDINGS.

CHAPTER XXI.

OF THE DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

No abatement by party's death, if cause of action survive.

361. (S.) The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives.

Illustrations.

(*a.*) A. covenants with B. and C. to pay an annuity to B. during C.'s life. B. and C. sue A. to compel payment. B. dies before the decree: the cause of action survives to C., and the suit does not abate.

(*b.*) In the same case, all the parties die before decree. The cause of action survives to the representative of the survivor of B. and C. and he may continue the suit against A.'s representative.

(*c.*) A. sues B. for libel. A. dies. The cause of action does not survive, and the suit abates.

(*d.*) A., a member of a Hindu joint family under the Mitakshara law, institutes a suit for partition of the family property. A. dies leaving B., a minor son, his heir. The cause of action survives to B., and the suit does not abate.

This section corresponds with s. 99 of Act VIII of 1859, following the Common Law Procedure Act, 1852, s. 135. Upon the death of one joint contractor, the whole legal interest in, or liability upon, the contract survives, and the survivor alone can sue or be sued; the personal representatives of the deceased cannot be made parties to the suit, although the whole beneficial interest belonged to them (*a*). When all the parties to a joint contract are dead, the right of suit is vested in the executors or administrators of the last survivor. So, if one of several executors die, the survivors alone are entitled to sue or are liable to be sued (*b*). In actions arising out of torts, on the death of one of several interested in the subject of the suit, the survivors must sue, and

(*a*) Anderson *v.* Martindale, 1 East, 497. (*b*) Lush's Practice, p. 48.

the representative of the deceased party cannot join (*a*). And where one of the wrong-doers dies, his executors or administrators may be sued in separate actions, not in the same actions as the survivors (*b*).

The death of a party must be proved like any other fact; but, after long absence, there are certain presumptions as to death recognized by the law of India. The Indian Evidence Act, No. I of 1872, s. 108, as amended by Act XVIII of 1872, s. 9, shifts the burthen of proof from the person affirming the death to the person denying it, where it has been proved that the supposed dead person has not been heard of for seven years by those who would naturally have heard of him if he had been alive. In the case of a Hindu, if no intelligence was received during twelve years concerning the existence of a man who travelled to a foreign country, the presumption had been that he was dead (*c*). And this presumption in favor of death would apply to a case in which it was desired to continue any suit on the supposition that one of the parties was dead. The person wishing to go on, being the party affirming the fact, would have to give evidence in the first instance that the person said to be deceased is really dead or has not been heard of for seven years, and then it would lie upon the person sought to be substituted to rebut the presumption of death by other evidence. In a case (*d*) before the Allahabad High Court, this presumption was held applicable to the institution of an original suit, and on the same grounds it would seem to apply where the suit has been already begun; but where the suit is for the purpose of administering the estate, it was thought—but the question did not directly arise, and was not determined in the case—that the Court might have to apply the law of succession, applicable when the person is missing and not dead (*e*). In suits for the administration of the property of deceased persons, it is the usual practice, when a person claiming an interest or share in the property is supposed to be dead, or has not been heard of for a long time, to reserve the share and issue special notices calling on him to come in within a certain time to be fixed by the Court, and in default his share is distributed. Death without issue may be presumed from long

(*a*) Smith *v.* London and N. W. Ry. Co, 2 E & B, 69.

(*b*) 1 Saund., 207 note.

(*c*) Musst. Anundee Koonwur *v* Khedoo Lall, 14 Moo. I. A., 412. See also 1 Strange's Hindu Law (1830), pp. 131, 166, 188, 199, 200.

(*d*) Parmeshar Rai *v.* Bisheshar Singh, I. L. R., 1 All., 53.

(*e*) I. L. R., 1 All., 56.

absence, and from there having been no intelligence received (*a*). Subject to the above rules, if there is proof that the person in question was alive within thirty years, the burthen of proving that the person is dead lies on the person who affirms it (Act I of 1872, s. 107). When it appears that the defendant was dead when the plaint was filed, the Court should stay all proceedings, and the plaintiff must begin *de novo* (*b*).

Proceeding in case of death of one of several plaintiffs or defendants, if cause of action survive.

362. (S.) If there be more plaintiffs or defendants than one, and any of them dies, and if the cause of action survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

This section corresponds with Act VIII of 1859, s. 100.

The words "cause of action" mean, so far as this section is concerned, "right to bring an action:" thus, where A. and B., joint owners of land, sued for damages for trespass, and B. died, it was held that the cause of action survived to A. (*c*). Where one defendant having ceased to have an interest in the suit dies, the suit can go on against the other defendants without any revivor against his representative (*d*).

Proceeding in case of death of one of several plaintiffs where cause of action survives to survivors and representative of deceased.

363. (S.) If there be more plaintiffs than one, and any of them dies, and if the cause of action does not survive to the surviving plaintiff or plaintiffs alone, but survives to him or them and the legal representative of the deceased plaintiff jointly, the Court may, on the application of such legal representative, enter his name on the record in the place of such deceased plaintiff, and the suit shall proceed at the

(*a*) Rawlinson *v.* Miller, 1 L. R., Ch. Ca., 55.

(*b*) Moharanee Surnomoyee *v* Bykunt Chunder Mustofee, 25 Suth. W. R., 17.

(*c*) Chandramohan Dutt *v.* Biswambhar Laha, 1 B. L. R., O. O. C. J., 42, Markby, J.

(*d*) Moung Kine *v.* Burn, 6 Suth. W R, Civ. Ref., 2, Peacock, C. J., and Jackson, J.

instance of the surviving plaintiff or plaintiffs and such legal representative.

This section corresponds with the first part of s. 101 of Act VIII of 1859. The application must be made within sixty days of the date of the death of the plaintiff (*a*).

A certificate to collect debts under Act XXVII of 1860 does not of itself constitute the person obtaining it the legal representative of a deceased person; it merely authorizes him to collect debts, and protects the persons who may pay him. Thus it does not enable the holder to sue for the recovery of property, moveable or immoveable, alleged to have belonged to the deceased and detained by a third person (*b*). In like manner, it has been held in another case (*c*) by the same Judges that the holder of a certificate under Act XXVII of 1860 is not necessarily the proper person to continue the suit; but as the holder of the certificate was in this case a Hindu widow, it might be that she was in that capacity entitled to continue the suit, and the Court below was referred to the case of *Katama Natchier* v. *Rajah of Shiva Gunga* (*d*), which case shows what is the power of a widow of a Hindu dying without issue as regards suits for immoveable property. In the same manner it was decided in Bombay by Couch, C. J., and Newton, J., that a certificate of heirship under Reg. VIII of 1827 is not even *primâ facie* evidence that the holder is the rightful heir of the deceased (*e*). By the term legal representative must be understood some one who may be answerable for the estate of the deceased or in position to defend it. A purchaser of property with the *dena pownа* is not the legal representative of his vendor (*f*).

A member of the family not an heir, and not in possession, cannot be added as a party after the death of the ancestor. Where a plaintiff sued to set aside a certain deed as fraudulent, and died pending the special appeal, and certain grandchildren of hers claimed the property, not as her heirs, but under another subse-

(*a*) Act XV of 1877, sched. ii, 3rd div, No. 171.

(*b*) Awkinfee *v.* Mee Nay, 8 Suth. W. R., 1, Peacock, C. J., and Hobhouse, J.; see also the explanation to s. 366, *post.*

(*c*) Sevinthia Pillay *v.* Mootoosawmy, 8 Suth. W. R., 2.

(*d*) 9 Moo. I A., 539.

(*e*) Shripat Ramchundra Kulkarni *v.* Vithoji, 4 Bom. H. C. Rep., App., 178, Couch, C. J., and Newton, J.; and see explanation to s. 366, *post.*

(*f*) Macleod *v.* Kunhojee Sahoo, 9 Suth. W. R., 271, Bayley and Phear, JJ. See however, s. 372, *post*, where the sale has been made *pendente lite.*

quent deed, and appeared to prosecute the appeal, it was held, that they appearing to be admittedly near relatives of the deceased, and joint heirs of the property, might proceed with the appeal to try the validity of the defendant's deed, but not to set up their own (*a*).

In cases where Hindus, Mahomedans, or Buddhists, or persons who may be exempt from the operation of the Indian Succession Act, die, and their estates are not represented by persons holding grants of probate of a will or letters of administration, it is necessary for any one claiming to represent the deceased, either for the purpose of continuing a suit, or for any other purpose not comprised in the certificates above referred to, to prove his right by evidence; and he should not be allowed to assume the position of a party to the suit, whereby he may obtain possession of the property of the deceased, or put it in jeopardy, without giving proper proof of his title. But the estate of a Hindu, Mahomedan, &c., may, in some cases, be represented by a person holding a grant of probate or letters of administration from a High Court at a Presidency-town, such Courts having the jurisdiction of the late Supreme Courts continued to them by their charters, and those Courts were held to have had jurisdiction to grant probate or letters of administration in the case of a Hindu or Mahomedan deceased leaving property within the local limits of the Court's jurisdiction (*b*); and although such probate or letters may not be necessary, yet it has been held, and is now established by the legislature, that, when granted, the probate or letters of administration is the only and proper evidence of the representative character (*c*), such probate or grant, when made by a Court of competent jurisdiction, being conclusive evidence that the legal character which it confers accrued at the time when it came into operation.

Act XIX of 1841 also enables a District Judge to appoint a curator with power to sue or be sued in respect of the property of deceased persons, where there is reason to apprehend that forcible means of seizing his property will be resorted to, or where it has been already seized, and where the Court is applied to within six months of the death of the deceased person.

(*a*) Luteefunnissa Bebee *v.* Syud Reza Ruhman, 4 Wym. Rep., 63; S. C., 8 Suth. W. R, 84, Kemp and Glover, JJ.

(*b*) In the Goods of Beebee Muttra Morton, 75; S. C., Morton by Montriou, 191; and other cases cited in 1 Morley's Digest, 383—4.

(*c*) See Anundchunder Ghose *v.* Soorjee Money Dassee, Morton by Montriou, 230; Act I of 1872, s. 41.

Act II of 1874, s. 17, enables the High Court in a Presidency-town, on application made to it, to direct an Administrator-General to apply for letters of administration of the effects of any deceased person to be granted to him, in all cases where the property requires protection, and there are assets within the limits of the ordinary original civil jurisdiction of the Court.

Act XXI of 1870, which applies to all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist, on or after the 1st day of September, 1870, within the territories of the Lieutenant-Governor of Bengal, or within the local limits of the ordinary original civil jurisdiction of the High Courts at Madras or Bombay, enables all such wills to be proved either by a grant of probate or letters of administration with a copy of the will annexed.

When any person not a Hindu, Mahomedan, or Buddhist, or a person exempted by the Indian Succession Act, s. 332, dies, leaving assets within the limits of the jurisdiction of a District Judge (that is to say, a Judge of a principal Civil Court of original jurisdiction, but not of a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction)—Act I of 1868, s. 2 (11)—certain steps are to be taken in order to protect the property on the one hand and the rights of the creditors of the deceased on the other. The District Judge is in the first place to send a report to the Administrator-General of the Presidency as defined in that Act, and to retain the property of the deceased person under his charge, or he may, in cases where special arrangements are necessary, appoint an officer, under the provisions of the Indian Succession Act, 1865, s. 239, to take and keep possession of the same until the Administrator-General has obtained letters of administration, or until some other person has obtained such letters or a certificate from the Administrator-General under the provisions of Act II of 1874, when the property shall be delivered over to the person obtaining such letters of administration or certificate or probate of a will, if it be found (*a*). It is essentially necessary that full information as to the nature and extent of the assets should, with all convenient speed, be furnished to the Administrator-General in order to enable him to make his application for letters of administration with or without the will annexed, as the case may be, or for probate, if he be appointed executor.

The probate or letters of administration in such case form, as

(*a*) See Act II of 1874, s. 64.

has been already shown, the title of the holder as legal representative; and by s. 179 of Act X of 1865, all the property of the deceased person vests in him as such. The Judge who holds the property under Act II of 1874, s. 64, is not, nor is a manager under s. 239, Act X of 1865, a legal representative, and unless he is empowered by the order appointing him manager, he cannot prosecute or defend a suit. Should he be called on to do so, he should apply to the Court which made him manager for an extension of his powers. If a suit is pending, and it is necessary that the representative of a person deceased be made a party, and the executor or person entitled to administration, whether next-of-kin or executor or the Administrator-General, or a creditor has declared that he is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or any other Court between the parties, or any other parties touching the matter at issue in the said cause or suit, and until a final decree shall be made therein and carried into execution (*a*). But the power to grant probate or letters of administration is limited to a District Judge (ss. 235, 236), and such probate and letters are available only in the province in which they are granted, unless they are granted by a High Court and certified under Act XIII of 1875, or to an Administrator-General, when, under Act II of 1874, they apply to the whole Presidency of Bengal, Madras or Bombay as defined in s. 3 of that Act.

When an officer of Her Majesty's army, or of Her Majesty's Indian army, or a Soldier of Her Majesty's army, or a European soldier of Her Majesty's Indian army, dies on service, there are special provisions contained in the Regimental Debts Act, 26 and 27 Vict., c. 57, for the representation of his estate for the purpose of securing the payment of certain regimental debts, and a committee of adjustment is to be appointed, who are (s. 7) to secure all such of his effects as are within the station or command, and they may, if those debts are not paid within a month by the representatives or the widow, without representation, and as if they were the representatives to the exclusion of all other authorities and persons whomsoever, get in and give receipts, which shall be effectual discharges for all or any of the credits forming part of the estate of

(*a*) Act X of 1865, s. 222.

the deceased and being payable in India, and if they think fit sue for and recover the same (s. 8).

Proceeding where no application made by representative of deceased plaintiff.

364. (S.) If no application be made to the Court by any person claiming to be the legal representative of a deceased plaintiff, the suit shall proceed at the instance of the surviving plaintiff or plaintiffs;

and the legal representative (if any) of the deceased plaintiff shall be made a party, and shall be interested in and bound by the decree passed in the suit in the same manner as if the suit had proceeded at his instance conjointly with the surviving plaintiff or plaintiffs.

This section corresponds with the 2nd part of s. 101 of Act VIII of 1859. It applies only to the case of the cause of action surviving to the remaining plaintiff or plaintiffs and the legal representative of a deceased plaintiff.

Proceeding in case of death of sole, or sole surviving, plaintiff.

365. (S.) In case of the death of a sole plaintiff or sole surviving plaintiff, the Court may, where the cause of action survives, on the application of the legal representative of the deceased, enter his name in the place of such plaintiff on the record, and the suit shall thereupon proceed.

This section corresponds with the first paragraph of s. 102 of Act VIII of 1859. The application must be made within sixty days of the date of the plaintiff's death (*a*). It was held that s. 102 and the following section of Act VIII of 1859 related only to proceedings prior to decree, and not to proceedings in execution (*b*). It may be doubtful whether this is so now; those sections were placed with others in a chapter of the Code which exclusively related to proceedings before judgment, whereas this chapter appears to have a more general application. This appears to be the view taken of the old Procedure Code by the High Court in Bombay, under Act XXIII of 1861, s. 37, which enacted that, "unless where otherwise provided, the Appellate Court shall have "the same powers in cases of appeal which are vested in the Courts "of original jurisdiction in respect of original suits." Where an

(*a*) Act XV of 1877, sched. ii, 3rd div., No. 171.

(*b*) Abidunnissa Khatoon *v.* Amirunnissa Khatoon, I. L. R., 2 Calc., 327.

appellant died, and no application was made by his representative to be made a party to the appeal, s. 102 of Act VIII applied, and the appeal abated (*a*). The 582nd section of the present Code likewise gives the Appellate Court the same powers which would be applicable in an Original Court, in all incidental proceedings under this chapter, so far as the nature of the case admits.

Abatement where no application by representative of deceased plaintiff.

366. (S.) If no such application be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the Court may pass an order that the suit shall abate, and award to the defendant the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff;

or the Court may, if it think proper, on the application of the defendant, and upon such terms as to costs or otherwise as it thinks fit, pass such other order as it thinks fit for bringing in the legal representative of the deceased plaintiff, or for proceeding with the suit in order to a final determination of the matter in dispute, or for both those purposes.

Explanation.—A certificate of heirship, or a certificate to collect debts, does not of itself constitute the person holding it the legal representative of the deceased. But when the person holding any such certificate obtains thereby property belonging to the deceased, he may be treated as a legal representative liable in respect of such property.

This section corresponds with the second and third paragraphs of s. 102 of Act VIII of 1859, the words of s. 102 requiring this course to be followed unless an application was made "within a reasonable time," are omitted. The Court has, however, a discretion in the matter, and if within a reasonable time such an application were not made, it would be justified in acting. Where a plaintiff died on the very day on which the

(*a*) Jaita bin Kalu *v.* Balu bin Raghu, 3 Bom. H. C. Rep., App., 81, Newton and Warden, JJ.; see also Macleod *v.* Kunhojee Sahoo, 9 Suth. W. R., 271.

time for filing an appeal expired, and the plaintiff's son unsuccessfully applied to the District Judge, two days after his father's death, for leave to file an appeal, the High Court thought that the application was made within a reasonable time after the father's death, and might have been dealt with on the principle laid down in s. 102 of Act VIII of 1859, but that it was a matter entirely within the District Judge's jurisdiction, and that the order was not appealable (*a*). The explanation is founded on the cases referred to in the note to s. 363; with the addition as to the liability of a certificate-holder who obtains assets of the deceased, this is merely a declaration of the liability of any person who thus obtains assets, and such a person might be brought in under this section and s. 364, and made liable to the extent of the assets not duly administered, in respect of an order or decree in the suit fixing him with any liability.

Procedure in case of dispute as to representative of deceased plaintiff.

367. (S.) If any dispute arise as to who is the legal representative of a deceased plaintiff, the Court may either stay the suit until the fact has been determined in another suit, or decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit.

This corresponds with Act VIII of 1859, s. 103. The proof to be required in case of such a dispute may be gathered from what has been said in connexion with s. 363. It shows that a judicial enquiry as to who is the proper representative should be made where the point is disputed, and that until it is determined the suit ought generally to be stayed. But all the powers conferred upon the Court as to bringing the representative of deceased plaintiffs on the record are discretionary, and the Court should always be satisfied that the applicant is the proper person to represent the deceased. The bringing in of a representative on the record is not a mere form, and the Court should always see that the person who is to defend the interests of the estate, or who is to receive any benefit from the decree, is a responsible person.

Procedure in case of death of one of several defendants, or of sole or sole surviving defendant.

368. (S.) If there be more defendants than one, and any of them die before decree, and the cause of action does not survive against the surviving defendant or defendants alone,

(*a*) *In re* Bhojohuree Mundul, 18 Suth. W. R., 293, Markby, J.

and also in case of the death of a sole defendant, or sole surviving defendant, where the right to sue survives,

the plaintiff may make an application to the Court, specifying the name, description and place of abode of any person whom he alleges to be the legal representative of the deceased defendant, and whom he desires to be made the defendant in his stead.

The Court shall thereupon enter the name of such representative on the record in the place of such defendant,

and shall issue a summons to such representative to appear on a day to be therein mentioned to defend the suit;

and the case shall thereupon proceed in the same manner as if such representative had originally been made a defendant and had been a party to the former proceedings in the suit:

Provided that the person so made defendant may object that he is not the legal representative of the deceased defendant, or may make any defence appropriate to his character as such representative.

This section corresponds with s. 104 of Act VIII of 1859.

Where the plaintiff makes an application of this nature, and gets a new defendant put on the record, he does it at his own risk, and if the new defendant is not the representative of the defendant, deceased, the plaintiff will not be able to execute the decree. The Court is bound to enter the name of the person who is alleged to be representative, but it is not bound to give a decree against him unless it be proved that he is the representative and liable in that capacity. On the contrary, where a person is improperly joined as representative of a deceased person, the suit ought to be dismissed as against him, and unless there is some reason arising from his conduct in the matter he ought to have his costs against the plaintiff who has wrongly brought him in. This section applies only to the case of a cause of action which survives *against* the legal representative of the deceased person in the same way as ss. 361, &c., applied to the case of a cause of action surviving *to* the legal representative of a deceased plaintiff. In the one

case the substituted person sues to realize the estate of the deceased plaintiff, and in the other the plaintiff gets a representative of the deceased defendant placed upon the record in order that he may obtain the fruits of his litigation by proceeding against the property of the deceased defendant. When, therefore, the plaintiff makes an application under this section, he must be prepared to show that the person who is alleged to be the legal representative of the deceased defendant really fills that character, and that he has property of the deceased with which to account, or that he has dealt with the property of the deceased in such a way as to fix upon himself responsibility. The new defendant may put forward any defence which the deceased might have put forward, and he may also deny the character in which he is sued, or that he has assets. And if the plaintiff gets the wrong person put upon the record as representative, he cannot execute his decree against the real representative, who has acted with good faith, because the latter has had no opportunity of contesting the case. Thus, where a plaintiff sued a defendant for rent, who died pending the suit, and the plaintiff, on a suggestion, got the son of the defendant, who declined administering to his father's estate, made a defendant, it was held that the plaintiff could not execute his decree against the person who had represented the estate of the defendant, or in that suit attach the assets in his hand (*a*). Nor can a decree be passed against the estate of a deceased person unless there is some one to represent it (*b*). The decree should be against some person shown to be representative of the deceased.

The son or heir of a deceased Hindu is not bound by any legal obligation to pay his ancestor's debts, unless he has property of the ancestor to do so; he may be under a moral obligation, but this cannot be enforced in a Court of Law. Unless, therefore, he has property of the deceased, he should not be made a party to a suit. In the Bombay Presidency, the case was, until recently, different; but a Bombay Act, VII of 1866, after reciting that, according to the law in force as applied to Hindus by the High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, no son or grandson of a deceased Hindu is liable for the debts of his ancestor merely by reason of his being such son or grandson, and no son, grandson or other heir of a deceased Hindu who has received assets of the deceased is merely from that cir-

(*a*) Suttyanund Ghosal *v.* Norton, by Macpherson, J, 19th Dec., 1873.

(*b*) Lekraj Roy *v* Beecha Ram Roy, 7 Suth W. R, 52.

cumstance liable for the debts of his ancestor beyond the amount of the assets received, and no person marrying a Hindu widow is liable in consequence of such marriage for the debts of her former or any prior deceased husband, and that a different law was applied to Hindus by the Civil Courts which exercise jurisdiction in places beyond the local limit of the ordinary original civil jurisdiction of the said High Court, and that it was expedient to amend the law as applied by such other Courts and to make the law in that respect uniform throughout the Presidency of Bombay, and to limit the liability of a Hindu for a family debt contracted when he was unborn or under twenty-one years of age,—enacted (s. 1) that a Hindu son or grandson shall not be liable as such for the debt of a deceased ancestor; that (2) the heir is to be liable as representative of his deceased ancestor to the extent of assets received, and personally to the extent of assets received and not duly applied; that (4) the husband of a Hindu widow is not to be liable for a debt of a deceased former husband; and that (5) a member of an undivided Hindu family who was unborn or under twenty-one years of age at the time of contracting a debt, under such circumstances as that the same forms the debt of the undivided family, shall not be liable personally to pay the same, but only out of, and to the extent of, the property of the undivided Hindu family, and of the separate property, if any, belonging to any deceased members of the undivided family who were above the age of twenty-one years at the time of the contracting the same, received or taken possession of by such member or any other person by his order or to his use and remaining unapplied, and personally to the extent of such property taken and misapplied (*a*).

Under Mahomedan law the heir succeeds to the estate subject to the payment of debts; if the estate is wholly involved in debt, the heir does not succeed at all (*b*). But when there was a debt due by the estate and a minor heir, it was held that a suit was wrongly brought and therefore would be wrongly continued against other members of the family not heirs and not in posses sion of the effects (*c*) in respect of the debt. The decree in such a suit does not bind the heir (*d*).

(*a*) This Act is printed at p. 437 of the first volume of the Bombay High Court Reports, together with the Statement of Objects and Reasons for the introduction of the bill by the Hon'ble J. Sewell White. These objects and reasons show the state of the law in the Bombay Presidency regarding this matter as it existed prior to the passing of the Act.

(*b*) Bailhe, Book XI.

(*c*) Hedaya, Book XXXVI.

(*d*) Hamir Singh *v.* Musst. Zakia, I. L R, 1 All., 57, Turner, Offg. C. J., Spankie, Pearson, and Oldfield, JJ.

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Suit not abated by marriage of female party.

369. (S.) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and where the decree is against a female defendant, it may thereupon be executed against her alone.

If the case is one in which the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and in case of judgment for the wife, execution of the decree may with such permission be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

This section corresponds with Act VIII of 1859, s. 105. Since Act VIII was passed some material alterations have been made in the law relating to the property of married women and their rights to sue and defend suits. Act X of 1865 (The Indian Succession Act), s. 4, enacts, that "no person shall, by marriage, acquire any "interest in the property of the person whom he or she marries, nor "become incapable of doing any act in respect of his or her own "property which he or she could have done if unmarried." This Act does not apply to any case in which the marriage occurred before the 1st of January, 1866 (see s. 331), nor does it apply to any marriage where one or both of the parties to it professed at the time of the marriage the Hindu, Mahomedan, Buddhist, Sikh or Jaina religion (Act III of 1874, s. 2), nor does it apply to a case in which the domicile of both parties is not in British India and the property is not immoveable. In such cases they must be governed by the law of the place of their domicile (*a*). It would not apply to the case of a man whose domicile is not in British India marrying a woman whose domicile is in British India, the property not being immoveable, for by the act of marriage the woman takes her husband's domicile (Act X of 1865, s. 16).

The Married Woman's Property Act (III of 1874), s. 7, enacts, that "a married woman may maintain a suit for the recovery of "property of any description which, by force of the Indian Succession Act of 1865 or of this Act, is her separate property, and "she shall have in her own name the same remedies, both civil and

(*a*) Miller *v.* The Administrator-General of Bengal, I. L. R., 1 Calc., 417.

"criminal, against all persons, for the protection and security of "such property, as if she were unmarried, and she shall be liable to "such suits, processes, and orders in respect of such property as she "would be liable to if she were unmarried."

Section 8 enacts, that "if a married woman (whether married "before or after the 1st day of January, 1866) possesses separate pro-"perty, and if any person enters into a contract with her with refer-"ence to such property, or on the faith that her obligation arising "out of such contract will be satisfied out of her separate property, "such person shall be entitled to sue her, and, to the extent of her "separate property, to recover against her whatever he might have "recovered in such suit had she been unmarried at the date of the "contract and continued unmarried at the execution of the decree. "Provided that nothing herein contained shall affect the liability of "a husband for debts contracted by his wife's agency, express or im-"plied, or render a married woman liable to arrest or to imprison-"ment in execution of a decree."

Section 9 enacts, that "a husband married after the 31st day of "December, 1865, shall not, by reason only of such marriage, be "liable to the debts of his wife contracted before marriage, but the "wife shall be liable to be sued for, and shall, to the extent of "her separate property, be liable to satisfy such debts as if "she had continued unmarried: Provided that nothing contained "in this section shall affect any suit instituted before the passing "of this Act, nor invalidate any contract into which a husband "may, before the passing of this Act, have entered in consideration "of his wife's antenuptial debts."

The Act does not apply to any married woman who at the time of her marriage professed the Hindu, Mahomedan, Buddhist, Sikh or Jaina religion, or whose husband at the time of such marriage professed any of those religions, or to people exempted from the operation of the Act (s. 2).

The separate property described in the Act consists of the earnings of the woman or her savings therefrom (s. 4).

In a case (*a*) decided in the year 1872 by Phear, J., the defendant was a married woman living with her husband; they were both domiciled in British India, and resident in Calcutta, where they were married in May, 1866. She had property to which she was absolutely entitled under the provisions of the Succession

(*a*) Archer *v.* Watkins, 8 B. L. R., 372.

Act. She signed a promissory note in favour of the plaintiff for a debt due by her to the plaintiff, at the same time giving a verbal promise to pay the amount out of her own property. In a suit upon the promissory note in which the husband and wife were made defendants, the wife pleaded her coverture. It was held that she was liable to pay the amount of the promissory note out of her own property, and the Court would, if necessary, make a personal decree against her. In another case (*a*), decided by Couch, C. J., and Macpherson, J., affirming on appeal the decision of Pontifex, J., the suit was against husband and wife, and the trustees of their marriage settlement, on two joint and several promissory notes given by the husband and wife after their marriage, but before the passing of Act III of 1874, and the plaintiff sought to render liable property settled on the marriage upon the wife for her separate use without power of anticipation. The marriage was contracted after the passing of the Indian Succession Act, and the parties were domiciled in British India. It was held that s. 4 of the Indian Succession Act did not prevent the operation of the clause in the marriage settlement in restraint of anticipation, and that s. 8 of Act III of 1874 did not apply to contracts made before the passing of the Act. Couch, C. J., was of opinion, but it was not necessary to decide the point, and it was not decided, that if the contract had been made after that Act came into operation, the plaintiff would have had a remedy against the wife's separate estate notwithstanding the clause restraining anticipation. And his Lordship referred to a decision of the Master of the Rolls (*b*) on the construction of the English Married Woman's Property Act, 33 and 34, Vict., c. 93, s. 12, which came into operation on the 9th of August, 1870. The section corresponds with s. 7 of Act III of 1874. In that case a testator, who died in 1857, gave to his widow an annuity for her life, for her separate use, without power of anticipation. A suit was instituted for the administration of his estate, and a fund was set apart to answer the annuity. During her widowhood the widow became indebted, and on the 19th of January, 1871, before ten o'clock in the morning, she married again without having made any settlement. On the same day but a few hours later, judgment was signed against her in an action brought by the creditors for his debt. It was contended on behalf of the wife that the legislature could not have intended to sweep away the protection

(*a*) Peters *v.* Manuk, 13 B. L. R., 383.

(*b*) Sanger *v.* Sanger, L. R., 11 Eq., 470; S. C., 40 L. J., N. S., Ch., 372.

afforded to married women by the clause restraining anticipation; that the property made liable to her debts by that section was only such property as she was able to dispose of, and not such as she was restrained from dealing with. But the Master of the Rolls said, that the question had been fully considered by the legislature, which had resolved that if the creditor was deprived of the liability of the husband, he should retain that of the wife. His Honor, therefore, held that the restraint on anticipation did not arise to the prejudice of the rights of creditors prior to the marriage.

In *Harris* v. *Harris*, and *Harris* v. *Koylas Chunder Bandopadia* (*a*), the plaintiff and defendant in the first suit were husband and wife, domiciled in British India, and married in 1870. The wife had separate property. In 1875, she separated from her husband, but left her property in his home. On her applying for it in June, 1875, he referred her to the Court, but before this he had mortgaged it to B., without the plaintiff's knowledge or consent. In June, 1875, K. obtained a decree against the husband and B., in execution of which he seized this property as property of the husband, and it remained in the Calcutta Court of Small Causes subject to the seizure. In July, 1875, the plaintiff sued in her own name to recover the articles or their value from her husband, on the ground that they were her separate property; and in August, 1875, she preferred a claim in her own name to the property under s. 88 of Act IX of 1850 (Calcutta Court of Small Causes). It was held that, under s. 7 of the Married Woman's Property Act, the suit was maintainable against the husband, and also that the claim under Act IX of 1850 was maintainable.

It has been held under the Code of 1859, that the word "judgment," used in s. 105 and repeated here, does not mean judgment on appeal. This was decided on the ground that the section was placed in a part of the Code headed "Suits previous to judgment," and altogether disconnected with that portion of the Code which related to appeals (*b*). As this chapter of the present Code is general, this limited interpretation of the word "judgment" will, probably, be considered to be now unnecessary.

When plaintiff's bankruptcy or insolvency bars suit.

370. (S.) The bankruptcy or insolvency of a plaintiff in any suit which his assignee or the receiver appointed under section 351 might maintain for the benefit of his

(*a*) I. L. R., 1 Calc, 285.

(*b*) Bindabun Chunder Sircar Chowdry *v.* Mackintosh, 5 Wym., 263, L. S. Jackson and Hobhouse, JJ.

creditors shall not bar the suit, unless such assignee or receiver declines to continue the suit and to give security for the costs thereof within such time as the Court may order.

Procedure when assignee fails to continue suit or give security.

If the assignee or receiver neglect or refuse to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's bankruptcy or insolvency, and the Court may dismiss the suit and award to the defendant the costs which he has incurred in defending the same, to be proved as a debt against the plaintiff's estate.

This section corresponds with s. 106 of Act VIII of 1859. An appeal lies against an order rejecting an application under this section for the dismissal of the suit; see s. 588 (o), *post.*

Effect of abatement on parties' rights.

371. (S.) When a suit abates or is dismissed under this chapter, no fresh suit shall be brought on the same cause of action.

Application to set aside abatement or dismissal.

But the person claiming to be the legal representative of the deceased bankrupt or insolvent plaintiff, may apply for an order to set aside the order for abatement or dismissal; and if it be proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

This section is new. There does not appear to be any limit of time within which the person claiming to be legal representative can come in, independent of any limit which may be a bar to the suit itself, or three years under Act XV of 1877, No. 178.

Procedure in case of assignment pending the suit.

372. (S.) In other cases of assignment, creation or devolution of any interest pending the suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them,

and hearing their objections, if any, be continued by or against the person to whom such interest has come, either in addition to, or in substitution for, the person from whom it has passed, as the case may require.

This is a new provision. It is taken in part from Order L, Rule 3, under the English Judicature Act, 1875 (*a*). A substitution could not have been made under Act VIII (*b*). An appeal lies against an order disallowing an objection under this section; see s. 588 (p), *post*.

CHAPTER XXII.

OF THE WITHDRAWAL AND ADJUSTMENT OF SUITS.

Power to allow plaintiff to withdraw with liberty to bring fresh suit.

373. (S.) If, at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff (a) that the suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or for the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit.

If the plaintiff withdraw from the suit, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh suit for the same matter.

Nothing in this section shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

This section corresponds with 1st and 3rd parts of s. 97 of Act VIII of 1859; the words "after the institution of the suit" are substituted for the words "before final judgment" The plaintiff, if he wish to withdraw and sue again, is bound to apply, and on the grounds specified in this section. The section

(*a*) See Griffith's Practice, p. 325.

(*b*) Juddooputtee Chatterjee *v.* Chunder Kant Bhuttacharjee, 5 Wym, 273, Peacock, C.J., L. S. Jackson and Macpherson, JJ.

also permits of the withdrawal of the suit in part. The clause in s. 97, which bound the plaintiff to the same time with reference to limitation, as if the first suit had not been brought, is repeated in the next section. The last clause is new, following a decision of the High Court at Calcutta (*a*). In this case C. and others had sued B. C. M. While the action was going on, the defendant, under an Act X decree, which he had obtained against the plaintiffs, caused their rights and interests to be sold, and the property was bought in the name of J. It was said that it was bought benamee for B. C. M., but that was considered immaterial. Afterwards J. applied to have his name substituted in the suit for the plaintiff, and being so substituted, he applied to withdraw the suit. This was done. The High Court, however, defeated this; and under 24 and 25 Vict., c. 104, s. 15, reversed the orders as made without jurisdiction.

This section applies, it would seem, as the corresponding section of Act VIII was held to apply, to appeals as well as to original suits (*b*). In this case, decided by Scotland, C. J., and Collett, J., it was said that, as a general rule of practice, the respondent should be served with due notice of the application to withdraw the appeal, when it is made after the notice of the day fixed for the hearing has been issued. In every instance the appellant will be liable to pay to the respondent his costs occasioned by the appeal (*c*).

Where the order to withdraw directs the applicant to pay costs, but does not go on to direct that the payment of costs shall be a condition precedent to the institution of a fresh suit, the Court cannot stay proceedings in the fresh suit on the ground that the costs have not been paid (*d*). The words of s. 97 were "at any time before final judgment," and it was held that a Court could not, in its judgment, give leave to sue again (*e*); but as those words are now replaced by the words "at any time after the institution of

(*a*) Juddooputtee Chatterjee *v.* Chunder Kant Bhuttacharjee, 5 Wym., 273, Peacock, C. J., L. S. Jackson and Macpherson, JJ.

(*b*) See note to s. 361, *ante*, and see s. 582, *post*; and the case of Kareem Bee *v.* Beegam Bee, 3 Mad. H. C. Rep., 368.

(*c*) See also the cases of the Bombay City Bank *v.* Mowjee Hurrydoss, Bourke (1865), 99; and Rampershad Ojha *v.* Bhurosa Koonwar, 9 Suth. W. R., 328.

(*d*) Chitto Sheikh *v.* Kazee Muzzur Hossein, 2 Hyde, 212, Macpherson, Norman, and Levinge, JJ.

(*e*) Gobind Chunder Paul Chowdhry *v.* Ram Kishen Paul Chowdhry, 2 Suth. W. R., 297.

the suit," the Court could apparently, in its judgment, give leave to sue again, and would perhaps be the more inclined to do so in consequence of the stringent rules laid down in s. 13 of this Act. The section does not limit the plaintiff's right to withdraw his suit. A plaintiff may always do that at any moment if he finds that it is not maintainable; the principal subject of the suit is then withdrawn from the consideration of the Court, and there remains only the question of costs to be considered. But it is an enabling section, and permits the plaintiff to sue again if the Court permit him (*a*). In this case Phear, J., said, that a Full Bench had decided that the section did not apply to a rent case under Act X of 1859. This appears to be the case of *Doyal Chunder Ghose* v. *Dwarkanath Misser* (*b*), before Peacock, C. J., Bayley and Kemp, JJ., who decided that where a plaintiff withdrew his suit under that Act to recover possession of land, and withdrew it in consequence of a compromise which was not carried out, there was nothing to prevent his suing again (*c*). Act VIII of 1869 (B. C.), which supersedes and repeals Act X of 1859, and now regulates rent suits in the Lower Provinces, contains a clause (s. 34) subjecting the proceedings in such suits to the rules contained in the Civil Procedure Code for the time being. This section (373) would, therefore, apply to such suits. Act X of 1859 was finally repealed by Act XVIII of 1873 (Rent, N. W. P.,) which lays down a special procedure in rent suits in the North-Western Provinces, and this clause of the Civil Procedure Code does not apply. Prior to the enactment of the Code of Civil Procedure of 1859, it was not the practice of the Courts in India to permit the plaintiff to withdraw a suit with power to sue again or any proceeding by way of nonsuit, after which the plaintiff could sue again, except where the suit failed for some formal defect; and in a case (*d*), which, after protracted litigation, was ultimately appealed to the Judicial Committee of the Privy Council, their Lordships were of opinion that the power to dismiss a suit with liberty to bring a fresh suit was limited to such cases, and should not be exercised where, after issue joined, the plaintiff has failed to make out his case.

(*a*) Ram Churn Bysack *v.* Ripsima Harmi, 10 Suth. W. R., 373.

(*b*) Marsh., 148.

(*c*) See also Muddoosoodun Mulick *v.* Panchcowrie Mulick, 7 Suth. W. R., 302; Ramanath Dutt *v.* Joykishen Mookerjee, 11 *ib.*, 3, L. S. Jackson and Markby, JJ.: Beer Chund Joobraj *v.* Tarinee Churn Roy, *ib.*, 46, Bayley and Hobhouse, JJ.

(*d*) Watson *v.* Collector of Rajshahye, 3 B. L. R., P. C., 48.

In the Courts of Small Causes established in the Presidency-towns under Act IX of 1850, the Judges may direct a nonsuit, in which case the plaintiff can bring a fresh suit on the same matter.

It was held in Madras that the Court had no power to award costs under the Code of 1859, when a plaintiff withdrew his suit without leave (*a*); but Markby, J., dissented from this view and imposed costs (*b*), holding that as he had power under the circumstances to dismiss the case altogether, he could, on allowing it to be withdrawn, impose terms; and s. 220 of the present Code expressly enables the Court to deal with the matter of costs on any application. The Court of Appeal will not interfere with an order that the plaintiff be permitted to withdraw with liberty to sue again conditionally on payment of costs (*c*). The proper order under this section is not one of dismissal, but one simply permitting the plaintiff to withdraw the suit with liberty to bring a fresh suit for the same matter on payment of costs or otherwise as the Court may direct (*d*). If the plaintiff does not appear and apply to withdraw, the Court will deal with the matter as provided in chap. vii, *ante*.

A suit for an account having been instituted, an agreement to compromise was entered into, and the plaintiff consequently withdrew his suit without having obtained leave. The compromise afterwards fell through. It was held that this section did not prevent the plaintiff suing to enforce the agreement to compromise and to establish his account. "The section only applies when the plaintiff withdraws his suit without the consent of the defendants and then renews it without a cause" (*e*).

The plaintiffs in one case (*f*) obtained a decree on evidence taken under a commission after the time of returning the commission had expired. On appeal it was held (Peacock, C. J., and Norman, J.,) that the evidence was inadmissible; and on the following day the Court permitted the plaintiffs (respondents) to withdraw under Act VIII of 1859, s. 97, with leave to sue again.

(*a*) Brass *v.* Tiruvengada Pillay, 1 Mad. H. C. Rep., 247, Scotland, C. J., and Bittleston, J.

(*b*) Hossaini Bibi *v.* Peri Khanum, 1 B. L. R., O. O. C. J., 45.

(*c*) Doucett *v.* Wise, 1 Suth. W. R., 322, Bayley and Macpherson, JJ.

(*d*) *Ibid.*

(*e*) Morgan, J., in Juggobundo Chatterjee *v.* Watson, 2 Bourke, 250; see also Kallynauth Shaw *v.* Rajeeblochun Mozoomdar, 2 In. Jur., N. S., 343, Peacock, C. J., and Macpherson, J., where the other case was referred to and approved.

(*f*) Doly Chund *v.* Gregory, 5th and 6th April, 1868, MSS.

A plaintiff withdrawing his suit would be precluded from bringing a fresh suit on the same matter under this section in the same way as he would have been precluded under Act VIII of 1859, s. 97, unless he could show that he had obtained the Court's permission to withdraw the former suit (*a*). But where a plaintiff having, under Act VIII of 1859, s. 97, asked leave to withdraw his suit with permission to bring a fresh suit, the Munsif granted the prayer, but the permission to bring a fresh suit was, through inadvertence, not recorded on the petition; and subsequently the Munsif made an order giving plaintiff this permission,—it was held, that there was nothing to prevent the passing of such an order, which was in the nature of a review of the original order, and declared that it was the Munsif's intention to give the permission, which intention had not been expressed through inadvertence (*b*).

Limitation-law not affected by first suit.

374. (S.) In any fresh suit instituted on permission granted under the last preceding section, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought.

This corresponds with the second paragraph of s. 97 of Act VIII of 1859.

Compromise of suits.

375. (S.) If a suit be adjusted by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final.

This corresponds with the first portion of s. 98 of Act VIII of 1859; the words "and the Court shall pass a decree," &c., being substituted for "and the suit shall be disposed of in accordance therewith." The rest of that section related to stamps, and was repealed by the Court Fees Act, VII of 1870.

This clause differs from s. 98 in limiting the power of the Court to decree the matter of compromise only so far as it relates to the suit, and in enacting that the decree shall be final.

Where there is a suit pending, and it is adjusted by a com

(*a*) Aboo Taleh *v.* Abdool Nubee, 20 W. R., 415.

(*b*) Pearee Mohun Dutt *v.* Goolooddoss Dutt, 20 Suth. W. R., 401.

promise, and a decree is drawn up in accordance with and embodying the terms of the compromise,—the rights of the parties are ascertained and finally fixed by such decree, and the decree must be set aside before a suit can be brought on the original cause of action. And even where the compromise is out of Court, if it be shown that both parties freely consented to its terms and accepted them fully in substitution of their previous right, unless the parties have expressly agreed that on a breach of the condition alleged to have been broken they should revert to their original status, or unless the broken condition goes to the whole of the consideration, or unless the consideration has been wholly unperformed, such adjustment must be taken to supersede all former rights of suit and other rights, and to establish the deed of compromise as the only basis of right for the future (*a*). In an anonymous case (*b*) it appeared that the plaintiff's duly authorized vakil appeared in Court on the day fixed for the hearing, and stated on behalf of his client that the defendant had satisfied him in respect of a bond-debt, the subject-matter of the suit, by payment of the amount sued for, and prayed that the suit might be dismissed; and that there was no appearance on the part of the defendant; there was no reason to doubt the vakil's statement, and the Judge acceded to the application. It was held that, under s. 98 of Act VIII of 1859, the Judge ought to have recorded an order to the following effect: "That it appearing upon the day fixed for the hearing of "the suit, by the statement in open Court of the plaintiff's vakil, "that the plaintiff acknowledged himself to be satisfied by the "defendant in respect of the matter of the suit, by payment of the "amount sued for, and there being no appearance by or on behalf "of the defendant, the Court accordingly declares the suit to be "fully satisfied, and orders the same to be put an end to, and that "the defendant be thereof wholly acquitted and discharged." The form of the order will, of course, depend upon the nature of the compromise, and it would be more satisfactory for the Court to have the parties or their representatives before it in order that the compromise may be drawn up and recorded in the terms of their agreement, for it will be observed that the decree is only final under this section where it is drawn up in accordance therewith, and so far as it relates to the suit. The case last referred to shows,

(*a*) Ameer Begum *v.* Noor Begum, H. C. Rep., N. W. P., F. B., 1867, p. 1.
(*b*) 1 Mad. H. C. Rep, 127.

however, that there may be circumstances under which the matter may be disposed of in the absence of one of the parties. Where a Judge makes no order or decree, but merely strikes the case off his file, under a wrong impression that it has been compromised, he acts irregularly; but the case not having been in any way determined, it can be brought on again for trial (*a*).

CHAPTER XXIII.

OF PAYMENT INTO COURT.

Deposit by defendant of amount in satisfaction of claim.

376. (S.) The defendant in any suit to recover a debt or damages, may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

This chapter is new. Payment into Court is limited to suits to recover a debt or damages; thus, in a case where the plaintiff claims the return of property detained by the defendant or its value, the claim is not a simple claim for debt or damages, for the Court may decree the return of the property, and payment into Court would, if allowed, give the plaintiff no option of obtaining his property in specie (*b*). But if the plaintiff sues for the return of the goods or their value and damages for their detention, the defendant can pay money into Court in respect of the damages (*c*), and the effect of such payment is to admit the cause of action and the debt or damages to the extent of the money paid in (*d*).

When money was paid into Court, and the case was referred to arbitrators, who were asked to assess damages, which they did, omitting, however, to take into consideration the money paid into Court, the defendant was held entitled to deduct it (*e*).

(*a*) Deendyal Poramanick *v.* Ramcoomar Chowdhry, 5 Wym (Rent Suits), 54.

(*b*) Allan *v.* Dunn, 26 L. J., N. S., Exch., 185; see also 1 H. & N., 572.

(*c*) Crossfield *v.* Such, 8 Exch., 159; S. C., 22 L. J., N. S., Exch., 65.

(*d*) Robinson *v.* Harman, 18 L. J., N. S, Exch., 202; S. C., 1 Exch., 850; Story *v* Finnis, 6 Exch., 123; Schreger *v* Carden, 21 L. J, N. S., C. P., 135 Perren *v.* Monmothshire Ry. and C. Co., 22 L. J., N. S., C. P., 163; S. C., 11 C B., 855.

(*e*) Carr *v.* The Royal Exchange Assurance Co., 34 L. J., N. S., Q. B., 21; M'Cance *v.* The L. and N. W. Ry. C., 31 L. J., Exch., 65; see also Turner *v.* Diaper, 2 Sc. N. R., 447; Goldy *v.* Goldy, 26 L. J., N. S., Exch, 29; Speck *v.* Phillips, 5 Mee. and W., 279; Robinson *v.* Harman, 18 L. J., N. S., Exch., 202.

If the money is not paid into Court generally, but in respect of some particular part of the claim, it is not an admission of the rest of the claim (*a*).

Payment into Court in any suit upon a contract admits the contract, and it has been held in England that it also admits that the contract is properly stamped (*b*); it may be questioned, however, whether, with reference to Act VIII of 1869, s. 18, payment into Court can give any validity to an insufficiently stamped document, or enable the Court, when it is objected to, to act otherwise with regard to it than is prescribed by s. 20 and the following sections of that Act.

If made in respect of a claim on a bond or note payable by instalments, the payment admits the amount of the instalments as due which the money paid in will cover, but not that the suit on the bond or note itself is within time under the law of limitations (*c*). Where the plaintiff accepts the money paid into Court in full of his debt or damages, the question of costs is left open; he may accept it in full of debt or damages and costs, in which case the Court would have nothing to do with the costs (*d*).

Notice of deposit.

377. (S.) Notice of the deposit shall be given by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

A form of notice is given in the 4th schedule to this Act, see No. 155.

Interest on sum deposited not allowed to plaintiff after receipt of notice.

378. (S.) No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited be in full of the claim or fall short thereof.

Procedure where plaintiff accepts deposit as satisfaction in part.

379. (S.) If the plaintiff accept such amount only as satisfaction in part of his claim, he may prosecute his suit for the balance; and if the Court decides that the deposit by

(*a*) Kingham *v.* Robins, 5 Mee. and W., 94; Stevenson *v.* Corporation of Berwick, 1 Q. B., 154; Goff *v.* Harris, 5 Man. & Gr., 573; Elgar *v.* Watson, 1 Car. & M., 494.

(*b*) Israel *v.* Benjamin, 3 Camp., 40.

(*c*) Reid *v.* Dickens, 5 B. & Ad., 499; Jourdain *v.* Johnson, 2 C. M. & R., 566.

(*d*) Thame *v.* Boast, 12 Q. B., 808; S. C., 17 L. J, N. S., Q. B., 339; see 25 L. J., N. S., Exch., 71, and several cases cited.

the defendant was a full satisfaction of the plaintiff's claim, the plaintiff must pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

Procedure where he accepts it as satisfaction in full.

If the plaintiff accept such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pass judgment accordingly, and in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Illustrations.

(*a.*) A. owes B. Rs. 100. B. sues A. for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A. pays the money into Court. B. accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(*b.*) B. sues A. under the circumstances mentioned in illustration (a). On the plaint being filed, A. disputes the claim. Afterwards A. pays the money into Court. B. accepts it in full satisfaction of his claim. The Court should also give B. his costs of suit, A.'s conduct having shown that the litigation was necessary.

(*c.*) A. owes B. Rs. 100 and is willing to pay him that sum without suit. B. claims Rs. 150, and sues A. for that amount. On the plaint being filed, A. pays Rs. 100 into Court, and disputes only his liability to pay the remaining Rs. 50. B. accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay A.'s costs.

CHAPTER XXIV.

OF REQUIRING SECURITY FOR COSTS.

When security for costs may be required from plaintiff at any stage of suit.

380. (S.) If, at the institution or at any subsequent stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property

within British India independent of the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time to be fixed by the order, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

This section corresponds with Act VIII of 1859, ss. 34 and 35. It is made expressly to apply to the case of several plaintiffs, but that was understood under the old Code.

The plaintiff must now be shown not to possess sufficient immoveable property. In the case of *Russicklall Day* v. *Jadubram Day* (*a*), the suit was for the administration of the estate of a deceased Hindu; the plaintiffs resided at Chandernagore, and as it was admitted that they had a share in the property under administration, Pontifex, J., held, that they could not be called on to furnish security. The report does not state whether the property of the deceased Hindu was moveable or immoveable, or what was the share of the plaintiffs; but the decision, no doubt, proceeds on the ground that the admitted share about which there was no question, and which could not be said to be "in suit," was sufficient to cover the costs. The property was probably immoveable; where it is moveable, the section seems to require security; but if it consists of money or securities in the custody of the Court, this might be held to be sufficient security: the object of the enactment is merely to provide for the payment of costs by the plaintiff.

This provision as to security applies equally to paupers although, under Reg. XIV of 1829 (Bengal), they were exempt (*b*). It was held that a Judge had no discretion, but must order a plaintiff, ordinarily resident out of the jurisdiction, to find security (*c*). This was under Act VIII of 1859, s. 34, which was imperative; s. 35 was not, nor is this section, imperative. Section 34 applied to a plaintiff *ordinarily* residing out of the jurisdiction. This section deals with the matter more generally, and in this respect the law is altered, and the Court has a discretion in the matter of ordering the plaintiff to find security.

It was held by Phear, J., that leaseholds are immoveable property within the meaning of the corresponding section of Act VIII (*d*).

(*a*) 10 B. L. R., Apx, 25.

(*b*) Jacob *v.* Jacob, S. D. A., N. W. P., 1861, p. 811.

(*c*) Peacock, C. J., and Mitter, J., Dec. 4, 1869, MSS.

(*d*) Allman *v.* Justices of the Peace for Calcutta, 7 B. L. R., Apx., 60.

Procedure where requisition is not complied with.

381. (S.) In the event of such security not being furnished within the time so fixed, the Court shall dismiss the suit unless the plaintiff or plaintiffs be permitted to withdraw therefrom under the provisions of section 373.

This corresponds with the last paragraphs of ss. 34 and 35 of Act VIII of 1859. The former required the Court to return the plaint to the plaintiff, if at the time of presenting the plaint he failed to find security when ordered to do so; the latter required the Court to pass judgment against the plaintiff by default, or allow him to withdraw, if at any stage of the suit he did not find the required security.

Where the plaintiff was not ready with his security by the time appointed, Macpherson, J., refused to accept it. There the plaint had been admitted for final disposal, the plaintiff's attorney allowed to verify the plaint, each party to be at liberty to put in a written statement, "and the plaintiff to be at liberty to furnish security within one week," which was not done (*a*). Where the plaintiff, having deposited security, obtained a decree, it was held that the defendant was not entitled to an order to detain the security in Court pending an appeal (*b*). In the last case the defendant's property had been attached before judgment. The plaintiff got a decree, which was reversed on appeal, and he then appealed to the Queen in Council, and applied to the Court to continue the attachment. But the Full Bench unanimously held, that he could not do so, that the suit was at an end, and that the fact of there being an appeal pending was no ground for continuing the attachment.

In the present Code the Court is required to dismiss the suit or allow it to be withdrawn in either case.

Residence out of British India.

382. (S.) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India, within the meaning of section 380.

This section is new.

(*a*) Abadi *v.* Sherman, MSS, Sept. 21, 1869. C. of C. P., Broughton. Ed. by Wilkinson.

(*b*) Fleming *v.* Shearman, 4 B. L R. O J., 92, Macpherson, J., referring to the case of *In re* Ditta Harakman Sing, 3 B. L. R., F. B., 45.

CHAPTER XXV.

OF COMMISSIONS.

A.—Commissions to examine Witnesses.

Cases in which Court may issue commission to examine witness.

383. (S.) Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of persons resident within the local limits of its jurisdiction, who are exempted under this Code from attending the Court, or who are from sickness or infirmity unable to attend it.

This corresponds with the first part of s. 175 of Act VIII of 1859, so far as it extends to persons within the jurisdiction.

Where a witness is in prison, the provisions of the Prisoners Testimony Act, XV of 1869, apply. The prisoner may be either brought up in custody to be examined, or examined by commission, in certain cases under Part III of that Act.

A Judge should not refuse to issue a commission because he thinks it unlikely that it will be executed in time; that is a question for the applicant to consider (*a*). It is stated in that case, that the Judge should issue a commission as a matter of course. The law, however, does give the Court a discretion; and so it was held in another case (*b*), where the Court directed a commission to issue to examine a General of division, who could not leave his division to come to Calcutta, but refused a commission to examine another officer, who did not appear to be under the same disability. And a commission *may* be issued at any time, even if the case is set down peremptorily for hearing, if its issue is not calculated to prejudice the other side (*c*). A *party* to the suit should not be examined by commission except for very strong reasons (*d*).

Order for commission may be made either on application of parties or by Court of its own accord.

384. (S.) Such order may be made by the Court either of its own motion, or on the application, supported by affidavit, of any party to the suit or of the witness to be examined.

This corresponds with the second part of s. 175 of Act VIII of 1859.

(*a*) Haridas Baisakh *v.* Mir Moazan Hossein, 8 B. L. R., App., 16; and see Doucett *v.* Wise, 1 In. Jur., N. S., 357.

(*b*) Burney *v.* Eyre, 1 Hyde, 68.

(*c*) Anon., MSS., 1865.

(*d*) Doucett *v.* Wise, 1 In. Jur., N. S., 357.

When witness resides within Court's jurisdiction.

385. (S.) The commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same, may be issued to any person whom the Court thinks fit to execute the same.

This corresponds with the third part of s. 175 of Act VIII of 1859.

When witness resides beyond Court's jurisdiction, but in British India.

386. (S.) Any Court may in any suit issue a commission for the examination of—

(*a*) any person resident beyond the local limits of its jurisdiction;

(*b*) persons who are about to leave such limits before the date on which they are required to be examined in Court; and

(*c*) civil and military officers of Government who cannot, in the opinion of the Judge, attend the Court without detriment to the public service.

Such commission shall ordinarily be issued to any Court not being a High Court, within the local limits of whose jurisdiction such person resides, and which can most conveniently execute the same:

When witness is within local limits of ordinary original civil jurisdiction of a High Court.

Provided that if he resides beyond the local limits of the jurisdiction of the Court issuing the commission and within the towns of Calcutta, Madras, Bombay or Rangoon, the commission shall be issued to the Court of Small Causes within whose jurisdiction he resides:

Provided also that, under special circumstances, the commission may be directed to any person whom the Court issuing the commission thinks fit to appoint.

The Court on issuing any commission under this section shall direct whether the commission shall be returned to itself or to any subordinate Court.

See ss. 175 and 176 of Act VIII of 1859. Cls. (b) and (c) are new. Commissions were, in practice, issued under such cir-

cumstances. A form of commission to examine absent witnesses is given in the fourth schedule of this Act, see form No. 156.

When witness is not within British India.

387. (S.) When any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that his evidence is necessary, the Court may issue such commission.

See ss. 177, 178 of Act VIII of 1859.

Court to examine witness pursuant to commission.

388. (S.) Every Court receiving a commission for the examination of any person shall examine him pursuant thereto.

This clause is new. See s. 399 as to the summoning, attendance, and examination of witnesses, &c.

The Oaths Act, X of 1873, gives power to the Court, or to a commissioner, to administer an oath or affirmation (s. 4), and the witness must be examined on oath or affirmation (s 5). This Act extends to the whole of British India, and, so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty. Witnesses examined in British India should be examined in the manner prescribed by Act I of 1872 (the Indian Evidence Act), chap. x, so far as it is applicable to the case. The commission should state whether the witness is to be examined on interrogatories or *vivâ voce;* but it would probably be held that where the person deputed to take an examination on interrogatories, takes the evidence not upon the interrogatories but *vivâ voce,* the depositions ought not to be rejected where no material injury has been done to the party who objects (*a*). The commission should take down all the questions and answers, and leave the parties to make any objections to their admissibility at the trial (*b*).

Commission when executed to be returned to Court issuing it with depositions of witnesses.

389. (S.) After the commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court out of which it issued, unless the order for issuing the commission has

(*a*) Grill *v* The General Screw Collier Co, 35 L. J., N. S., C. P, 321.

(*b*) Hutchinson *v.* Bernard, 2 Moo. and Rob., 1.

otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto, and the evidence taken under it, shall (subject to the provisions of the next following section) form part of the record of the suit.

See s. 179 of Act VIII of 1859.

In one case (*a*) the plaintiff obtained a decree on evidence taken under a commission, after the time of returning the commission had expired. On appeal it was held by Peacock C. J., and Norman, J., that the evidence was inadmissible, and on the following day the Court allowed the plaintiffs (respondents) to withdraw with leave to sue again.

Where the return to a commission obtained at the instance of the defendant or plaintiff becomes part of the record, it may be referred to by the other party, and gives the same right of reply to the plaintiff or defendant, as the case may be, without the necessity of his putting it in as his own evidence (*b*).

When depositions may be read in evidence.

390. (S.) Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless

(*a*) the person who gave the evidence is beyond the jurisdiction of the Court, or dead, or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or

(*b*) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in the last preceding clause, and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

See s. 179 of Act VIII of 1859, and s. 33 of the Indian Evidence Act.

Provisions as to execution and return of commissions to apply to commissions issued by foreign Courts.

391. (S.) The provisions hereinbefore contained as to the execution and return of commissions shall apply to commissions issued by

(*a*) Doly Chund *v* Gregory, Mss., April 5th and 6th, 1868.

(*b*) Dwarkanath Dutt *v.* Gunga Dayi, 8 B. L R., Apx., 102, Macpherson

(*a*) Courts situate beyond the limits of British India and established by the authority of Her Majesty or of the Governor-General in Council, or

(*b*) Courts situate in any part of the British Empire other than British India, or

(*c*) Courts of any foreign country for the time being in alliance with Her Majesty.

This section is new. Clause (c) apparently contemplates a case where there is a treaty of alliance between the two Governments. Ava was not a country in alliance with Her Majesty in 1868 (*a*). Since then a Court has been established there by the authority of the Governor-General in Council. Cabul is a state in alliance with Her Majesty (*b*).

B.—Commissions for Local Investigations.

Commission to make local investigations.

392. (S.) In any suit or proceeding in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual nett profits, and the same cannot be conveniently conducted by the Judge in person, the Court may issue a commission to such person as it thinks fit, directing him to make such investigation and to report thereon to the Court.

Provided that, when the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

This section corresponds with the first part of s. 180 of Act VIII of 1859, as amended by Act XXVI of 1867, and s. 307 of Act VIII, which applies the proceeding to pauper suits. Under the old Procedure, an officer of the Court, if there was one, was required to conduct the investigation, if there was none, some one else might be appointed. It was held to be imperative on the Court to appoint an officer of the Court if it could. Now the Court

(*a*) Aga Mahomed Jaffer Tehrani *v.* Mirza Nazir Ullah, 2 B. L. R., A. C., 73, Peacock, C. J., and Mitter, J.

(*b*) Meher Banoo *v.* Mahomed Moosroorkhan, 2 Wym., 354.

may appoint any one. The proviso is new. A form of commission is given in the fourth schedule of this Act, see form No. 157.

The ordering of a local investigation or not is a matter of discretion (*a*). But the Court cannot delegate its own functions to the ameen. It cannot direct him "to ascertain the real facts of right and possession, and the boundary of the place." All it can charge the ameen with is to obtain such information with regard to the physical features of the place in dispute, the identification of lands depicted in maps with one another by the aid of objects to be found on the land, and other matters of this kind which may be of use in, and auxiliary to, the proper trial of the suit by the Court before which it is pending (*b*). This accords with the opinion of Mitter and Loch, JJ., in one case (*c*), and with that of Kemp and E. Jackson, JJ., in another case (*d*), who thought, however, that although the reference was perhaps improper, there was no illegality in it, and the evidence could be read at the trial. In another case (*e*) L. S. Jackson and Glover, JJ., thought that the Court had the widest discretion as to what it should refer to the ameen (*f*). It was considered by Turner, Offg. C. J, and Spankie, J., in a case (*g*) before them, that local investigations should be had recourse to, not so much for the purpose of collecting evidence which could be taken in Court, but to obtain the evidence which, from its conflicting nature, can only be obtained on the spot. An ameen was deputed to make, and made, a very elaborate investigation in a case (*h*), and his report was upheld by the Judicial Committee. The matter investigated was the situation of a chur, and the proceeding appears to have been strictly within the limits of the opinion of Phear, J., in *Iswarchandra Das* v. *Jugal Kishore Chuckerbutty* (*i*). It is not an error of law in the investigation of the case when the

(*a*) Graham *v.* Lopez, 1 Suth. W. R., 141, Bayley and E. Jackson, JJ.

(*b*) *Per* Phear, J, in Iswarchandra Das *v.* Jugal Kishore Chuckerbutty, 4 B. L. R., Apx., 33; Buroda Churn Bose *v* Ajoodhya Ram Khan, 23 Suth. W. R, 286.

(*c*) Shadoo Singh *v.* Ramanoograha Lall, 9 Suth. W. R, 83.

(*d*) Ram Churn Mahtoon *v.* Surubjeet Mahtoon, 9 Suth. W. R., 494; Mohun Lall Roy *v* Umopoorna Dossee, 9 Suth. W. R., 566; Umbica Churn Dey *v* Goluck Chunder Chuckerbutty *ib*, 596.

(*e*) Gour Chunder Roy *v.* Rash Beharee Dutt, 10 Suth. W. R, 43.

(*f*) See Bhyrub Roy *v.* Nobin Roy, 9 Suth. W. R, 601, Kemp and E. Jackson, JJ.

(*g*) Bhowanee Dutt Singh *v.* Beer Singh, 2 H. C, N. W. P., Rep., 196.

(*h*) Rani Saratsundari Debi *v.* Baboo Prasanna Kumar Tagore, 6 B. L. R., P. C., 677.

(*i*) 4 B. L. R., Apx, 3.

Court does not order an investigation of its own motion, not being asked to do so by either party (*a*).

Where a Judge orders a local investigation pending which another Judge is appointed to succeed him, the successor should permit the investigation to proceed before deciding the case (*b*).

Procedure of Commissioner.

393. (S.) The commissioner, after such local inspection as he deems necessary, and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing, subscribed with his name, to the Court.

Report and depositions to be evidence in suit.

The report of the commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court, or any of the parties to the suit may, with the permission of the Court, examine the commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to the manner in which he has made the investigation.

Commissioner may be examined in person.

This corresponds with the latter part of s. 180 of Act VIII of 1859. The words "but not the evidence without the report" are introduced in accordance with a decision of Norman, C. J., Loch and Ainslie, JJ. In that case (*c*) it was held that where an ameen could not complete his investigation in consequence of the default of the person who applied for it in supplying the necessary funds, the deposition of the witnesses examined by the ameen could not be given in evidence at the trial. This was an application made by the defaulting party who claimed to put the deposition in.

Under s. 33 of the Evidence Act (I of 1872), the evidence or depositions would not have been evidence except under the circumstances detailed in that section. Under this clause, however, the

(*a*) MacDonald *v.* Munar Roy, B. L. R., F. B., 358.

(*b*) Shurrioollah *v.* Bawl Mundul, 1 Suth. W. R., 102, Loch and Seton-Karr, JJ.

(*c*) Debnarayan Deb *v.* Kali Das Mitter, 6 B. L. R., Apx., 70.

Court is bound to take notice of, and pronounce an opinion upon, the evidence taken by, and the report of the ameen (*a*), even although there circumstances do not exist. The fact that one of the parties does not appear before the person who makes the investigation at the time and place he appoints, does not, of itself, preclude him from afterwards objecting to the report (*b*); but where a party neglected to examine the commissioner in person in Court, having an opportunity of doing so, his objections to the report at a subsequent stage of the case were held to be rightly rejected (*c*). So the Judicial Committee refused to entertain an objection to the commissioner's report, which was not raised in the Courts below (*d*).

C.—Commissions to examine Accounts.

Commission to examine or adjust accounts.

394. (S.) In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

See Act VIII of 1859, s. 181, first paragraph, omitting the directions as to attendance of parties, &c., which are contained in the general provisions of s. 399, *post*. The consent of the parties is not necessary to the appointment of a commissioner; where such consent is given, and all facts are referred, leaving only questions of law to be decided by the Court, the parties are bound by their agreement, and the commissioner has larger powers. If he finds that something is due on the account from one party to the other, but the Court is not satisfied with his whole report, it should rather refer it back again than dismiss the suit (*e*).

Court to give commissioner necessary instructions.

395. (S.) The Court shall furnish the commissioner with such part of the proceedings and such detailed instructions as appear necessary,

(*a*) Janobee Chowdhrain *v.* Collector of Mymensingh, 8 Suth. W. R., 287, Loch and Mitter, JJ.; Bhyrub Roy *v.* Nobin Roy, *ib.*, 601, Kemp and E. Jackson, JJ.; Umbica Churn Dey *v.* Goluck Chunder Chuckerbutty, 9 *ib.*, 596, Bayley and Macpherson, JJ.

(*b*) Karoo Lall Thakoor *v.* Forbes, 7 Suth. W. R., 140, Macpherson and Loch, JJ.

(*c*) Bukshee Ali *v.* Anund Mohun Ghose, 1 Suth. W. R., 254, Steer and E. Jackson, JJ.

(*d*) Seth Gujmull *v.* Musst. Chakee Kowar, L. R., 2 I. A., 34.

(*e*) Watson *v.* Aga Mehedee Sherazee, L. R., 1 I. A., 346.

and the instructions shall distinctly specify whether the commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Proceedings of commissioner receivable in evidence.
Power to make further inquiry.

The proceedings of the commissioner shall be received in evidence in the suit, unless the Court has reason to be dissatisfied with them, in which case the Court shall direct such further inquiry as is requisite.

See the remaining part of s. 181 of Act VIII of 1859. A form of commission is given in the fourth schedule of this Act, see form No. 157. Where a commissioner has made his report, the Court will act upon it, and will not take a fresh account, the object of the Act being to shorten and simplify the procedure of the Courts in suits relating to matters of account (*a*), unless of course on special grounds, such as fraud, &c., or where the Court is dissatisfied with the accounts, as where they have been taken on a wrong principle (*b*).

D.—Commission to make Partition.

Commission to make partition of non-revenue paying immoveable property.

396. (S.) In any suit in which the partition of immoveable property not paying revenue to Government appears to the Court to be necessary, the Court, after ascertaining the several parties interested in such property and their several rights therein, may issue a commission to such persons as it thinks fit to make a partition according to such rights.

The commissioners shall ascertain and inspect the property, and shall divide the same into as many shares as may be directed by the order under which the commission issues, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award

(*a*) Sarapu Venkadesan *v.* Malai Isvaraiyya, 1 Mad. H. C. Rep., 1, Phillips and Frere, JJ.

(*b*) Venkata Reddi *v.* Venkata Ramanja, 1 Mad. H. C. Rep., 418, Frere and Holloway, JJ.; but see Amed Valad Nunhubhai *v.* Khasaji Valad Karim Bhai, 6 Bom. H. C. Rep., 149, Lloyd and Melvill, JJ.

sums to be paid for the purpose of equalizing the value of the shares.

The commissioners shall then prepare and sign a report, or (if they cannot agree) separate reports appointing the share of each party, and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court: and the Court, after hearing any objections which the parties may make to the report or reports, shall either quash the same and issue a new commission, or (where the commissioners agree in their report) pass a decree in accordance therewith.

This is a new provision. It is not intended to interfere with any local law providing for the partition of immoveable property; see s. 4, *ante*.

E.—General Provisions.

Expenses of commission to be paid into Court.

397. (S.) Before issuing any commission under this chapter, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be paid into Court by the party at whose instance or for whose benefit the commission is issued.

This corresponds with Act VIII of 1859, s. 182.

Commissioner may examine parties and witnesses and call for papers.

398. Any Commissioner appointed under this chapter may, unless otherwise directed by the order of appointment,

(*a*) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the commissioner thinks proper to call upon to give evidence in the matter referred to him:

(*b*) call for and examine documents and other things relevant to the subject of inquiry:

(*c*) at any reasonable time enter upon or into any land or building mentioned in the order.

This section corresponds with a provision contained in the

180th section of Act VIII of 1859, and in addition gives power to the commissioner to enter on or into lands or buildings under clause (c).

Attendance, examination, and punishment of witnesses before commissioner.

399. (S.) The provisions of this Code relating to the summoning, attendance, and examination of witnesses and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this chapter, whether the commission in execution of which they are so required has been issued by a Court situate within, or by a Court situate beyond, the limits of British India.

This corresponds also with s. 180 of Act VIII of 1859.

Procedure *ex parte* where parties do not appear.

400. (S.) Whenever a commission is issued under this chapter, the Court shall direct that the parties to the suit shall appear before the commissioner in person or by their agents or pleaders.

If the parties do not so appear, the commissioner may proceed *ex parte*.

See Act VIII of 1859, s. 181, first paragraph. Under that Code if a plaintiff did not appear and the ameen reported that he could not carry on the enquiry *ex parte*, it was held that the suit was rightly dismissed for default under s. 114, corresponding with s. 102 of this Code (*a*). But the fact of a party not appearing before the person and at the time appointed for the making of a local investigation does not of itself preclude him from making objections to the report (*b*).

(*a*) Esan Chunder Chuckerbutty *v.* Soorjoo Lall Gossain, 1 Hay, 335; S. C., Suth. F. B. Rep., 1.

(*b*) Karoo Lal Thakoor *v.* Forbes, 7 Suth. W. R., 140, Loch and Macpherson, JJ.,

PART III.

OF SUITS IN PARTICULAR CASES.

CHAPTER XXVI.

SUITS BY PAUPERS.

Suits may be brought in *formâ pauperis.*

401. (S.) Subject to the following rules, any suit may be brought by a pauper.

Explanation.—A person is a 'pauper' when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.

This clause corresponds with s. 297 of Act VIII of 1859. A suit in *formâ pauperis* may be brought by a next friend who is also a pauper (*a*); but it would seem that if the next friend is not a pauper, the suit cannot be brought in *formâ pauperis,* and an executor or other representative not a pauper cannot sue or defend a suit in *formâ pauperis* (*b*). There is, however, no provision in this Code for *defending* a suit in *formâ pauperis.* This seems to confirm the view taken in a case cited in the note to s. 410, *post,* that the pauper is only exempt from payment of the cost of the stamp on the institution of the suit, for a defendant is not called upon to pay any *ad valorem* stamp of this nature. A suit was filed in the ordinary way, and the defendants put in written statements; the hearing was postponed in consequence of the illness of one of the defendants. Afterwards the plaintiff put in a petition to be allowed to go on in *formâ pauperis.* It was objected that he could not do so, but might be permitted to withdraw his suit with leave to sue again as a pauper. Pontifex, J., however,

(*a*) S. M. Golaupmonee Dassee *v.* S. M. Prosonomoye Dassee, 11 B. L. R., 373, Macpherson, J.

(*b*) 2 Wm. on Executors, 1780, 6th ed., citing Paradiee *v.* Sheppard, 1 Dick, 136; Beames on Costs, 78; Oldfield *v.* Cobbett, 1 Phill. Ch. C., 613; Fowler *v.* Davies, 16 Sim., 182; see Bayly *v.* Bayly, 11 Beav., 256.

permitted the plaintiff to continue his suit as a pauper, holding that the power to allow the suit to be continued as a pauper was included in the power given to the Court to allow a pauper suit to be brought (*a*). The suit must be brought in the Court competent to try it according to the value of the property claimed or other circumstances giving jurisdiction; but where a pauper application to sue in a subordinate Judge's Court having been opposed on the ground of over-valuation, was renewed successfully in the Moonsiff's Court where the plaintiff obtained a decree, and in appeal the question of jurisdiction was raised, and the Additional Judge decided that the suit was of a value beyond the Moonsiff's competency to try,—it was held that as it was at the defendant's opposition that the original application was rejected, he was not at liberty at this stage of the case to turn round and object to the jurisdiction of the Moonsiff (*b*).

What suits excepted.

402. (S.) No suit shall be brought by a pauper to recover compensation for loss of caste, libel, slander, abusive language or assault.

This corresponds with s. 298 of Act VIII of 1859.

Application to be in writing.

Contents of application.

403. (S.) The application for permission to sue by a pauper shall be in writing, and shall contain the particulars required by section 50 in regard to plaints in suits: a schedule of any moveable or immoveable property belonging to the petitioner, with the estimated value thereof, shall be annexed thereto; and it shall be subscribed and verified in the manner hereinbefore prescribed for the subscription and verification of plaints.

This corresponds with ss. 299 and 300 of Act VIII of 1859.

A pauper suit commences for the purposes of limitation on the day when the petition to sue *in formâ pauperis* is filed (*c*). Prompt dower, under the Mahomedan law, is payable on demand. On demand and refusal, a right to sue accrues. An application by the wife to be allowed to sue as a pauper for her

(*a*) Nirmul Chandra Mookerjee *v.* Doyal Nath Bhuttacharjee, I. L. R., 2 Cal., 130.

(*b*) Brohmomoyee Dassia *v.* Anund Chunder Chatterjee, 22 Suth. W. R., 120, Ainslie and McDonell, JJ.

(*c*) Act XV of 1877, s. 4.

dower is not a demand, so as to cause the time to run for the purposes of limitation, unless the application is successful (*a*).

Presentation of application.

404. (S.) Notwithstanding anything contained in section 36, the application shall be presented to the Court by the applicant in person unless he is exempted from appearing in Court under section 640 or 641, in which case the application may be presented by a duly authorized agent, who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

The like provision in the corresponding s. 301 of Act VIII of 1859 was held to be imperative, and to control s. 17 of that Act, which provided for applications and appearances to be made by recognized agents of the parties (*b*). In like manner, the provision of s. 27 of this Code would be controlled by this section.

Rejection of application.

405. (S.) If the application be not framed or presented in the manner prescribed by sections 403 and 404, the Court shall reject it.

This corresponds with Act VIII of 1859, s. 302.

Examination of applicant.

406. (S.) If the application be in proper form and duly presented, the Judge shall examine the petitioner, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

If presented by agent, Court may order applicant to be examined by commission.

When the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken under the provisions of this Code.

This corresponds with Act VIII of 1859, s. 303.

(*a*) Ranee Khajooroonnissa *v.* Mirza Saifoolla Khan, 15 B. L. R., 306, P. C.

(*b*) *Ex parte v.* Devgirguru Sumbhagir, 4 Bom. H. C. Rep., App. Civ., 91, Couch, C. J., and Newton, J.

Rejection of application.

407. (S.) If it appear to the Court upon such examination

(*a*) that the applicant is not a pauper, or

(*b*) that he has, within the two months next before the presentation of the application, disposed of any property fraudulently or with a view to obtain the benefit of this chapter, or

(*c*) that his allegations do not show a right to sue in such Court, or

(*d*) that he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter,

the Court shall reject the application.

This corresponds with Act VIII of 1859, s. 304. The examination should be conducted by the Judge in person (*a*). Cl. (a), see explanation to s. 401; cl. (b), "within two months" is substituted for "recently;" cl. (c), "show a right to sue in such Court," for "the "matter of the suit is not within the jurisdiction of the Court, or "that the claim is barred by the Statute of Limitations, or that the "allegations of the petitioner do not constitute a reasonable ground of "action." Where the objections here stated appear, the Court must refuse the application, otherwise it must proceed under the next section; and if the objections then appear, it may still (see s. 409) refuse leave. Although the wording of the section is changed, it is evident that the matter cannot be entertained unless it be within the jurisdiction (*b*). Cl. (d) is new, the object probably being to prevent arrangements which would be considered by an English Court champertous, but which would not always be so treated in India (*c*).

(*a*) *In re* Eknath bin Madoba, 1 Bom. Rep, 102.

(*b*) See the judgment of L. S. Jackson, J., *In re* Gunga Dass Adhikaree, 14 Suth. W. R., 281, Jackson and Mitter, JJ; S. C., 11 B. L. R, Apx., 23 note, followed in Taramoney Dabee *v.* Hurro Mohun Chatterjee, *ib.*, Macpherson, J., who would not allow any one but the plaintiff to be examined as to the cause of action. These cases go beyond Shiponessa Bibee *v.* Kaminee Bibee, 2 In. Jur, N. S., 121; and Dipsangji Jitsangji *v.* Fattesangji Jasvatsangji, 5 Bom H. C. Rep, App. Civ., 59, Newton and Tucker, JJ, and Bhuggobutty Dossee *v.* Konnoylall Mitter, 11 B. L. R, Apx, 25 note,

(*c*) Chedambara Chetty *v.* Renga Krishna Muthuvira Puchaiyar Naickar, L. R, 1 I. A., 241; S. C., 13 B. L. R., P. C, 509; see also Grose *v.* Amirtamayi Dassee, 4 *ib.*, O. C., 1, Peacock, C. J., and Macpherson, J.; Chunderkant Mookerjee *v.* Ramcoomar Koondu, 13 *ib.*, 530; I. L. R., 2 Cal, 233, Couch, C. J, and Pontifex, J.

408. (S.) If upon such examination the Court sees no reason to refuse the application on any of the grounds stated in section 407, it shall fix a day (of which at least ten days' previous notice shall be given to the opposite party and the Government Pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

Notice of day for receiving evidence of applicant's pauperism.

This corresponds with Act VIII of 1859, s. 305. The Government Pleader is also to have notice, the Crown being interested in the question of the stamp duty.

409. (S.) On the day so fixed, or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may cross-examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

Procedure at hearing.

The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in section 407.

The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

This corresponds with Act VIII of 1859, s. 306. The second paragraph, which is an addition, adopts the view of L. S. Jackson, J., in 14 Suth. W. R., referred to in the note to s. 407, and allows a more complete investigation than was permitted in the cases reported in 2 In. Jur. and 5 Bom., and in 11 B. L. R., Apx., 23.

410. (S.) If the application be granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted under Chapter V, except that the plaintiff shall not be liable to any court-fee (other than fees payable for service

Procedure if application admitted.

of process) in respect of any petition, appointment of a pleader, or other proceeding connected with the suit.

This corresponds with Act VIII of 1859, s. 308. An application to sue as a pauper, if allowed, is to be deemed a plaint, and the suit will be deemed to have been instituted on the day on which it was filed (*a*). But where an application for leave to sue as a pauper is numbered and registered, and deemed to be the plaint in the suit, not in consequence of proof of the plaintiff's pauperism, but in consequence of his abandoning his claim to sue as a pauper, and paying for the stamps, the date of such payment, not the date of the filing, must be taken to be the date of presentation of the plaint and of the institution of the suit (*b*). The pauper is not exempt from payment of fees on service of process or of subsistence-money for witnesses, or from giving security if he resides out of British India, or goes out of that territory (*c*) or of fees on documents he puts in evidence (*d*).

Costs when pauper succeeds.

411. (S.) If the plaintiff succeed in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; and such amount shall be a first charge on the subject-matter of the suit and shall also be recoverable by the Government from any party ordered by the decree to pay the same, in the same manner as costs of suit are recoverable under this Code.

Recovery of court-fees.

This corresponds with Act VIII of 1859, s. 309. This section gives the Crown a first claim in accordance with a Bombay case (*e*). The right of the Crown to recover the stamp fees is not affected by the Limitation Act (*f*).

Procedure when pauper fails.

412. (S.) If the plaintiff fails in the suit, or if he is dispaupered, the Court shall order the plaintiff, or any person made under

(*a*) Act XV of 1877, s. 4.

(*b*) Skinner *v.* Orde, I. L. R., 1 All., 230, Stuart, C. J., and Pearson, J.

(*c*) Jacob *v.* Jacob, S. D. A., N. W. P., 1861, p. 811.

(*d*) Golam Guffoor *v.* Ekram Hossein Chowdhry, 10 Suth. W. R., 358, Kemp and E. Jackson, JJ.

(*e*) Ganpat Putaya *v.* Collector of Kanara, I. L. R., I Bom. 7, West and Nanabhai Haridass, JJ.

(*f*) Shami Mahommed *v.* Mahommed Ali Khan, 2 B. L. R., Apx., 22, Norman and E. Jackson, JJ.

section 32 co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper;

and, if it find that the suit was frivolous or vexatious, it may also punish the plaintiff with fine not exceeding one hundred rupees, or with imprisonment for a term which may extend to a month, or with both.

This provision is also taken from s. 309, but the second part of it is new. K. and H. instituted a suit in *formâ pauperis* against S., the claim was valued at over Rs. 5,500. The suit was decided in 1876 in favor of the plaintiffs in part, and the decree provided that out of the Government stamp duty, the plaintiffs were to pay Rs. 224-8 and the defendants Rs. 80-8. The defendants appealed to the High Court, and the result of the appeal was that the plaintiff's suit was wholly dismissed. The decree of the High Court did not, however, contain, as it should have done, any order as to the amount due to the Government for stamp duty. The Secretary of State applied to the High Court afterwards by petition, asking that the stamp duty, Rs. 305, might be ordered to be paid by the plaintiff. This application was refused on the ground that the Secretary of State had no *locus standi* (*a*). This suit was decided upon the Code of 1859; the present Code, s. 408, *ante*, enables the Government to come in when the question of pauperism is being investigated, and s. 414 preserves his *locus standi* for some purposes throughout the whole of the proceedings.

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.

413. (S.) Refusal to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by Government in opposing his application for leave to sue as a pauper.

This corresponds with Act VIII of 1859, s. 310. It was considered in a case decided in Calcutta doubtful whether an order

(*a*) Shusti Charan Chowdry *v.* Kamar Ali Daroga, Garth, C. J., and McDonell, J., June 17, 1878.

refusing to allow a plaintiff to sue as a pauper can be reviewed (*a*). In that case the review was however disallowed on the ground that it had not been presented in time. Orders under this chapter are not appealable, see s. 588, *post*. If they have been improperly obtained, the course to be pursued is to apply to the Court which made the order (which appears to contemplate a review in such a case), or the objection may be taken if the case comes before the Court of Appeal on other points (*b*).

Dispaupering.

414. (S.) The Court may, on motion by the defendant, or by the Government Pleader, of which one week's notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

(*a*) if he is guilty of vexatious or improper conduct in the course of the suit;

(*b*) if it appears that his means are such that he ought not to continue to sue as a pauper, or

(*c*) if he has entered into any agreement with reference to the subject-matter of the suit, under which any other person has obtained an interest in such subject-matter.

This provision is new.

Costs.

415. (S.) The costs of an application for permission to sue as a pauper and of an inquiry into pauperism are costs in the suit.

This section enacts what was decided on the old law.

CHAPTER XXVII.

SUITS BY OR AGAINST GOVERNMENT OR PUBLIC OFFICERS.

Suits by or against Secretary of State in Council.

416. (S.) Suits by or against the Government shall be instituted by or against (as the case may be) the Secretary of State for India in Council.

This is newly introduced into the Civil Procedure Code. The

(*a*) Mahomed Gazee Chowdhry *v.* Doolub Beebee, 11 Suth. W. R., 22, Bayley and Hobhouse, JJ.

(*b*) Khodejoonissa, petitioner, 7 Suth. W. R., 486, Markby and Hobhouse, JJ.

Act for the transfer of the Government of India to the Crown, 21 and 22 Vict., c. 106, s. 65, makes the Secretary of State in Council a body corporate, and enables suits to be brought by or against him. He cannot be sued in any other way (see note to s. 11, p. 29, *et seq*), and must sue as here pointed out. See also the same note as to the extent of the liability of Government.

Persons authorized to act for Government.

417. (S.) Persons being *ex-officio* or otherwise authorized to act for Government in respect of any judicial proceeding, shall be deemed to be the recognized agents by whom appearances, acts, and applications under this Code may be made or done on behalf of Government.

This corresponds with Act VIII of 1859, s. 17, para. 3.

Plaints in suits by Secretary of State in Council.

418. (S.) In suits by the Secretary of State for India in Council, instead of inserting in the plaint the name and description and place of abode of the plaintiff, it shall be sufficient to insert the words "The Secretary of State for India in Council."

This corresponds with Act VIII of 1859, s. 26, para. 6. The description "Secretary of State in Council" being substituted for the "Government" in accordance with the Act of Parliament 21 and 22 Vict., c. 106, s. 65.

Agent of Government to receive process.

419. (S.) The Government Pleader in any Court shall be the agent of the Government for the purpose of receiving processes against the said Secretary of State in Council issuing out of such Court.

This corresponds with Act VIII of 1859, ss. 52 and 67, 1st paragraph.

Appearance and answer by Secretary of State in Council.

420. (S.) The Court, in fixing the day for the said Secretary of State in Council to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channels, and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State

in Council or the Government, and may extend the time at its discretion.

This corresponds with the 2nd and 3rd paragraphs of s. 67, Act VIII of 1859.

Attendance of person able to answer questions relating to suit against Government.

421. (S.) The Court may also in any case in which the Government Pleader is not accompanied by any person on the part of the said Secretary of State in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

This corresponds with the last paragraph of s. 67 of Act VIII of 1859.

Service on public officers.

422. (S.) Where the defendant is a public officer, the Court may send a copy of the summons to the head of the office in which the defendant is employed, for the purpose of being served on him, if it appear to the Court that the summons may be most conveniently so served.

This corresponds with Act VIII of 1859, s. 62, 1st clause, see also s. 38. For the definition of "public officers," see *ante*, s. 2.

Extension of time to enable officer to make reference to Government.

423. (S.) If the public officer on receiving the summons considers it proper to make a reference to the Government before answering to the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel; and the Court upon such application may extend the time for so long as appears to be requisite.

This corresponds with Act VIII of 1859, s. 69.

Notice previous to suing Secretary of State in Council or public officer.

424. (S.) No suit shall be instituted against the said Secretary of State in Council or against a public officer until the expiration of two months next after notice in

writing has been in the case of the Secretary of State in Council delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action and the name and place of abode of the intending plaintiff ; and the plaint must contain a statement that such notice has been so delivered or left.

This is a new provision, and applies generally the usual clauses inserted in Acts which appoint public bodies, such as municipal corporations in towns, &c., acting within their jurisdiction, and the scope of their duties.

Arrests in such suits.

425. (S.) No warrant of arrest shall be issued in such suit without the consent in writing of the District Judge.

This is also a new provision.

Application where Government undertakes defence.

426. (S.) If the Government undertake the defence of a suit against a public officer, the Government Pleader, upon being furnished with authority to appear and answer to the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register.

This corresponds with Act VIII of 1859, s. 70.

Procedure where no such application made.

427. (S.) If such application is not made by the Government Pleader on or before the day fixed in the notice for the defendant to appear and answer to the plaint, the case shall proceed as in a suit between private parties, except that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

Defendant not liable to arrest before judgment.

This corresponds with s. 71 of Act VIII of 1859.

428. (S.) In a suit against a public officer the Court shall exempt the defendant from appearing in person when he satisfies the Court that he cannot absent himself from his duty without detriment to the public service.

Exemption of public officers from personal appearance.

This corresponds with Act VIII of 1859, s. 72, omitting the proviso "but he shall be liable to be examined in any way in which an absent witness may be examined," which it is unnecessary to repeat here as the matter is provided for in chap. xxv, *ante*.

429. (S.) When the decree is against the said Secretary of State in Council or against a public officer, a time shall be specified in the decree within which it shall be satisfied; and if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government.

Procedure where decree is against Government or a public officer.

Execution shall not issue on any such decree unless it remains unsatisfied for the period of three months computed from the date of the report.

This is a new provision.

CHAPTER XXVIII.

SUITS BY ALIENS AND BY OR AGAINST FOREIGN AND NATIVE RULERS.

430. (S.) Alien enemies residing in British India with the permission of the Governor General in Council and alien friends may sue in the Courts of British India as if they were subjects of Her Majesty.

When aliens may sue.

No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

Explanation.—Every person residing in a foreign country, the Government of which is at war with the United Kingdom of Great Britain and Ireland and carry-

ing on business in that country without a license in that behalf under the hand of one of Her Majesty's Secretaries of State or of a Secretary to the Government of India, shall, for the purpose of the second paragraph of this section, be deemed to be an alien enemy residing in a foreign country.

When a foreign State may sue.

413. (S.) A foreign State may sue in the Courts of British India, provided that—

(*a*) it has been recognized by Her Majesty or the Governor General in Council, and

(*b*) the object of the suit is to enforce the private rights of the head or of the subjects of the foreign State.

The Court shall take judicial notice of the fact that a foreign State has not been recognized by Her Majesty or by the Governor General in Council.

This section follows (cl. b), the rule that a reigning sovereign may sue in our Municipal Courts to protect his own, or the rights of his people, laid down in a well-known case (*a*), in which the defendants, the Days, at the instance of Louis Kossuth, also a defendant, printed a quantity of notes to be used as notes of the Kingdom of Hungary after Kossuth should have revolutionized that country as he hoped to do. The plates and stones and notes were ordered to be delivered up to the plaintiff on his paying the Days the price of the pulp out of which the paper on which the notes were printed was made (*b*). A foreign State should sue in the name by which it is recognized by the Queen, and need not join a public officer as co-plaintiff (*c*), and by coming in and submitting to the jurisdiction subjects itself to the Court in which it sues, and to its procedure in a cross suit (*d*).

(*a*) Emperor of Austria *v.* Day and others, 30 L. J., Ch., 690.

(*b*) De-Haber *v.* Queen of Portugal, 17 Q. B., 176, p. 212; King of Spain *v.* Hullet, 7 Bligh N. S., 359; King of the two Sicilies *v.* Willcox, 1 Sim. N. S., 301.

(*c*) United States of America *v.* Wagner, L. R. 2 Ch., 582; Priolcau *v.* United States of America, *ib.*, 2 Eq., 659.

(*d*) *ib.*, see s. 433, *post.*

432. (S.) Persons specially appointed by order of Government at the request of any Sovereign Prince or ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts, and applications under this Code may be made or done on behalf of such Prince or Chief.

Persons specially appointed by Government to prosecute or defend for Princes or Chiefs.

This corresponds with para. 4 of s. 17 of Act VIII of 1859.

433. (S.) Any such Prince or Chief, and any Ambassador or Envoy of a foreign State may, with the consent of Government certified by the signature of one of its Secretaries (but not without such consent) be sued in any competent Court not subordinate to a District Court.

Suits against Sovereign Princes, &c.

Such consent shall not be given unless—

(*a*) the Prince, Chief, Ambassador or Envoy has instituted a suit in such Court against the person desiring to sue him, or

(*b*) the Prince, Chief, Ambassador or Envoy by himself or another, trades within the local limits of the jurisdiction of such Court; or

(*c*) the subject-matter of the suit is immoveable property situate within the said local limits and in the possession of the Prince, Chief, Ambassador or Envoy.

No such Prince, Chief, Ambassador or Envoy shall be arrested under this Code; and no decree shall be executed against the property of any such Prince, Chief, Ambassador or Envoy unless with consent of Government certified as aforesaid.

Sovereign Princes, &c., exempt from arrest.

When their property may be attached.

No suit can be brought in our Municipal Courts against an independent sovereign prince for anything done in his political

capacity (*a*); if, at the time the suit is brought and defended, he is still a sovereign prince (*b*). This was a suit on an agreement for an annuity. It would seem that when the defendant is also a subject of the Crown, and the suit has reference to a private matter, it is unobjectionable. But he is ordinarily exempt from the jurisdiction of the Courts, although he may sue in such Courts; and if he do, he submits himself to the jurisdiction, and a cross suit may be brought against him; but he does not, by suing A., render himself liable to a suit at the instance of B. on an independent matter (*c*).

The principle of these decisions has already been recognized in this country, and it has been held that the succession to an independent raj is not a question for our Civil Courts; but where the raja has submitted to the jurisdiction, he may be sued for property in British territory (*d*); and it has also been held that an independent Native chief is not amenable to the Civil Courts for debts contracted here (*e*). This section would permit such a suit if the debt were contracted in trade, and if leave were given. As to the immunity of ambassadors from suits in the Municipal Courts of the countries to which they are accredited, see Wheaton's Elements of International Law, Part III, C. 1, where the subject is very fully discussed. Mr. Wheaton himself, when American ambassador in Prussia, was unfortunate enough to have his goods seized by his landlady, and on his claiming immunity in his character of ambassador, which was resisted by the Prussian authorities, a correspondence and reference to the opinion of leading jurists ensued: all which is described in his treatise. In the result Mr. Wheaton paid the money claimed by his landlady, and the matter dropped.

See also another case (*f*), where the Court held unanimously that a public minister duly accredited to the Queen by a foreign

(*a*) Duke of Brunswick *v.* King of Hanover, 6 Beav., 1, and in appeal, 2 H. L. C., 1.; Nabob of Arcot *v.* East India Co., 4 Bro. C. C., 179; S. C., 2 Vesey, 56; Wadsworth *v.* Queen of Spain and De-Haber *v.* Queen of Portugal, 17 Q. B, 171, *et seq.*

(*b*) Munden *v.* Duke of Brunswick, 10 Q. B, 656.

(*c*) Duke of Brunswick *v.* King of Hanover, *supra*; see also Republic of Costa Rica *v.* Erlanger, L. R., 19 Eq., 33; United States of America *v.* Wagner, L. R., 2 Ch., 582; Republic of Peru *v.* Weguelin, *ib.*, 20 Eq., 140; Prioleau *v.* United States, *ib.*, 2 Eq, 659.

(*d*) Rajkumar Nobodip Chundro *v.* The Rajah of Independent Tipperah, 25 Suth. W. R, 404.

(*e*) Janwa Pershad *v.* Rana of Dholepore, S. D. A, N. W. P., 1863, p. 579.

(*f*) The Magdalena Steam Navigation Co. *v.* Martin, 28 L. J., Q B., 310.

State is privileged from all liability to be sued in civil actions. It is doubtful, however, whether there can be an ambassador or public minister accredited to the Viceroy of India. Consuls enjoy no immunity: Wheaton, *supra*.

The first paragraph of this section does not apply to Mofussil Courts of Small Causes.

Execution in British India of decrees of Courts of Native States.

434. (S.) The Governor General in Council may from time to time, by notification in the *Gazette of India*,

(*a*) declare that the decrees of any Courts situate in the territories of any Native Prince or State in alliance with Her Majesty, and not established by the authority of the Governor General in Council, may be executed in British India as if they had been made by the Courts of British India, and

(*b*) cancel any such declaration.

So long as such declaration remains in force, the said decrees may be executed accordingly.

This is a new provision in the Code of Civil Procedure.

CHAPTER XXIX.

SUITS BY AND AGAINST CORPORATIONS AND COMPANIES.

Subscription and verification of plaint.

435. (S.) In suits by a Corporation, or by a Company authorized to sue and be sued in the name of an officer or of a trustee, the plaint may be subscribed and verified on behalf of the Corporation or Company by any director, secretary, or other principal officer of the Corporation or Company, who is able to depose to the facts of the case.

This corresponds with Act VIII of 1859, s. 26, cl. 6, and the 2nd paragraph of s. 28; see the Companies' Act, 1866, s. 18. A company incorporated should sue and be sued in its corporate name (*a*); the plaint should have the common seal affixed to it, but it should be verified by some one who is able to depose to the truth

(*a*) Ram Doss Sein *v.* Stephenson, 10 Suth. W. R., 366.

of its contents;—that is the object of verification in all cases, and must be satisfied (*a*). In the case cited the suit was on bills protested, and therefore appearing on the face of them to be dishonoured, this was held not to be enough to justify the verification by one who held a sufficient power from the plaintiff to appear and act in the suit. If the plaint is filed by a firm not authorized to sue and be sued by any director, &c, the names of all the partners should appear (*b*); and in suing such a company, the plaintiff, if he be ignorant of the names of the various partners, should sue them in the name and by the style under which they carry on their business, and state his inability to describe them with greater accuracy (*c*).

Various bodies are empowered by the legislature to sue and be sued by their officers; thus Act XXI of 1860, for the registration of literary, scientific, and charitable societies, s. 6, enables societies registered under that Act to do so.

Service on Corporation or Company.

436. (S.) When the suit is against a Corporation, or against a Company authorized to sue and be sued in the name of an officer or of a trustee, the summons may be served

(*a*) by leaving it at the registered office (if any) of the Corporation or Company, or

(*b*) by sending it by post in a letter addressed to such officer or trustee at the office (or if there be more offices than one, at the principal office in British India) of the Corporation or Company, or

(*c*) by giving it to any director, secretary or other principal officer of the Corporation or Company,

and the Court may require the personal appearance of any director, secretary or other principal officer of the Corporation or Company who may be able to answer material questions relating to the suit.

This corresponds with Act VIII of 1859, s. 63. The letter in the case referred to in cl. (b) must be addressed to the officer or trustee, not merely to the office. The last proviso corresponds with

(*a*) Overend Gurney & Co. *v.* Steel, 1 In. Jur., N. S., 39.

(*b*) Watson *v.* Roopchund Sircar, Suth. S. C. C. Ref., 38, Peacock, C. J., and Pundit, J.

(*c*) Koylash Chunder Roy *v.* Ellis, 8 Suth. W. R., 45, Peacock, C. J., and Hobhouse, J.

Act VIII of 1859, s. 46. When a claim is made against a company which is being wound up by the Court, the suit is considered for the purposes of limitation to be instituted when the claimant first sends in his claim to the Official Liquidator (Act XV of 1877, s. 4).

CHAPTER XXX.

SUITS BY AND AGAINST TRUSTEES, EXECUTORS, AND ADMINISTRATORS.

Representation of beneficiaries in suits concerning property vested in trustees, &c.

437. (S.) In all suits concerning property vested in a trustee, executor or administrator, the trustee, executor or administrator shall represent the persons beneficially interested in such property; and it shall not ordinarily be necessary to make such persons parties to the suit. But the Court may, if it think fit, order them or any of them to be made such parties.

With regard to executors or administrators in cases which fall under the operation of the Indian Succession Act, the whole of the property of the deceased person vests, by virtue of s. 179, in them as such, and they are his legal representatives for all purposes; but the executor must have proved the will, or letters of administration with the will annexed must have been obtained from a Court of competent jurisdiction over the assets, before the executor or administrator can establish in any Court of Justice any title to them (s. 187); and in the same way no right to the property of an intestate person can be established in any Court of Justice, except letters of administration have been granted (s. 190). A grant, therefore, is necessary before the executor or administrator can represent the persons beneficially interested in the estate under this section.

The Official Trustee is always sole trustee (Act XVII of 1864, s. 13), and the trust property vests in him on his appointment as trustee (ss. 8 and 11); it vests in his successor without a fresh appointment (s. 17), and he should sue and be sued in his name of his office. There are similar provisions with regard to the Administrator-General under Act II of 1874.

This clause is taken from the English Act (*a*) to improve the

(*a*) 15 & 16 Vict., c. 86, s. 42, rule 9.

jurisdiction of equity. The construction of the corresponding Act has been frequently before the Court of Chancery, and several cases are cited by Mr. Osborne Morgan in his Chancery Acts and Orders, in the note to 15 and 16 Vict., c. 86, s. 42. The general result of the cases seems to be, as this section declares, that executors, administrators, and trustees generally sufficiently represent the persons beneficially interested in the property; but that if the Court is not satisfied that their interests are properly defended by these representatives, or are in any degree adverse to those of the latter, or where the latter have been charged with a breach of trust, or the trustees renounce, the persons beneficially interested ought to be made parties, and served with notice; and where any of them are minors, they must of course be represented by properly appointed guardians. There is no period of limitation to bar a suit against express trustees or their representatives (Act XV of 1877, s. 10).

Joinder of executors and administrators.

438. (S.) When there are several executors or administrators, they shall all be made parties to a suit against one or more of them:

Provided that executors who have not proved their testator's will, and executors and administrators beyond the local limits of the jurisdiction of the Court, need not be made parties.

This is more for the protection of the executors and administrators themselves than of the persons beneficially interested, for one may act for all that have proved or taken out letters under Act X of 1865. See s. 271 of that Act.

Husband of married executrix not to join.

439. (S.) Unless the Court directs otherwise, the husband of a married administratrix or executrix shall not be a party to a suit by or against her.

The fact of a married woman being executrix and having proved, or having letters of administration, implies (see Act X of 1865, ss. 183 and 189) that she has obtained the previous consent of her husband to her taking upon herself the powers and responsibilities of the office, which are then as complete as if she were a single woman (s. 275).

CHAPTER XXXI.

SUITS BY AND AGAINST MINORS AND PERSONS OF UNSOUND MIND.

Minor must sue by next friend.

440. (S.) Every suit by a minor shall be instituted in his name by an adult person, who in such suit shall be called the next friend of the minor, and may be ordered to pay any costs in the suit as if he were the plaintiff.

Costs.

This is taken from Rule 8, High Court, Fort William, 10th June, 1874.

The age at which a person attains majority in British India has been, until recently, a matter of uncertainty; the Indian Succession Act fixes the age of 18, but only for limited purposes, and the age at which natives of India attained majority was left in doubt. Act IX of 1875 now fixes the age of majority of persons domiciled in British India, subject to certain exceptions, at 18 years; but, subject as aforesaid, any minor of whose person or property a guardian has been or shall be appointed by a Court of Justice, and every minor under the jurisdiction of the Court of Wards, comes of age at 21. It has been held in a late case that the appointment of a guardian *ad litem* is enough to fix the age of majority at 21 (*a*). That was a case of a suit brought in 1872 for partition, in which it was declared that the lady in question, a Hindu then under 18 years of age, should receive Rs. 425 a month as her maintenance, and her husband was appointed by the Court her guardian *ad litem*. On attaining the age of 18 she applied to the Court to order the money to be paid to herself. It was held that she was a minor until 21. But as the husband agreed to her receiving the money personally, it was ordered to be paid to herself. Where a plaintiff was found to be a minor, the Court directed that he should apply for the appointment of a guardian and refused to dismiss the suit (*b*).

Act XXXIV of 1858 regulates the procedure in lunacy in Courts of Judicature established by Royal Charter. Act XXXV of 1858, in Courts not so established.

(*a*) Suttya Ghosal *v.* Suttyanund Ghosal, I. L. R., 1 Cal., 388, Pontifex, J.

(*b*) Rollo *v.* Smith, 1 B. L. R., O. C. J., 10, Markby, J.

Applications to be made by next friend or guardian *ad litem*.

441. (S.) Every application to the Court on behalf of a minor (other than an application under section 451) shall be made by his next friend, or his guardian for the suit.

This is taken from Rule 10, High Court, Fort William, 10th June, 1874.

Plaint filed without next friend to be taken off the file.

Costs.

442. (S.) If a plaint be filed by or on behalf of a minor, without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented. Notice of such application shall be given to such person by the defendant; and the Court, after hearing his objections, if any, may make such order in the matter as it thinks fit.

This is taken from Rule 9, High Court, Fort William, 10th June, 1874.

Guardian *ad litem* to be appointed by the Court.

443. (S.) Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the case.

A guardian for the suit is not a guardian of person or property within the meaning of the Indian Majority Act, 1875, section 3.

This is taken from Rule 11, High Court, Fort William, 10th June, 1874.

Order obtained without next friend or guardian may be discharged.

Costs.

444. (S.) Every order made in a suit or on any application before the Court, in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, if the pleader of the party at whose instance

such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

This is taken from Rule 12, High Court, Fort William, 10th June, 1874.

Who may be next friend.

445. (S.) Any person being of sound mind and full age may act as next friend of a minor, provided his interest is not adverse to that of such minor, and he is not a defendant in the suit.

This is taken from Rule 13 of High Court, Fort William, 10th June, 1874.

Removal of next friend.

446. (S.) If the interest of the next friend of a minor is adverse to that of such minor, or if he is so connected with a defendant whose interest is adverse to that of the minor, as to make it unlikely that the minor's interest will be properly protected by him, or if he does not do his duty, or, pending the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court (if satisfied of the sufficiency of the cause assigned) may order the next friend to be removed accordingly.

This is taken from Rule 14, High Court, Fort William, 10th June, 1874.

Retirement of next friend.

447. (S.) Unless otherwise ordered by the Court, a next friend shall not retire at his own request without first procuring a fit person to be put in his place, and giving security for the costs already incurred.

Application for appointment of new next friend.

The application for the appointment of a new next friend shall be supported by affidavit showing the fitness of the person proposed, and also that he has no interest adverse to the minor.

The first para. is taken from Rule 15, and the second from Rule 16, of the High Court, Fort William, dated 10th June, 1874.

Stay of proceedings on death or removal of next friend.

448. (S.) On the death or removal of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

This is taken from Rule 17, High Court, Fort William, 10th June, 1874.

Application for appointment of new next friend.

449. (S.) If the pleader of such minor omits, within reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or the matter at issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

This is taken from Rule 18, 2nd part, altered, High Court, Fort William, 10th June, 1874.

Course to be followed by minor plaintiff or applicant on coming of age.

450. (S.) A minor plaintiff, or a minor not a party to a suit on whose behalf an application is pending, on coming of age must elect whether he will proceed with the suit or application.

This is taken from Rule 21, cl. 1, High Court, Fort William, 10th June, 1874.

Where he elects to proceed.

451. (S.) If he elects to proceed with it, he shall apply for an order discharging the next friend, and for leave to proceed in his own name.

The title of the suit or application shall in such case be corrected so as to read thenceforth thus:

"*A. B.*, late a minor, by *C. D.*, his next friend, but now of full age."

This is taken from Rule 21, cl. 2, High Court, Fort William, 10th June, 1874.

Where he elects to abandon.

452. (S.) If he elects to abandon the suit or application, he shall, if a sole plaintiff, or sole applicant, apply for an order to dismiss the suit or application on repayment of the

Costs.

costs incurred by the defendant or respondent, or which may have been paid by his next friend.

This is taken from Rule 21, 3rd para., High Court, Fort William, 10th June, 1874.

Making and proving applications under sections 451, 452.

453. (S.) Any application under section 451 or section 452 may be made *ex parte;* and it must be proved by affidavit that the late minor has attained his full age.

This is taken from Rule 21, 4th and last clauses, High Court, Fort William, 10th June, 1874.

When minor co-plaintiff.

454. (S.) A minor co-plaintiff on coming of age and desiring to repudiate the suit, must apply to have his name struck out as co-plaintiff; and the Court, if it find that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

Notice of the application shall be served on the next friend, as well as on the defendant; and it must be proved by affidavit that the late minor has attained his full age.

Costs.

The costs of all parties of such application and of all or any proceedings theretofore had in the suit shall be paid by such persons as the Court directs.

If the late minor be a necessary party to the suit, the Court may direct him to be made a defendant.

This is taken from Rule 22, High Court, Fort William, 10th June, 1874.

When suit unreasonable or improper.

455. (S.) If any minor on attaining majority can prove to the satisfaction of the Court that a suit instituted in his name by a next friend was unreasonable or improper, he may, if a sole plaintiff, apply to have the suit dismissed.

Notice of the application shall be served on all the parties concerned: and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the

application, and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit.

Costs.

This is taken from Rule 23, High Court, Fort William, 10th June, 1874, but restricted to a *sole* plaintiff.

456. (S.) An order for the appointment of a guardian for the suit may be obtained upon application in the name of the minor. Such application must be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in question in the suit adverse to that of the minor, and that he is a fit person to be so appointed.

Petition for appointment of guardian *ad litem.*

This is taken from Rule 25, cl 1, and half of cl. 2, High Court, Fort William, 10th June, 1874; and the rest of that rule relating to proof of unsoundness of mind (in those cases).

457. (S.) A co-defendant of sound mind and of full age may be appointed guardian for the suit, if he has no interest adverse to that of the minor; but neither a plaintiff, nor a married woman, can be so appointed.

Who may be guardian *ad litem.*

This is taken from Rule 26, High Court, Fort William, 10th June, 1874.

458. (S.) If the guardian for the suit of a minor defendant does not do his duty, or if other sufficient ground be made to appear, the Court may remove him, and may order him to pay such costs as may have been occasioned to any party by his breach of duty.

Guardian neglecting his duty may be removed.

Costs.

This is taken from Rule 30, High Court, Fort William, 10th June, 1874.

459. (S.) If the guardian for the suit dies pending such suit or is removed by the Court, the Court shall appoint a new guardian in his place.

On death of guardian *pendente lite*, new guardian to be appointed.

This is taken from Rule 29, High Court, Fort William, 10th June, 1874, which relates to application also, but does not include removal.

460. (S.) When the enforcement of a decree is applied for against the heir or representative, being a minor, of a deceased party, a guardian for the suit of such minor shall be appointed by the Court, and the decree-holder shall serve on such guardian notice of such application.

When decree to be enforced against heir or representative.

This is taken from Rule 31, High Court, Fort William, 10th June, 1874.

461. (S.) No sum of money or other thing shall be received or taken by a next friend or guardian for the suit at any time on behalf of a minor, at any time before decree or order, unless he has first obtained the leave of the Court, and given security to its satisfaction that such money or other thing shall be duly accounted for, to, and held for the benefit of, such minor.

Before decree, next friend or guardian *ad litem* not to receive money without leave of Court and giving security.

This is Rule 34, modified, of the High Court, Fort William, 10th June, 1874.

462. (S.) No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian.

Next friend or guardian *ad litem* not to compromise without leave of Court.

Any such agreement or compromise entered into without the leave of the Court shall be voidable against all parties other than the minor.

Compromise without leave voidable.

This is taken from Rule 35, High Court, Fort William, 10th June, 1874.

463. (S.) The provisions contained in sections 440 to 462 (both inclusive) shall, *mutatis mutandis*, apply in the case of persons of unsound mind, adjudged to be so under Act No. XXXV of 1858, or under any other law for the time being in force.

Application of sections 440 to 462 to persons of unsound mind.

This is new. See note to s. 440.

464. (S.) Nothing in sections 442 to 462 applies to any minor or person of unsound mind, for whose person or property a guardian or manager has been appointed by the Court of Wards or by the Civil Court under any local law.

Wards of Court.

This is new.

CHAPTER XXXII.

SUITS BY AND AGAINST MILITARY MEN.

465. (S.) When any officer or soldier actually serving the Government in a military capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead.

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them.

The authority shall be in writing and shall be signed by the officer or soldier in the presence of (a) his commanding officer or of the next subordinate officer, if the party be himself the commanding officer, or (b) where the officer or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority which shall be filed in Court.

When so filed, the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation.—In this chapter the expression 'commanding officer' means the officer in actual command for the time being of any regiment, corps, detachment or depôt, to which the officer or soldier belongs.

This corresponds with Act VIII of 1859, s. 19. The authority being deficient can be objected to on appeal (*a*).

(*a*) Shivram Vithal *v.* Bhagirthibai, 6 Bom. H. C. Rep., A. C., 20, Newton and Warden, JJ.

Person so authorized may act personally or appoint pleaders.

466. (S.) Any person authorized by an officer or soldier to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer or soldier could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier.

This corresponds with the first part of s. 20, Act VIII of 1859.

Service on person so authorized, or on his pleader, to be good service.

467. (S.) Processes served upon any person authorized by an officer or soldier, as in section 465, or upon any pleader appointed as aforesaid by such person to act for, or on behalf of, such officer or soldier, shall be as effectual as if they had been served on the party in person or on his pleader.

This corresponds with the second part of s. 20, Act VIII of 1859.

Service cannot be made in this way on an officer in the Military service whose regiment has been disbanded, and there is no commanding officer in consequence; it must be made in the ordinary way (*a*). The Officer of the Court returns the writ into Court with the certificate of the commanding officer that it has been served attached to it; no affidavit of service is necessary (*b*). In this case the defendant had originally signed the writ, but afterwards drew his pen through the signature, observing that he had been improperly described. The service was considered satisfactorily proved.

Service on officers and solders.

468. (S.) When an officer or soldier is a defendant, the Court shall send a copy of the summons to his commanding officer for the purpose of being served on him.

The officer to whom such copy is sent, afer causing it to be served on the person to whom it is addressed, if practicable, shall return it to the Court with the written acknowledgment of such person endorsed thereon.

(*a*) Anonymous, MSS., May 11, 1865 (High Court, Calcutta).

(*b*) Allan and Hayes *v.* Remington, MSS., Nov. 17, 1865, Norman, J.

If from any cause the copy cannot be so served, it shall be returned to the Court by which it was sent, with information of the cause which has prevented the service.

This corresponds with Act VIII of 1859, s. 62, para. 2.

Execution of warrant of arrest in cantonments, &c.

469. (S.) If, in the execution of a decree, a warrant of arrest is to be executed within the limits of a cantonment, garrison, military station or military bazar, the officer charged with the execution of such warrant shall deliver the same to the commanding officer.

The commanding officer shall back the warrant with his signature, and if the person named therein is within the limits of his command, shall cause him to be arrested and delivered to the officer so charged.

This is new.

CHAPTER XXXIII.

INTERPLEADER.

When iterpleader-suit may be instituted.

470. (S.) When two or more persons claim adversely to one another the same payment or property from another person, whose only interest therein is that of a mere stakeholder and who is ready to render it to the right owner, such stakeholder may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to whom the payment or property should be made or delivered, and of obtaining indemnity for himself:

Provided that if any suit is pending in which the rights of all parties can properly be decided, the stakeholder shall not institute a suit of interpleader.

This is new. The proper course for a stakeholder to pursue, when a suit is pending, is to apply to the Court in which the suit is being brought for leave to pay the money, or deposit any other moveable property in Court, or in cases where this cannot be done, to ask for the Court's directions, and state that he is ready to submit to its orders, and ask for his costs of the application,

which, if he is acting in good faith, he ought to get as a matter of course; see ss. 472, 473, 475.

Plaint in such suit.

471. (S.) In every suit of interpleader the plaint must, in addition to the other statements necessary for plaints, state—

(*a*) that the plaintiff has no interest in the thing claimed otherwise than as a mere stakeholder;

(*b*) the claims made by the defendants severally; and

(*c*) that there is no collusion between the plaintiff and any of the defendants.

This is new.

Payment of thing claimed into Court.

472. (S.) When the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff must so pay or place it before he can be entitled to any order in the suit.

This is new.

Procedure at first hearing.

473. (S.) At the first hearing the Court may

(*a*) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit:

or, if it thinks that justice or convenience so require,

(*b*) retain all parties until the final disposal of the suit:

and, if it finds that the admissions of the parties or other evidence enable it,

(*c*) adjudicate the title to the thing claimed; or else it may

(*d*) direct the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court.

This is new. An appeal lies against an order made under this section. See s. 588 (q).

When agents and tenants may institute interpleader-suits.

474. (S.) Nothing in this chapter shall be taken to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

Illustrations.

(*a.*) A. deposits a box of jewels with B as his agent. C. alleges that the jewels were wrongfully obtained from him by A., and claims them from B. B. cannot institute an interpleader-suit against A. and C.

(*b.*) A. deposits a box of jewels with B. as his agent. He then writes to C. for the purpose of making the jewels a security for a debt due from himself to C. A. afterwards alleges that C.'s debt is satisfied, and C. alleges the contrary. Both claim the jewels from B. B. may institute an interpleader-suit against A. and C.

This is new.

Charge of plaintiff's costs.

475. (S.) When the suit is properly instituted, the Court may provide for the plaintiff's costs by giving him a charge on the thing claimed or in some other effectual way.

This is new. An appeal lies against an order made under this section. See s. 588 (q).

Procedure where a defendant is suing stakeholder.

476. (S.) If any of the defendants in an interpleader-suit is actually suing the stakeholder in respect of the subject of such suit, the Court in which the suit against the stakeholder is pending shall, on being duly informed by the Court which passed the decree in the interpleader-suit in favor of the stakeholder, that such decree has been passed, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit.

Costs.

This is new. An appeal lies against an order made under this section. See s. 588 (q).

PART IV.

PROVISIONAL REMEDIES.

CHAPTER XXXIV.

OF ARREST AND ATTACHMENT BEFORE JUDGMENT.

A.—Arrest before Judgment.

When plaintiff may apply that security be taken.

477. (S.) If at any stage of any suit, other than a suit for the possession of immoveable property, the plaintiff satisfies the Court by affidavit—

that the defendant, with intent to avoid or delay the plaintiff, or to avoid any process of the Court, or to obstruct or delay the execution of any decree that may be passed against him,

(*a*) has absconded or left the jurisdiction of the Court, or

(*b*) is about to abscond or to leave the jurisdiction of the Court, or

(*c*) has disposed of or removed from the jurisdiction of the Court his property or any part thereof, or

that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the plaintiff may apply to the Court that security be taken for the appearance of the defendant to answer any decree that may be passed against him in the suit.

This section corresponds with Act VIII of 1859, s. 74. Clause (a) is new ; and the clause after (c) is taken from s. 80.

To arrest a man on mesne process, which is the proceeding under the next section, is a very strong measure, and the Courts will not willingly adopt it, except for very cogent reasons. It

has, therefore, been held that applications for this purpose must be founded upon strong evidence, and must clearly show that the defendant has taken, or intends to take, the steps indicated in order to avoid the suit. *Teenaram* v. *Ramrutton* (*a*) was an early decision upon this subject. It appeared in that case that the plaintiff had accepted a bill for the accommodation of the defendant, who was one of the members of a firm carrying on business in Calcutta. On the bill coming to maturity, the acceptor had been obliged to pay, and upon calling upon the defendant to reimburse him, he discovered that the place of business of the firm was shut up, and he was unable to find the defendant. On these facts, Phear, J., refused to issue a warrant to arrest the defendant, observing that he was not satisfied that the defendant was about to leave the jurisdiction with intent to avoid process, or to delay the plaintiff in the prosecution of the suit, without which circumstances the Court had no jurisdiction to grant a warrant. A summons was, however, granted calling upon the defendant to show cause why he should not give security to answer any judgment which might be given against him in the suit. Two days afterwards the application was renewed upon a fresh affidavit, showing that an unsuccessful attempt had been made to serve the summons, that the defendant and his partner were out of the jurisdiction, that their place of business was entirely closed, and that none of the people in the neighbourhood knew where they were. The affidavit also stated that the summons had been posted on the door of the plaintiff's house. Upon this a warrant was issued.

Where a defendant is called upon to show cause, he may show that the suit is groundless (*b*). It has been seen, *ante*, p. 57, note to s. 11, that an arrest made without reasonable and probable cause may subject the person at whose instance it has been made to a suit for damages, unless the defendant apply for and obtain compensation under s. 491, *post;* and the Court may infer that it was made under circumstances which amount in law to malice from the absence of reasonable and probable cause, and such a suit is not barred if the applicant fail to obtain compensation (*c*).

(*a*) 2 Hyde, 181.

(*b*) Spence's Hotel Co. *v.* Anderson, 1 In. Jur., N. S., 294 note, Phear, J.; MacNicholl *v.* Wilson, MSS., High Court, Fort William, 7th July, 1865.

(*c*) Nanda Kumar Shaha *v.* Gaur Saukar, 5 B. L. R., Apx., 4.

It will be noticed that there is a distinction between the case of a defendant who is leaving the jurisdiction and a defendant who is leaving British India; in the former case, it is necessary, in order to afford grounds for the arrest, to show that the defendant is intending to avoid process or obstruct or delay the execution of any decree that may be passed against him; in the latter, there is no such necessity. The case of *Spence's Hotel Company* v. *Anderson* (*a*) was one of the latter kind, and it was held that the defendant might show, either that he was not going to leave the British territories, or not for so long a time as would obstruct or delay the suit, or that the suit was not a *bonâ fide* one, or that although *bonâ fide*, it had been vexatiously delayed until he was about to leave India in order to embarrass or coerce him. The case of *MacNicholl* v. *Wilson, supra,* was the case of a captain of a ship. The suit was brought for the price of the repairs of the ship while she was in port, and the captain was about to sail for England in the course of his duty; he was ordered to find bail or to be arrested in default. In a similar case (*b*), Norman, J., ordered the captain of a ship about to depart for Arabia to find bail or to be arrested.

In another case (*c*) Macpherson, J., issued a warrant of arrest, after cause shown, under the following circumstances. The defendant had become surety for the South Cachar Tea Company for an advance of Rs. 50,000 made by the plaintiff, who also held shares in different companies to a considerable amount as collateral security, deposited by the defendant Minto, who had taken his passage for England, intending to remain for six months; but his return depended upon certain financial arrangement which he hoped to be able to make in England.

Each case must depend upon its own circumstances, and the plaintiff makes the application for this unusual interference of the Court on his behalf at his own risk.

Order to bring up defendant to show cause why he should not give security.

478. (S.) If the Court, after examining the applicant, and making such further investigation as it thinks fit, is satisfied that the defendant, with any such intent as aforesaid,

(*a*) 1 In. Jur., N. S., 294 note.

(*b*) Abdool Johinan *v.* Ameerooddeen, MSS., Dec. 6th, 1865.

(*c*) Agra and Masterman's Bank *v.* Minto, 1 In. Jur., N. S., 265.

(*a*) has absconded or left the jurisdiction of the Court, or

(*b*) is about to abscond or to leave the jurisdiction of the Court, or

(*c*) has disposed of or removed from the jurisdiction of the Court his property or any part thereof, or

that the defendant is about to leave British India under the circumstances last aforesaid,

the Court may issue an order for bringing the defendant before the Court to show cause why he should not give security for his appearance.

This corresponds with Act VIII of 1859, s. 75. It has been held that the security required of a defendant brought up in arrest under this section does not include security for costs that may be incurred in the suit; and that the word "claim," as used in the next section, means the amount of money claimed, as in s. 50 and subsequent sections (*a*).

If defendant fail to show cause, Court may order him to make deposit or give security.

479. (S.) If the defendant fail to show such cause, the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to give security for his appearance at any time when called upon while the suit is pending, and until execution or satisfaction of any decree that may be passed against him in the suit.

The surety shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

This corresponds with Act VIII of 1859, s. 76; and s. 253 of this Code provides for execution of the decree against the surety. An appeal lies against an order made under this section, see s. 588 (r).

Procedure in case of application by surety to be discharged.

480. (S.) The surety for the appearance of the defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

(*a*) Reinhold *v.* Holloway, Suit No. 655 of 1877, Calcutta, 26th Nov., 1877, White, J.

On such application being made, the Court shall summon the defendant to appear, or, if it thinks fit, may issue a warrant for his arrest in the first instance.

On the appearance of the defendant pursuant to the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

This corresponds with Act XXIII of 1861, s. 24. An appeal lies against an order made under this section, see s. 588 (r).

Procedure where defendant fails to give security or find fresh security.

481. (S.) If the defendant fail to comply with any order under section 479 or section 480, the Court may commit him to jail until the decision of the suit, or, if judgment be given against the defendant, until the execution of the decree: provided that no person shall be imprisoned under this section in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees.

This corresponds with Act VIII of 1859, s. 78, and in effect makes the arrest before judgment an arrest in execution, as soon as the decree is passed, and with all the incidents of such an arrest limiting the period of his detention. An appeal lies against an order made under this section, see s. 588 (r).

Subsistence of defendant arrested.

482. (S.) The provisions of section 339 as to allowances payable for the subsistence of judgment-debtors shall apply to all defendants arrested under this chapter.

This is new.

B.—Attachment before Judgment.

Application before judgment for security from defendant to satisfy decree, and in default, for attachment of property.

483. (S.) If at any stage of any suit the plaintiff satisfies the Court by affidavit that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,

(*a*) is about to dispose of the whole or any part of

his property, or to remove the same from the jurisdiction of the Court in which the suit is pending, or

(*b*) has quitted the jurisdiction of the Court, leaving therein property belonging to him,

the plaintiff may apply to the Court to call upon the defendant to furnish security to satisfy any decree that may be passed against him in such suit, and, on his failing to give such security, to direct that any portion of his property shall be attached until the further order of the Court.

Contents of application.

The application shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

The first part of this section corresponds with Act VIII of 1859, s. 81, and the last paragraph with s. 82; but the application must now be made on affidavit, and the Court may, by its direction, allow the plaintiff to omit the specification of the property to be attached. It must, however, be property within the local limits of the Court's jurisdiction (*a*). It was held by Phear, J., that it is not necessary that the suit should have been commenced; but merely that the defendant should be acting on the supposition that it would be (*b*). Where, however, the plaint was filed, and the application made at the same time—the words of Act VIII are "either at the time of the institution of the suit," &c.—it was held by a Full Bench of the Sudder Dewanny Adawlut at Agra, that the corresponding section of the Code of 1859 did not enable the Court to attach property in litigation. This case was decided in June, 1863, and was referred to and acted upon in another case (*c*), where it was held that the proper course was to apply for an injunction, and this remedy is open now under the 492nd section, *post* (*d*). In the case of an attachment, as of an

(*a*) Balaram Mullick *v.* Solano, 8 B. L. R., 335, Phear, J., overruling *In re* Abraham, 6 Bom. H. C. Rep., 170; Sagore Dutt *v.* Ramchunder Mitter, 1 Hyde, 136, Wells, J.; Haji Jiva Nur Muhammad *v.* Abubakar Ibrahim Meman, 8 Bom. H. C. Rep., O. O. C. J., 29, Westropp, C. J., and Green, J., also overruling *In re* Abraham, 6 *ib.*, 170; Kedar Nath Dutt *v.* Seeva Veyana Rana Luchmun Chetty, 1 Cal. Rep., 336.

(*b*) Ramnarain Podder *v.* Ezekiel Levy, 2 Hyde, 183, Phear, J.; and see the note to s. 486.

(*c*) Razeea Begum *v.* Jones, S. D. A., N. W. P., 1863, p. 301.

(*d*) See Joynarain Geeree *v.* Shibpersad Geeree, 6 Suth. W. R., Mis., 1.

arrest, the plaintiff moves the Court at his own risk; if without reasonable and probable cause, he may subject himself to a suit for damages, or he may be ordered to pay compensation under s. 491, *post;* see note to s. 477, *ante.* But where a Court orders attachment of a defendant's property after it is satisfied that he is about to remove or dispose of it with intent to obstruct or delay the execution of the decree, it must be presumed that there was good and sufficient cause for the plaintiff having moved the Court to do so, even though the suit resulted unsuccessfully; and unless the contrary can be established, damages cannot be claimed (*a*). A suit will lie for the recovery of the value of property attached under this section, and afterwards made away with by the defendants in collusion with the attaching officer, without a criminal prosecution being previously instituted against them (*b*).

Court may call on defendant to furnish security or show cause.

484. (S.) If the Court, after examining the applicant, and making any further investigation which it thinks fit, is satisfied that the defendant is about to dispose of or remove his property, with intent to obstruct or delay the execution of any decree that may be passed against him in the suit, the Court may require him, within a time to be fixed by the Court, either to furnish security in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

The Court may also in the order direct the conditional attachment of the whole or any portion of the property specified in the application.

This corresponds with Act VIII of 1859, s. 83. The last paragraph is taken from the case of *Toogunchund* v. *Janvaher Mull* (*c*), where it was pointed out that property attached by order of a Court of Justice could only be released by an order of the same Court.

(*a*) Dhurmo Narain Sahoo *v.* Sreemutty Dossee, 18 Suth. W. R., 440, Markby and Ainslie, JJ.

(*b*) Choitunno Paramanick *v.* Zumeerooddee Shaikh, 18 Suth. W. R., 27, Kemp and Glover, JJ.

(*c*) S. D. A., N. W. P., 1864, p. 128.

485. (S.) If the defendant fail to show cause why he should not furnish security, or fail to furnish the security required within the time fixed by the Court, the Court may order that the property specified in the application, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, shall be attached.

Attachment if cause not shown or security not furnished.

If the defendant show such cause or furnish the required security, and the property specified in the application or any portion of it has been attached, the Court shall order the attachment to be withdrawn.

Withdrawal of attachment.

This corresponds with Act VIII of 1859, s. 84. An appeal lies against an order under this section, see s. 588 (r).

486. (S.) The attachment shall be made in the manner herein provided for the attachment of property in execution of a decree for money.

Mode of making attachment.

This corresponds with Act VIII of 1859, s. 85. It refers only to the provisions of the Code as to the mode or manner of attachment of the various kinds of property. It does not apply the provisions as to executing process out of the jurisdiction; so it was held in Bombay (*a*). This was under Act VIII of 1859, but seems quite applicable to the present Code, which divides the subject of execution of decrees into several headings. Thus chapter xix (A) relates to the Court by which the decree may be executed; (B) to the application for execution, and so on; (E) to the *mode* of executing decrees. This mode of division confirms the view taken in the above case.

487. (S.) If any claim be preferred to the property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for money.

Investigation of claims to property attached before judgment.

This corresponds with Act VIII of 1859, s. 86.

(*a*) Haji Jiva Nur Muhammad *v.* Abubakar Ibrahim Meman, 8 Bom. H. C. R., O. O. C. J., 29, Westropp, C. J., and Green, J.; and see the note to s. 483.

488. (S.) When an order of attachment before judgment is passed, the Court which passed the order shall remove the attachment whenever the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

Removal of attachment when security furnished.

This corresponds with Act VIII of 1859, s. 87.

489. (S.) Attachment before judgment shall not affect the rights existing prior to the attachment of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Attachment not to affect rights of strangers, or bar the decree-holder from applying for sale.

This corresponds with Act VIII of 1859, s. 89; but with the addition of the words "existing prior to attachment." Norman, J., in the case of *Petumber Mundle* v. *Gocool Doss Soonderjee* (*a*), and Phear J., in the same case at a later stage—*Petumber Mundle* v. *Cochrane* (*b*)—were quite clear that the earlier sections of Act VIII of 1859, relating to attachment before judgment, rendered the goods, &c., only a security, and had not the effect of changing the property in them independently of the wording of s. 89, which confirmed their clear opinion. The earlier sections of the present Code relating to attachment before judgment are to the same purport as those of the Code of 1859, and notwithstanding the addition of the words above quoted, it cannot be supposed that it has in any way altered the law as to priorities where the property has been charged pending the attachment, so that if the property has, in the meantime, become vested in some one else, as in the case of the insolvency of the defendant, and an order made after attachment and prior to decree, vesting the defendant's property, including that which is attached, in the Official Assignee (*c*), unless such decree was affirmative of an antecedent claim made in the plaint against the property itself, not where it is a mere money-decree (*d*), the attachment before judgment could not prevail against the vesting order (*e*). Norman, J., who so decided, adding that if there

(*a*) 1 In. Jur., N. S., 327.
(*b*) *Ibid*, 11.
(*c*) 1 In. Jur., N. S., 11, by Phear, J.
(*d*) 1 In. Jur., N. S., 11, by Phear, J.
(*e*) *Ibid*, 327.

was any doubt about this it was completely set at rest by the 89th section of Act VIII of 1859, which enacted that an attachment before judgment "shall not affect the rights of persons not parties to the suit." If the question depended upon these words, it might perhaps be held that, under the new Code, the rights of parties not existing prior to attachment included the rights of the Official Assignee who came in under a vesting order subsequent to the attachment, and that such an attachment had priority; but both Norman, J., and Phear, J., decided the question upon the more general ground based on the consideration of the earlier sections, that the attachment, while it places the goods in the custody of the law, and binds them, so far as the judgment-debtor is concerned, "does not alter the property in them." It "does not either actually "or constructively amount to the creation of a lien on the "defendant's property, nor does it place the plaintiff in any more "favorable position relatively to it than that in which he pre-"viously stood" (*a*). Suppose, for example, that, pending the attachment prior to decree, another creditor obtains a decree, and attaches the property and proceeds to bring it to sale before the original attaching creditor obtains his decree. Then, although, under the new Code, the first attachment in execution does not give to the execution-creditor a right to be paid in full to the prejudice of other creditors who have got decrees and applied for execution (s. 295) as the old Act did (VIII of 1859, s. 270), it does give him the right to apply for a sale and satisfaction of his own decree, notwithstanding the prior attachment before decree (*b*), and if so, a vesting order, which is a decree in favor of the whole body of creditors, will still give the Official Assignee a better right than a single creditor who has merely attached the goods by way of security. An alteration of such importance would have been effected by express words, and not by implication. Accordingly the cases of the *Bank of Bengal* v. *Newton* (*c*) and *Gamble* v. *Bholagirs* (*d*), giving priority to the Official Assignee over an attaching creditor, where the vesting order was prior to decree, seem applicable to this Code (*e*).

(*a*) 1 In. Jur., N. S., 327.

(*b*) See also Anonymous, 6 Mad. H. C Rep., 135, Scotland, C. J., and Innes, J.

(*c*) 12 B. L. R., Apx., 1, Macpherson, J.

(*d*) 2 Bom. H. C. Rep., 146.

(*e*) See also Rajchunder Roy *v.* Issurchunder Roy, 1 Bourke, 139; Juggurnath Shaw *v.* Issurchunder Roy, *ib.*, 146; Sarkies *v.* Musst. Brindha Baee, 1 H. C. Rep., N. W. P., 81.

490. (S.) Where property is under attachment by virtue of the provisions of this chapter, and a decree is given in favour of the plaintiff, it shall not be necessary to re-attach the property in execution of such decree.

Property attached under this chapter not to be re-attached in execution of decree.

This is new, and follows the interpretation put upon the old enactment in numerous cases.

C.—Compensation for improper Arrest or Attachment.

491. (S.) If in any suit in which an arrest or attachment has been effected, it appear to the Court that such arrest or attachment was applied for on insufficient grounds,

Compensation for obtaining arrest or attachment on insufficient grounds.

or if the suit of the plaintiff fails, and it appears to the Court that there was no probable ground for instituting the suit,

the Court may, on the application of the defendant, award against the plaintiff in its decree such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him by the arrest or attachment:

Provided that the Court shall not award under this section a larger amount than it might decree in a suit for compensation.

Proviso.

An award under this section shall bar any suit for compensation in respect of such arrest or attachment.

This corresponds with Act VIII of 1859, s. 88. Where the compensation is not awarded although applied for, the suit is not barred (*a*).

(*a*) Nanda Kumar Shaha *v.* Gaur Sankar, 5 B. L. R., Apx., 4.

CHAPTER XXXV.

OF TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

A.—Temporary Injunctions.

Cases in which temporary injunction may be granted.

492. If in any suit it be proved by affidavit or otherwise

(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(*b*) that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or give such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit, or refuse such injunction or other order.

This corresponds with the first part of s. 92 of Act VIII of 1859, and relates only to temporary injunctions. Perpetual injunction can only be granted by a decree; see Act I of 1877 (Specific Relief), s. 53. If an affidavit in support of an application for an injunction discloses a case for an injunction before answer, unless it is met not merely by denial, but by showing that there is no case for an injunction at all, the injunction ought to go (*a*). The words "or wrongfully sold in execution of a decree" are added, see *Roy Luchmiput Singh Bahadoor* v. *Secretary of State* (*b*), where another course of proceeding in such a case is pointed out. In that case A. attached the property of B. in execution of a decree. C. came in with a claim to the attached property, which was disallowed. C. then sued A. to establish his right to the property, and B. was made a party to the suit. C. then moved for and obtained an injunction to restrain A. from executing his decree against the property of B.

(*a*) O'Dowda *v.* Rajah Dabeekisto, Montriou, 66.

(*b*) 11 B. L. R., Apx., 27, Jackson and Mitter, JJ.

in dispute. It was held that the plaintiff C. should have applied to the Court below, stating the facts and asking that the sale of the property might be stayed pending the suit, and an order to this effect was made, leaving A. to apply for execution in case of undue delay by C. in prosecuting his suit; but the Court dissolved the injunction on the ground that this section did not contemplate the granting of an injunction in such a case.

If the state of facts had shown that on the sale of the property in execution the purchaser was likely to waste the property, the injunction might have been granted (*a*).

Clause (b) of this section is added. An appeal lies against an order made under this section, see s. 588 (r)

Injunction to restrain repetition or continuance of breach.

493. In any suit for restraining the defendant from committing a breach of contract or other injury, whether compensation be claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

The Court may by order grant such injunction on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit, or refuse the same.

In case of disobedience, an injunction granted under this section or section 492 may be enforced by the imprisonment of the defendant for a term not exceeding six months, or the attachment of his property, or both.

No attachment under this section shall remain in force for more than one year, at the end of which time if the defendant has not obeyed the injunction, the property attached may be sold, and out of the proceeds the Court

(*a*) Roy Luchmiput Singh Bahadoor *v.* Secretary of State, 11 B. L. R., Apx, 27, Jackson and Mitter, JJ.

may award to the plaintiff such compensation as it thinks fit, and may pay the balance, if any, to the defendant.

This corresponds with Act VIII of 1859, s. 93, the last paragraph being added. An appeal lies against an order made under this section, see s. 588 (r).

Before granting injunction, Court may direct notice to be given to opposite party.

494. The Court shall, in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

This corresponds with Act VIII of 1859, s. 95, but renders the issue of notice imperative except when the object of granting the injunction would be defeated by delay, of which fact proof must be given.

Injunction to corporation binding on its members and officers.

495. An injunction directed to a corporation or public company is binding not only on the corporation or company itself, but also on all members and officers of the corporation or company whose personal action it seeks to restrain.

This is new.

Order for injunction may be discharged, varied, or set aside.

496. Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

This corresponds with the last paragraph of s. 93 of Act VIII of 1859. An appeal lies against an order made under this section, see s. 588 (r).

Compensation to defendant for issue of injunction on insufficient grounds.

497. If it appears to the Court that the injunction was applied for on insufficient grounds, or

if, after the issue of the injunction, the suit is dismissed or judgment is given against the plaintiff by default or otherwise, and it appears to the Court that there was no probable ground for instituting the suit,

the Court may, on the application of the defendant,

award against the plaintiff in its decree such sum, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him by the issue of the injunction:

Provided that the Court shall not award under this section a larger amount than it might decree in a suit for compensation.

Proviso.

An award under this section shall bar any suit for compensation in respect of the issue of the injunction.

This corresponds with Act VIII of 1859, s. 96. When the application for compensation has failed, the applicant may bring his suit for damages (*a*).

B.—Interlocutory Orders.

Power to order interim sale of perishable articles.

498. The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner, and on such terms as it thinks fit, of any moveable property being the subject of such suit, which is subject to speedy and natural decay.

This is new. It corresponds with Order lii, Rule 2, under the English Judicature Act.

Power to make order for detention, &c., of subject-matter and to authorize entry, taking of samples and experiments.

499. The Court may, on the application of any party to a suit, and on such terms as it thinks fit,

(*a*) make an order for the detention, preservation or inspection of any property being the subject of such suit;

(*b*) for all or any of the purposes aforesaid, authorize any person to enter upon or into any land or building in the possession of any other party to such suit, and

(*c*) for all or any of the purposes aforesaid, authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(*a*) Nanda Kumar Shaha *v.* Gaur Sankar, 5 B. L. R., Apx., 4.

The provisions hereinbefore contained as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this section.

This is new. It corresponds with Order lii, Rule 3, under the English Judicature Act.

Application for such orders to be after notice.

500. An application by the plaintiff for an order under section 498 or section 499 may be made after notice in writing to the defendant at any time after service of the summons.

An application by the defendant for a like order may be made after notice in writing to the plaintiff, and at any time after the applicant has appeared.

This is new. It corresponds with Order lii, Rule 4, under the English Judicature Act.

When party may be put in immediate possession of land, the subject of suit.

501. When land paying revenue to Government, or a tenure liable to sale, is the subject of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure;

and the Court in its decree may award against the defaulter the amount so paid, with interest thereupon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereupon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

This corresponds with Act VIII of 1859, s. 91.

Deposit of money, &c., in Court.

502. When the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds

such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

This is new.

CHAPTER XXXVI.

APPOINTMENT OF RECEIVERS.

Power of Court to appoint receivers.

503. Whenever it appears to the Court to be necessary for the realization, preservation, or better custody or management of any property, moveable or immoveable, the subject of a suit, or under attachment, the Court may by order

(*a*) appoint a receiver of such property,

and, if need be,

(*b*) remove the person in whose possession or custody the property may be from the possession or custody thereof;

(*c*) commit the same to the custody or management of such receiver; and

(*d*) grant to such receiver such fee or commission on the rents and profits of the property by way of remuneration, and all such powers as to bringing and defending suits, and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing, as the owner himself has, or such of those powers as the Court thinks fit.

Receiver's liabilities.

Every receiver so appointed shall

(*e*) give such security (if any) as the Court thinks fit duly to account for what he shall receive in respect of the property,

(*f*) pass his accounts at such periods and in such form as the Court directs,

(*g*) pay the balance due from him thereon as the Court directs, and

(*h*) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Nothing in this section authorizes the Court to remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove.

The 92nd section of Act VIII of 1859 enabled the Court to appoint a receiver or manager in all cases in which it might appear to the Court to be necessary for the preservation or the better management or custody of any property "which is in dispute in a suit." Section 243 enabled the Court to appoint a manager to realize debts or rents and receipts of landed property, where the debts or land were attached in execution of decrees.

This present chapter supplies the place of both of these provisions, and going further gives the Court very general powers as to the appointment of receivers.

Orders made under s. 92 of Act VIII were appealable only at the instance of the defendant (s. 94); but orders made under the present section are appealable at the instance of either party (s. 588 (r), *post.*)

The powers of the receiver depend of course upon the document under which he is appointed. He may have full powers to do all that is contemplated by this section, as where the document strictly follows the form No. 168; or his powers may be more limited as the Judge in his discretion under the circumstances of the case may determine. It has been held that he may protect the property by defending a suit, even although a power to defend suits is not expressly given to him (*a*), and being an officer of the Court he can always apply to the Court for directions and extension of his powers if necessary (*b*).

(*a*) Gunga Singh *v.* Mirza Abdoollah Beg, S. D. A., N. W. P., 1862, p. 1.

(*b*) On the subject of Receivers, see Story's Equity Jur., s. 829, *et seq.*

When Collector may be appointed receiver.

504. If the property be land paying revenue to Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may appoint the Collector to be receiver of such property.

See the last paragraph of s 92 of Act VIII of 1859; see also ss. 320 to 327 of this Act, enabling the Local Government to appoint managers to realise and manage land directed to be sold in execution.

Courts empowered under this chapter.

505. The powers conferred by this chapter shall be exercised only by High Courts and District Courts. Provided that whenever the Judge of a Court subordinate to a District Court considers it expedient that a receiver should be appointed in any suit before him, he shall nominate such person as he considers fit for such appointment, and submit such person's name, with the grounds for the nomination, to the District Court, and the District Court shall authorize such Judge to appoint the person so nominated or pass such other order as it thinks fit.

This section is new.

PART V.

OF SPECIAL PROCEEDINGS.

CHAPTER XXXVII.

REFERENCE TO ARBITRATION.

Where the parties by their original contract agree that matters of difference that may afterwards arise between them shall be settled by arbitration, they can do so subject to Act IX of 1872 (Indian Contract Act), s. 28, reference to which will be found in the note to s. 11 of this Code, p. 61, *ante*.

The parties may refer a matter actually in difference between them to arbitrators of their own choosing, and the award may be completed and acted on without recourse to a Court of Justice; or, if repudiated by either party, the breach may give a right to sue.

Or they may come into Court as plaintiff and defendant with a joint written application in a regular suit, and when they agree that the matters in difference be decided by arbitrators, they may apply to the Court to order a reference. This subject is dealt with by ss. 506 to 522.

Or they or either of them may come to the Court in the first instance with their agreement to refer, and ask that it may be filed in Court. The Court, after enquiry of both parties, may file the agreement to refer, and it is then carried out under the Court's directions. This subject is dealt with by ss. 523 and 524 of this chapter.

Or lastly, they or either of them may come to the Court with their award already determined by arbitrators, and ask that it may itself be filed. This subject is dealt with by ss. 525 and 526.

The Court here also, after enquiry of both parties, is to file the award, and it is then to proceed as in the last case.

In the three last cases, where the aid of Court is invoked, the matter may proceed to judgment, the decision of the arbitrators being adopted as the judgment of the Court, to be followed by the Court's decree, which is to be enforced by execution in the ordinary way.

But these judgments and decrees according to the award are

final; there is no appeal from them, and this is the case because the case is referred to the decision of the arbitrators, not to the Court of Appeal, or even to the Court of first instance.

Parties to suit may apply for order of reference.

506. (S.) If all the parties to a suit desire that any matter in difference between them in the suit be referred to arbitration, they may, at any time before judgment is pronounced, apply, in person or by their respective pleaders specially authorized in writing in this behalf, to the Court for an order of reference.

Every such application shall be in writing and shall state the particular matter sought to be referred.

These are enabling sections, and do not oblige the parties to arbitrate in the manner pointed out, or prevent their settling the case as they please (*a*).

This section corresponds with Act VIII of 1859, ss. 312 and 313, the word "all" and the concluding paragraph being added. It is required, therefore, that the application be written, and if a pleader make it, he must produce a special authority. An award should proceed only on the express recorded assent of both parties, and a party by appearing under protest before the arbitrators, does not waive this objection (*b*).

It has been held, however, that no written consent is necessary when the reference is agreed to when the case is before the Court and is being heard (*c*); still in such a case the words of the section prevent a pleader binding his client to a reference without a special authority.

It was held that a Court of Appeal cannot, even with the consent of the parties, refer the case to arbitration under these sections; nor did Act XXIII of 1861, s. 37, corresponding with s. 582 of this Code, confer such power on the Appellate Court (*d*). The introduction of the word "all" shows that some of the parties cannot refer the case as between themselves—a question that was

(*a*) Jogessur Bannerjee *v.* Kulyanee Churn Deo, 24 Suth. W. R., 41.

(*b*) Deegumber Chatterjee *v.* Musst. Ram Prea Dabea, Marsh., 517; Sheonath *v.* Ramnath, 10 Moo. I. A., 413; S.C., 1 In. Jur., N. S., 162; 5 Suth. W. R., P. C., 21.

(*c*) Jeyasankira Devi *v.* Nagannada Devi, 1 Mad. H. C., 106.

(*d*) Jagessur Dey *v.* Kritartho Moyee Dossee, 12 B. L. R., 266, F. B.

left in doubt under Act VIII of 1859, s. 312 (*a*). The power given in s. 43, *ante*, corresponding with Act VIII of 1859, s. 7, to a plaintiff in a suit to abandon the excess of a claim, applies also to a case where the party comes in with an application to cause an arbitration award to be filed (*b*).

Nomination of arbitrator.

507. (S.) The arbitrator shall be nominated by the parties in such manner as may be agreed upon between them.

When Court to nominate arbitrator.

If the parties cannot agree with respect to such nomination, or if the person whom they nominate refuses to accept the arbitration, and the parties desire that the nomination shall be made by the Court, the Court shall nominate the arbitrator.

This corresponds with Act VIII of 1859, s. 314. The Court cannot appoint arbitrators unless the parties consent (*c*). Arbitrators have no power to delegate their authority to others; and if some of the arbitrators are absent, those present cannot appoint others in their stead (*d*).

Order of reference.

508. (S.) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the delivery of the award, and specify such time in the order.

When once a matter is referred to arbitration, the Court shall not deal with it in the same suit, except as hereinafter provided.

This corresponds with Act VIII of 1859, s. 315. The clause at the end is new, and follows the decision of the High Court at Calcutta in the case of *Haradhun Dutt* v. *Radhanath Shaha* (*e*).

(*a*) Doorga Churn Thakoor *v.* Kally Doss Hazra, 10 Suth. W. R., 463; but see Bykuntnath Chatterjee *v.* Shaikh Nuzurooddeen, *ib.*, 171.

(*b*) In the matter of Grish Chunder Chooramonee, 20 Suth. W. R., 56.

(*c*) Sheonath *v.* Ramnath, 10 Moo. I. A., 413; Suroop Ram Deb *v.* Gobind Ram Deb, 7 Suth. W. R., 13.

(*d*) Baboo Sourubjeet Narain Singh *v.* Baboo Gouree Pershad Narain Singh, 7 Suth. W. R, 269, Norman and E. Jackson, JJ.

(*e*) 10 Suth. W. R., 398, Bayley and Markby, JJ.

Where all matters in difference are referred, the arbitrator has power to deal with the costs of the reference and award (*a*), and interest (*b*). Where no time is fixed for the delivery of the award the reference is a nullity (*c*). Where the reference was not begun by the arbitrators before the time for making the award had expired, the award was considered good, as the parties attended and made no objection (*d*).

When reference is to two or more, order to provide for difference of opinion.

509. (S.) If the reference be to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators,

(*a*) by the appointment of an umpire, or

(*b*) by declaring that the decision shall be with the majority if the major part of the arbitrators agree, or

(*c*) by empowering the arbitrators to appoint an umpire, or

(*d*) otherwise, as may be agreed between the parties; or, if they cannot agree, as the Court determines.

If an umpire is appointed, the Court shall fix such time as it thinks reasonable for the delivery of his award in case he is required to act.

This corresponds with Act VIII of 1859, s. 316. The words "if the major part of the arbitrators agree" in cl. (b), and the last clause, are added. Where the parties to the arbitration agreed to be bound by the decision of the majority of the arbitrators, but the Court made no formal order, and the case was heard by the arbitrators, and the parties went before them and made no objection to the want of the order,—it was held, that an objection to the award could not afterwards be sustained on the ground that it had been made by the majority (*e*). In this case there had been an express waiver; but where there is no waiver, and the

(*a*) Muddoosoodun Chowdhry *v.* Koylas Chunder Shaw, 2 In. Jur., N. S, 12, Phear, J.; Barrut Chunder Doss *v.* Damjee Pittumber, 1 Bourke, 7.

(*b*) Mohanlall *v.* Nathuram, 1 B. L. R., O. C., 144, Norman, J.

(*c*) *Ibid*, and Nusserwanjee Pestonjee *v.* Meer Mynoodeen Khan, 6 Moo. I. A., 134; Gunga Gobind Naek *v.* Kalee Prosunno Naek, 10 Suth. W. R., 206.

(*d*) S. M. Jagatsunderi Dasi *v.* Sonatan Bysak, 5 B. L. R., 357.

(*e*) Sreenath Ghose *v.* Rajchunder Paul, 4 Wym., 151; S. C, 8 Suth. W. R., 171.

order does not provide for an award by a majority, such an award, if made, must, if objected to, be set aside (*a*).

Death, incapacity, &c., of arbitrators or umpire.

510. (S.) If the arbitrator, or, where there are more arbitrators than one, any of the arbitrators, or the umpire, dies, or refuses, or neglects, or becomes incapable to act, or leaves British India under circumstances showing that he will probably not return at an early date, the Court may in its discretion either appoint a new arbitrator or umpire in the place of the person so dying, or refusing, or neglecting, or becoming incapable to act, or leaving British India, or make an order superseding the arbitration, and in such case shall proceed with the suit.

This corresponds with Act VIII of 1859, s. 319, first paragraph. The words "or make an order superseding the arbitration, and in such case shall proceed with the suit" are added. Where a person goes away from this country and remains away, and there is no evidence to show an intention to return, he becomes incapable of acting as an umpire within the meaning of this section (*b*).

Appointment of umpire by Court.

511. (S.) Where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so, any of the parties may serve the arbitrators with a written notice to appoint an umpire; and if, within seven days after such notice has been served, or such further time as the Court may in each case allow, no umpire be appointed, the Court, upon the application of the party who has served such notice as aforesaid, may appoint an umpire.

This corresponds with Act VIII of 1859, s. 319, second para.

Powers of arbitrator or umpire appointed under sections 509, 510, 511.

512. (S.) Every arbitrator or umpire appointed under sections 509, 510 or 511 shall have the like powers as if his name had been inserted in the order of reference.

This corresponds with the last paragraph of s. 319 of Act VIII of 1859.

(*a*) Futtch Singh *v.* Gango, 4 Suth. W. R., 4.

(*b*) Gaddhar Moitry *v.* Gangaprasad Moitry, 4 B. L. R., O. C. J., 89.

Summoning witnesses.

513. (S.) The Court shall issue the same processes to the parties and witnesses whom the arbitrators or umpire desire to examine, as the Court may issue in suits tried before it.

Punishment for default, &c.

Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties, and punishments by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

This corresponds with Act VIII of 1859, s. 317. Where the parties referred a question to arbitration, expressly restricting the arbitrators to hearing one witness only, it was held that they had no power to take other evidence (*a*).

Extension of time for making award.

514. (S.) If from the want of the necessary evidence or information, or from any other cause, the arbitrators cannot complete the award within the period specified in the order, the Court may, if it think fit, either grant a further time, and from time to time enlarge the period for the delivery of the award, or make an order superseding the arbitration, and in such case shall proceed with the suit.

This corresponds with the first paragraph of Act VIII of 1859, s. 318, the last clause being added. An order superseding an arbitration under this last clause is appealable under s. 588 (8), *post*. This leaves the matter of enlargement of time in the hands of the Court. It may, although the parties do not wish it, extend the time (*b*), or it may recall the suit and set it down for trial. This was done where one of the arbitrators became ill (*c*).

(*a*) Krishna Kanta Paramanik *v.* Bidya Sundari Dasi, 2 B. L. R., Apx., 25, Peacock, C. J., and Mitter, J.

(*b*) Gobindchunder Paul Chowdhry *v.* Ram Kishen Paul Chowdhry, 2 Suth W. R., 297.

(*c*) Joseph *v.* Shooker, MSS, 14th and 19th of July, 1865, by Phear, J., reported in the *Indian Daily News*, July 21, 1865.

When umpire may arbitrate in lieu of arbitrators.

515. (S.) When an umpire has been appointed, he may enter on the reference in the place of the arbitrators—

(*a*) if they have allowed the appointed time to expire without making an award, or

(*b*) when they have delivered to the Court or to the umpire a notice in writing, stating that they cannot agree.

This corresponds with the second paragraph of s. 318 of Act VIII of 1859.

Award to be signed and filed.

516. (S.) When an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them ; and notice of the filing shall be given to the parties.

This corresponds with Act VIII of 1859, s. 320. An award, in order to be good, must be signed by all the arbitrators to whom the matter of arbitration has been submitted, unless there is some provision by the terms of the agreement of submission that the majority of voices, or that the voice of the umpire, shall prevail in a case of difference of opinion between the arbitrators (*a*). It has been held that an award is bad if it is not signed by the arbitrators, where there are several, in the presence of each other and at the same time (*b*). Phear, J., in a later case (*c*), followed the opinion of E. Jackson, J., who dissented from this decision.

When the award is signed, the arbitrators have done with it except so far as they have to cause it to be filed. They cannot, much less can some of them, make any suggestion or alteration to be embodied in the judgment of the Court (*d*).

This section does not require the arbitrators to submit their award personally. They may do so through the parties, or either

(*a*) Nem Roy *v.* Bharut Roy, 22 Suth. W. R., 129, Phear and Morris, JJ.

(*b*) Maharaja Sri Jai Mangal Sing *v.* Mohan Ram Marwari, 8 B. L R., 130 note; S. C., *ib.*, 319 note, Norman, J., E. Jackson, J., dissenting. See also 3 *ib.*, A. C., 82, Norman and E. Jackson JJ.; and Khelut Chunder Ghose *v.* Tarachurn Koondoo Chowdry, 2 Wym., 329, Peacock, C. J., and L. S. Jackson, J.

(*c*) Bhabasundare Dasi *v.* Makhunlal Dey, 8 B. L. R., 129; see note to s. 96, *post.*

(*d*) Sarboree Kanto Bhuttacharjee *v.* Anadya Kanto Bhuttacharjee, 12 B. L. R., Apx., 10.

of them; and if one of the arbitrators should die after the making of the award, the survivor may submit it to the Court (*a*).

The award is a separate thing from the proceedings, depositions, and documents, and may be, without them, complete and regular,—there may be none; but an application to remit the award, in order that they may be, if there be any, submitted with it, is too late if the time for setting aside the award, which is ten days (*b*) from the date of its submission to the Court, has gone by (*c*).

Arbitrators or umpire may state special case.

517. (S.) Upon any reference by an order of Court, the arbitrators or umpire may, with the consent of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court; and the Court shall deliver its opinion thereon; and such opinion shall be added to and form part of the award.

This corresponds with Act VIII of 1859, s. 321, the last clause being added.

Court may, on application, modify or correct award in certain cases.

518. (S.) The Court may, by order, modify or correct an award—

(*a*) where it appears that a part of the award is upon a matter not referred to arbitration, provided such part can be separated from the other part and does not affect the decision on the matter referred, or

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision.

This corresponds with the first paragraph of s. 322 of Act VIII of 1859.

The Court can, however, modify or correct the award without an application by either party. Such an application was necessary under s. 322 of Act VIII of 1859. An order modifying an award under this section is appealable, see s. 588 (t), *post*.

Order as to costs of arbitration.

519. (S.) The Court may also make such order as it thinks fit respecting the costs of the arbitration, if any question arise res-

(*a*) Jagatsunderi Dasi *v.* Sonatun Bysak, 5 B. L. R., 357.

(*b*) Act XV of 1877, sched ii, div. 3, No. 158.

(*c*) Bancy Madaub Roy *v.* Hurry Mohun Roy, 2 In. Jur., N. S., 16.

pecting such costs and the award contain no sufficient provision concerning them.

This corresponds with the concluding paragraph of s. 322 of Act VIII of 1859.

When award or matter referred to arbitration may be remitted.

520. (S.) The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrators or umpire, upon such terms as it thinks fit,

(*a*) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration;

(*b*) where the award is so indefinite as to be incapable of execution;

(*c*) where an objection to the legality of the award is apparent upon the face of it.

This corresponds with Act VIII of 1859, s. 323.

If the arbitrators having power, omit to deal with costs (*a*), or make mistakes or omissions patent on the award (*b*), or mix up other matter, such as a private reference on another subject by the same parties, with the award (*c*), the Court will remit it; but it will not do so where the arbitrators exercise their discretion merely unusually, as where, deciding for the plaintiff in the main, they ordered him to pay the costs, but it was not shown that they exercised this discretion improperly (*d*); nor would the award be modified or set aside in such a case (*e*).

Grounds for setting aside award.

521. (S.) An award remitted under section 520 becomes void on the refusal of the arbitrators or umpire to reconsider it. But no award shall be set aside except on one of the following grounds, (namely)—

(*a*) corruption or misconduct of the arbitrator or umpire;

(*a*) Barrut Chunder Doss *v.* Damjee Pittumber, 1 Bourke, 7.

(*b*) Mohun Kishen *v.* Bhoobun Shyam, 7 Suth. W. R., 406.

(*c*) Roghoo Nundun Lall Sahoo *v.* Bunwaree Lall Sahoo, 3 Suth. W. R., Mis., 27.

(*d*) Mohendronath Bose *v.* Nussee Manjee, 1 In. Jur., N. S., 224.

(*e*) *Ibid.*

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire;

(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit;

and no award shall be valid unless made within the period allowed by the Court.

This section corresponds with s. 324 of Act VIII of 1859, the first paragraph following the ultimate decision of the Court (*a*) quoted in the note to the last section. Clauses (b) and (c) and the last clause are also added.

The application to set aside an award under this section must be made within ten days from the date of its submission to the Court (*b*); the Court cannot extend the time (*c*). It follows then that as there are ten days allowed to make the application, and, as is more plainly indicated in the next section than it was in the corresponding clause of Act VIII of 1859, judgment cannot be passed until that period has elapsed, and a decree founded on a judgment passed before the expiration of such time would be set aside upon appeal (*d*), although the same decree, following judgment upon the award, if made after the ten days had elapsed, would be final under s. 522.

The parties will be bound by the award, and the Court cannot set it aside unless the case comes strictly within the provisions of this section; and it was formerly held that an arbitrator could act upon a document not properly stamped (*e*). That was a case, however, decided when Act X of 1862 was the Stamp Act. S. 14 of that Act prohibited the reception of an unstamped or improperly stamped document in a Civil Court. Act XVIII of 1869, the new Stamp Act, by s. 18, prohibits the reception of a document by any one having by law or by the consent of parties power to receive

(*a*) Mohun Kishen *v.* Bhoobun Shyam, 7 Suth W. R., 406.

(*b*) Act XV of 1877, sched. ii, div. 3, No 158.

(*c*) Edalji Shapurji *v.* Tulsidas Sundardas, 2 Bom. H. C. Rep., O. C., 285; S. C., 1 In. Jur., N. S., 234.

(*d*) Sunt Lall *v.* Baboojee, S. D. A., N. W. P., 1863, p. 42, followed in the case of Gunganarain Ghose *v.* Ramchand Ghose, 12 B. L. R., 48.

(*e*) Reedoy Kristo Mujoomdar *v.* Pudoo Lochun Mujoomdar, 1 Suth. W. R., 12.

evidence, &c.; and consequently applies equally to arbitrators. The reception of such a document, and an award founded upon it, would, therefore, now be misconduct on the part of the arbitrator, as would also be the refusal to amend a clearly bad award (*a*), or the neglect of some of the arbitrators to attend meetings (*b*); but such misconduct, although a good reason for setting aside the award, does not render it (of itself) a nullity, the irregularity may in some cases, but not apparently where it is an irregularity in the matter of a stamp, be waived (*c*). The fact that an arbitrator was never present during the course of an arbitration, and simply signed the award of the other arbitrators, is sufficient reason for setting aside award (*d*).

Judgment to be according to award.

522. (S.) If the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application has been made to set aside the award, or if the Court has refused such application,

the Court shall, after the time for making such application has expired, proceed to give judgment according to the award;

or, if the award has been submitted to it in the form of a special case, according to its own opinion on such case:

Decree to follow.

Upon the judgment so given a decree shall follow, and shall be enforced in manner provided in this Code for the execution of decrees. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

This corresponds with Act VIII of 1859, s. 325.

When the arbitrator has dealt with all matters in difference, the Court cannot alter or vary the award when giving judgment on it (*e*). It cannot decree interest, for example, when the award

(*a*) Deb Narain Singh *v.* Rajmonee Koonwur, 3 Suth. W. R., 168.

(*b*) Sreenath Ghose *v.* Raj Chunder Paul, 8 Suth. W. R., 171; S. C., 4 Wym., 151

(*c*) *Ibid.*

(*d*) Ram Guttee Mundul *v.* Thakoor Doss Mundul, 22 Suth. W. R., 418, Kemp, J.

(*e*) Fornaro *v.* Joogul Kissore, MSS., Phear, J., Dec. 5, 1865.

is silent on the point (*a*). Where the Court of first instance, after hearing objections taken by the plaintiff, had modified the award of the arbitrators, it was held incompetent for the plaintiff to appeal on the ground of an objection not taken by him before the lower Court, and in respect of matter in regard to which the decision of the lower Court affirmed the award (*b*); and a Court of Appeal acts without jurisdiction if it goes into evidence to ascertain what the arbitrators meant (*c*). Where the award was duly signed by the arbitrators, and two of whom subjoined a suggestion, which, if acted on, would have prevented the necessity of proceeding on the award, and the Judge, disregarding the suggestion, gave judgment on the award,—this judgment was held to be unobjectionable on the ground of the omission of any reference to the suggestion of the two arbitrators, and to be a final judgment (*d*).

The second paragraph contains the additional words "after the time for making such application," which is ten days (*e*); and it is only a decree on a judgment "so given" that is final, as is stated in the note to the last section. Where an award was made after the arbitrators' authority had been repudiated, a judgment given on the award is not final (*f*). When the judgment has been duly given on the award, the subsequent decree is final, even although it should afterwards appear that there has been sufficient reason for setting aside the award on an application if it had been made in due time (*g*). But where the judgment goes into other matters, and adds a finding of a matter of fact not found by the arbitrators, the decree is not final (*h*). As no appeal lies to the High Court, the Judicial Committee will not entertain an appeal. The fact that one arbitrator tendered his resignation, which he afterwards withdrew, does not divest him of his character as an arbitrator (*i*).

(*a*) Mohun Lall Shaha *v.* Joy Narain Shaha Chowdhry, 23 Suth. W. R., 105.

(*b*) Chowdhree Sufdur Ali *v.* Zuhoor-oonissa, S. D. A., N.W.P., 1863, p. 371.

(*c*) Madhusudan Das *v.* Adita Charan Das, 8 B. L. R., 316 note, L. S. Jackson and Markby, JJ.

(*d*) Sarboree Kanto Bhuttacharjee *v.* Anadya Kanto Bhuttacharjee, 12 B. L. R., Apx., 10, Jackson and Mitter, JJ.

(*e*) Act XV of 1877, sched. ii, div. 3, No. 158.

(*f*) Sashti Charan Chatterjee *v.* Tarak Chandra Chatterjee, 8 B. L. R., 315, F. B., Paul, J., dissenting.

(*g*) Ramanoogra Chobey *v.* Musst. Purtmoorta Chobayan, 7 Suth. W. R., 205, Peacock, C.J., and L. S. Jackson, J.; Sreenath Ghose *v.* Raj Chunder Paul, 8 *ib.*, 171; S. C., 4 Wym., 151, Seton-Karr and Macpherson, JJ.

(*h*) Ram Bhanjan Bhakat *v.* Sreekrishna Bhakat, 2 B. L. R., App., 260, Norman and E. Jackson, JJ.; S. C., 11 Suth. W. R., 140.

(*i*) Jaimangal Sing *v.* Mohan Ram Marwari, 8 B L. R., 319 note; S. C., 23 Suth. W. R., 429.

The decree passed in terms of the award is here understood to mean the decree of the Court referring the case to arbitration. Thus, where the referring Judge declined to give judgment according to the award, and the Judge on appeal did so, the High Court entertained a special appeal against the Judge's decision (*a*). But where the referring Judge gives judgment in accordance with the award, there is no appeal, even although the award was a nullity in consequence of only two out of the three arbitrators appointed having made it (*b*). A suit was, on the written agreement of both parties and by an order of Court, referred to arbitrators. The arbitration was entered upon, but the parties afterwards agreed to withdraw from it, and no award was made within the time allowed by the order of reference. Under these circumstances the Court, on application, ordered that the case should be brought on again for trial (*c*). In another case, where the suit had been withdrawn on the faith of a compromise which was not carried out, the plaintiff was held entitled to sue on the agreement to compromise and to establish his former right on an account; and that he was not barred, even although no leave of the Court had been obtained (*d*). This case was referred to and approved of by Peacock, C.J., in *Kallynauth Shaw* v. *Rajeeblochun Mozoomdar* (*e*), where the plaintiff alleged that he was induced to come to a compromise of a suit which he had commenced upon the terms that, as soon as the stock of the rice trade then in store at the different *cotees* was sold, and an account could be prepared accordingly, he should have his share paid to him; that the defendants, having got a decree against him upon the faith of that arrangement, refused to carry out the agreement, and fraudulently availing themselves of the plaintiff's agreement to compromise, had disregarded the conditions upon which that agreement was made; and that although the stock of the rice trade had been sold, yet the defendants did not furnish the plaintiff with any account, or pay him his share of the said trade. And it was held that the fact of the consideration to this agreement being the consent of the plaintiff to the compromise of a suit, and to a decree being passed

(*a*) Pareshnath Dey *v.* Nabin Chandra Dutt, 5 B. L R., Apx., 77 note, Glover and Mitter, JJ.

(*b*) *In re* Sheikh Ilahi Bux, 5 B. L. R., Apx., 75, Bayley and Markby, JJ.

(*c*) Gapi Nath Nandi *v.* Shib Chandra Nandi, 6 B. L. R , Apx , 74.

(*d*) Juggobundo Chatterjee *v.* Watson, 2 Bourke, 162, Norman and Morgan, JJ.

(*e*) 2 In. Jur., N. S., 343.

against him, was no bar (if he could prove his case) to his maintaining a suit to compel the defendants to perform the agreement upon the basis of which the decree was obtained. Peacock, C.J., and Macpherson, J., overruling Norman, J., who thought that the first suit was a bar to the second.

The parties to certain suits having agreed to submit to arbitration, the suits were so referred. After this reference the same parties agreed by an ekrarnamah to submit the same suits, together with other matters, to the arbitration of five persons, the effect being to withdraw the first submission and substitute the new agreement. Before these arbitrators arrived at a final conclusion, the parties, by a solenamah, compromised the whole of the subject of dispute, and afterwards an award was drawn up in the terms of the solenamah and signed by two of the arbitrators and the head arbitrator. When the award was brought before the Subordinate Judge, he considered that it had been made *ultrâ vires* in respect of those matters which were not involved in the suits originally referred, and accordingly made a decree only in those suits corresponding with the terms of the award. Some of the defendants applied to the Subordinate Judge to have the effect of a decree given to that portion of the award which was left outstanding by the first decision. This application was granted, and the remainder of the award enforced. An appeal to the Judge was dismissed with costs. It was held that, although the award was illegal, as the parties concerned did not take steps to set the Subordinate Judge right, the High Court could not interfere; but that the effect of the decision was to dispose of the award altogether and not to divide it into two parts, of which one might form the foundation of a future judgment; and that the application to give effect to the unenforced portion of the award ought to have been dismissed (*a*).

Agreement to refer to arbitration may be filed in Court.

523. (S.) When any persons agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates, the parties thereto, or any of them, may apply that the agreement be filed in Court.

(*a*) Nem Roy *v.* Bharut Roy, 22 Suth. W. R., 129, Phear and Morris, JJ.

Application to be numbered and registered.

The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application have been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

Notice to show cause against filing it.

On such application being made, the Court shall direct notice thereof to be given to any of the parties to the agreement other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

If no sufficient cause be shown, the Court may cause the agreement to be filed, and shall make an order of reference thereon, and may also nominate the arbitrator when he is not named therein and the parties cannot agree as to the nomination.

This corresponds with Act VIII of 1859, s. 326, all but the last clause of that section; and the words at the end of this section, enabling the Court to appoint an arbitrator, are added. It has been held that either party having referred the case to arbitrators may, for good cause, withdraw at any time before the award is made, unless the submission to arbitration has been made a rule of Court under this provision (*a*); but it has been also held (*b*) that the fact of one of the parties revoking his submission is not of itself, where the revocation was arbitrary, a "sufficient cause" for refusing to file the award; and this was confirmed on appeal by the Judicial Committee (*c*). It has been held that when the award has been undertaken on the agreement, and the arbitrators make default, the reference to them falls to the ground. So that, where the parties had

(*a*) Surubjeet Narain Singh *v.* Gouree Pershad Narain Singh, 7 Suth. W. R., 269, Norman and Seton-Karr, JJ.; and see Alla Ayappa *v.* Nundula Peranja, 3 Mad. H. C. Rep., 82, Holloway and Innes, JJ.

(*b*) Pestonjee Nusserwanjee *v.* Maneckjee, 3 Mad. H. C. Rep., 183, Holloway and Innes, JJ.; S. C., 1 In. Jur., N. S., 64.

(*c*) Prestonjee Nussurwanjee *v.* Manockjee, 12 Moo. I. A., 112.

executed a deed agreeing to refer all matters in difference to the arbitration of three persons, and one of the arbitrators refused to continue to act, and the other two consequently refused to proceed with the reference, the Court declined to order the agreement to be filed in Court (*a*). There must be an existing agreement in the sense of an agreement capable of being carried into effect. This section corresponds with s. 11 of the Common Law Procedure Act, 1854, and it was considered that that enactment was not confined to a general agreement in a deed or other instrument that all differences arising under it shall be referred to arbitration; but applied also to an agreement to refer, collateral to the deed or instrument under which the dispute arises. But there is a material difference between an agreement to refer all matters that have arisen and an agreement to refer an existing dispute to a particular arbitrator. Where the agreement is general, although the parties might revoke a submission in pursuance of it to a particular arbitrator, yet the general agreement to refer would still continue capable of being carried into effect. But where there is no agreement to refer, except the agreement to refer the particular matters already arisen to a particular arbitrator, and that agreement has not been made a rule of Court, and there is no clause in it that it may be made a rule of Court, and consequently it is an agreement capable by law of being revoked, and it is revoked, the whole agreement is at an end (*b*).

Provisions of this chapter applicable to proceedings under order of reference.

524. (S.) The foregoing provisions of this chapter, so far as they are consistent with any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court under section 523, and to the award of arbitration and to the enforcement of the decree founded thereupon.

This corresponds with the last clause of s. 326 of Act VIII of 1859.

Filing award in matter referred to arbitration without intervention of Court.

525. (S.) When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person inter-

(*a*) Brooke *v.* Surdyal, 12 B. L. R., Apx., 13, Pontifex, J.

(*b*) Randell *v.* Thompson, L. R., 1 Q. B. D, 758, *per* Mellish, L. J.

ested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court.

Application to be numbered and registered.

The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

Notice to parties to arbitration.

The Court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

This corresponds with Act VIII of 1859, s. 327, except its last paragraph; the words "of the lowest grade having jurisdiction" are substituted for the words "having jurisdiction." This is in accordance with the decisions in *Ex parte Balkrishna Bhaskar Gupte* (*a*) and *Elam Paramanik* v. *Sojaitullah Sheikh* (*b*), in which case the proper Court was held to be the Small Cause Court (Peacock, C. J., and Mitter, J.), but it must be a Court having jurisdiction in the whole matter (*c*).

The words "sufficient cause" should be taken to comprehend any substantial objection which appears on the face of the award, or is founded on the misconduct of the arbitrator, or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in England. Thus, where one of the parties to the arbitration, which was based upon a will, knew of a former will, which was withheld, and submitted to take his chance upon the construction of the second, it was held that he could not afterwards object to the award (*d*).

This section does not lay down that no award shall be binding upon the parties unless filed in Court, nor does it bar a suit on an award not filed (*e*). It merely gives the sanction of a decree of

(*a*) 2 Bom. H. C. Rep., 96, Couch and Warden, JJ.

(*b*) 1 B. L. R., Ap, 43; S. C., 10 Suth. W. R., 85.

(*c*) Gangappa *v.* Kapinappa, 5 Mad. H. C., 128, Scotland, C. J., and Collett, J.

(*d*) Chowdhri Murtaza Hossein *v.* Musst. Bibi Bechunnissa, L. R., 3 I. A., 209.

(*e*) Matta Deen *v.* Bhowanee, S. D. A., N. W. P., 1862, p. 74; and *ib.*, 197; Palianappa Chetti *v.* Rayappa Chetti, 4 Mad. H. C. Rep., 119, Scotland, C. J., and Collett, J.

Court to all awards duly filed, which thereby become matters of record. But all awards which are relied upon on either side in any suit, and which have not been filed under this section, must be regularly proved (*a*). It is an almost universal rule that a submission to arbitration is revocable before the award is made, and when several arbitrators are appointed, and the parties do not agree to be bound by the majority, the award, in order to be valid and binding, must be concurred in and executed by all the arbitrators, and they have no power to delegate their authority (*b*). The limit of six months from the date of the award, which was fixed for the application under s. 327, is still maintained (*c*). The question of the stamp, which was also governed by that section, is now governed by the Court Fees Act, 1870.

Filing and enforcement of such award.

526. (S.) If no ground such as is mentioned or referred to in section 520 or 521 be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter.

This corresponds with the last paragraph of s. 327 of Act VIII of 1859. The application being numbered and registered as a suit, costs can be awarded as in a regular suit; but it was held that the result of the application is an order not in the nature of a decree so as to give an appeal (*d*). Dwarkanath Mitter, J., in this case, was inclined to hold that it was in effect a decree, and as such appealable; but felt bound by a course of decisions (*e*) to

(*a*) Soophul Singh *v.* Methoo Singh, 1 Suth. W. R., 163, Bayley and E. Jackson, JJ.

(*b*) Khelut Chunder Ghose *v* Tarachurn Coondoo Chowdhry, 2 Wym., 326, Peacock, C. J., and L. S. Jackson, J; Surubjeet Narain Singh *v.* Gouree Pershad Narain Singh, 7 Suth. W. R. 269, Norman and Seton-Karr, JJ., citing Gascoyne *v.* Edwards, 1 You. and Jer., 19; Tomlinson *v.* Arriskin, 1 Comyn's Rep., 328, and Russell on Awards, 517, 519; Brooke *v.* Surdyal, 12 B. L. R., Apx., 13, Pontifex, J.

(*c*) Act X of 1877, sched ii, div. 3, No. 176.

(*d*) Chintamun Singh *v.* Musst. Wooma Koonwaur, 2 In. Jur., N. S., 1; S. C., 6 Suth. W. R., Mis., 83, F. B, overruling Hulodhur Singh *v.* Gunesh Sonthal, 6 Suth. W. R., 60; Roy Priyanath Chowdhry *v.* Prasana Chandra Chowdhry, 2 B. L. R., A. C., 249, Loch and Mitter, JJ.

(*e*) See also Vyankatesh Ramchandra Jogekar *v.* Balajee Raobin Anandrav, 1 Bom. H. C. Rep., 1st edn., 184; Mahomed Ismail *v.* Kadar Buksh, S. D. A., N. W. P., 1861, p. 432; Digumburee Dossee *v.* Poornanund Dey, 7 Suth. W. R., 401; Raj Kumar Sing *v.* Kali Charan Sing, 2 B. L. R., Apx, 20; S. C., 11 Suth. W. R., 57, Kemp and Glover, JJ.

the contrary; and it is not one of those that are now appealable under s. 588, *post*. The same question again came under discussion in another case (*a*), where an application to file an award was opposed on the ground, that before the arbitrators completed their decision their authority had been revoked. This objection was considered and overruled, and the Moonsiff directed "that the suit be decreed in favor of the plaintiffs, that the "award of the arbitrators be upheld, that the plaintiffs do get "from the defendants costs in the suit." The defendant appealed, and his appeal was rejected on the ground that no appeal would lie. The case came up on special appeal to the High Court, and was referred for the decision of a Full Bench by Couch, C. J., and Mitter, J. (*b*), in consequence of a conflict of decisions (*c*). Couch, C. J., in referring the case, agreed with the decision of a Full Bench (*d*), that the order, not being a decree, was not appealable; and Mitter, J., concurred in the reference, on the ground that an appeal was taken away by the express provisions of s. 325 of Act VIII of 1859. The question referred was, whether an appeal lay from the order of the Moonsiff. The case came on to be heard with another case (*e*), referred by Loch and Hobhouse, JJ., where the question was, whether, when an award had been ordered to be filed, and judgment had been given in accordance with it under the provisions of s. 327 of Act VIII of 1859, the judgment was open to appeal. It was held by Norman, Offg. C. J., Jackson, Loch, and Kemp, JJ., that, in the first case, there was no award, and that an appeal would lie from the order of the Moonsiff; and in the second, that it was open to the appellant to show that there had been no award: if there had not, an appeal would lie; if there had, and judgment was given in accordance with the award, such judgment would be final. From these decisions Paul, J., dissented, pointing

(*a*) Sashti Charan Chatterjee *v.* Tarak Chandra Chatterjee, 8 B. L. R., 315.

(*b*) 8 B. L. R. 315.

(*c*) See Madhusudan Das *v.* Adita Charan Das, 8 B. L. R., 316 note; Syad Wali Alam *v.* Musst. Bibi Nassan, 3 B. L. R., Apx., 104; Chintamun Singh *v.* Roop Kooer, case 353 of 1866, apparently the same case as is reported in 2 In. Jur., N. S., 1; the case is also reported in 6 Suth. W. R., Mis., 83; if so, Couch, C. J., appears to have been under some misapprehension in referring the question again to the Full Bench on the ground that the case of Hulodhur Singh *v.* Gunesh Sonthal, 6 Suth. W. R., 60, had not been considered.

(*d*) Chintamun Singh *v.* Roop Kooer, *supra*.

(*e*) Lala Iswari Prasad *v.* Bir Bhanjan Tewari, 8 B. L. R., 315.

out that the course of proceeding was first an application to have the award filed; if good cause is shown, the award is not filed, and cannot be enforced in the summary way contemplated; if good cause is not shown, the award is filed, and no appeal would lie against that order under the old Code (nor, as has been stated, would an appeal lie under this Code), and considering that as an opportunity existed for the appellant to contest the validity of the award at the time of the application to file it, he could not afterwards appeal against the judgment given upon it (*a*). In another case (*b*) it was held, that where the Judge, on an application to file an award, decided a question of fact not determined by the award, an appeal would lie. Where A. and B. were arbitrators and gave their award in the form of two papers signed on different days, the Zilla Judge rightly sent the award back to them, as being no award; and, further, he sent with it a form of award to be signed by them together. This was done on the 29th or 30th of January, and on the 3rd of February it was brought up to be filed, and judgment was given upon it. It was held, that this judgment was not a judgment on an award within the terms of the Act, which requires and allows an interval of ten days, and that an appeal would lie. It appeared in this case that the last award of the arbitrators, though joint, was signed by one of them a day after the other had signed. An objection on this account was taken on appeal, but was not decided for want of evidence. In the opinion of Jackson, J., it was merely a technical point which should not prevail. Norman, J., differing, the case was sent back to the Court below (*c*). In a case of a private award, where the arbitrators granted a new trial, and eventually disposed of the case in the absence of the defendant, and after one year from the time of allowing a new trial, one day verbally pronounced their judgment

(*a*) 8 B. L. R., 324 *et seq*; see also the cases of Ram Coomar Chowdhry *v.* Nobin Chunder Chowdhry, W. R. 1864, Mis., 33; Brojolal Bajpye *v.* Umritololl Bajpye, Marsh., 163, where the case was referred by order of Court; Ram Bunjun Bhuggut *v.* Sreekishen Bhuggut, 11 Suth. W. R., 140; S. C., 2 B. L. R., 260, *nom.* Rambhanjan Bhakat *v.* Srikishna Bhakat; Sreenath Chatterjee *v.* Koylash Chunder Chatterjee, 21 Suth. W. R., 248, Couch, C J, and Glover, J.

(*b*) See also Maharaja Jaimangal Singh *v.* Mohanram Marwari, 8 B. L. R., 319 note.

(*c*) See Kelutchunder Ghose *v.* Tarachurn Coondoo Chowdhry, 6 W. R., 272; Mahomed Akil *v.* Asudoonissa Bibee (quoted in 8 B. L. R., 323, not reported; and Roscoe on Evidence tit. Action on Award, 10th edn., 338, citing Wade *v.* Dowling, 4 El. and Bl., 44; Peterson *v.* Ayre, 15 C. B., 724.

to one party, and on another day to the other party, and on a subsequent day wrote out the award, which was signed on a particular date by one arbitrator, who sent it to others elsewhere for signature on a different date,—it was held that the award ought not to be enforced under Act VIII of 1859, s. 327 (*a*).

A Court was held to have rightly refused to permit the filing of an award which was not complete in itself, and which, as a whole, the parties had not agreed to (*b*).

It seems also that, in order that a decree on an award may be final, it is necessary that the forms required by the Act for obtaining the decision of the differences between the parties in this particular manner should have been complied with: thus, where a Moonsiff, on an application to file an award, called upon the opposite side to make any objection that they had to make within one day, instead of allowing them the time to which they were entitled, and then proceeded to discuss the case upon its merits and to give judgment himself, it was held that this judgment was open to an appeal (*c*). Such a case seems to be open to another objection, namely that it is wholly null and void on the ground of irregularity and want of jurisdiction, and liable to be set aside under 24 and 25 Vict., c. 104, s. 15, or s. 622 of this Act. The Moonsiff in this case had received no plaint, heard no statement of the witnesses, and was not in a position to give judgment in the ordinary way; but he acted entirely without jurisdiction in giving a judgment on the materials which had been furnished not to him but to the arbitrator. When a private award between parties is filed in Court, the prescribed course is for the Court to give judgment upon it and pass a decree; not to order execution before such decree has been passed (*d*).

CHAPTER XXXVIII.

OF PROCEEDINGS ON AGREEMENT OF PARTIES.

Power to state case for Court's opinion.

527. (S.) Parties claiming to be interested in the decision of any question of fact or law, may enter into an agreement in writing

(*a*) Nadir Ali *v.* Majoo, 21 Suth. W. R., 377.

(*b*) Raj Chunder Roy Chowdhry *v.* Brojendro Coomar Roy Chowdhry, 21 W. R., 182.

(*c*) Gunga Narain Ghose *v.* Ram Chand Ghose, 12 B. L. R., 48, Couch, C. J., and Glover, J.

(*d*) Saheb Ram Jha *v.* Kashee Nath Jha, 21 Suth. W. R., 295.

stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,

(*a*) a sum of money fixed by the parties or to be determined by the Court, shall be paid by one of the parties to the other of them; or

(*b*) some property, moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them; or

(*c*) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

Every case stated under this section shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the question raised thereby.

This corresponds with the first part of s. 328 of Act VIII of 1859. The last paragraph in this section is new.

When value of subject matter must be stated.

528. (S.) If the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.

This corresponds with the last paragraph of s. 328 of Act VIII of 1859.

Agreement to be filed and numbered as a suit

529. (S.) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties

claiming to be interested, as plaintiff or plaintiffs, and the other or others of them as defendant or defendants; and notice shall be given to all the parties to the agreement other than the party or parties by whom it was presented.

This corresponds with Act VIII of 1859, s. 329.

Parties to be subject to Court's jurisdiction.

530. (S.) When the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court, and shall be bound by the statements contained therein.

This corresponds with Act VIII of 1859, s. 330.

Hearing and disposal of the case.

531. (S.) The case shall be set down for hearing as a suit instituted under Chapter V, the provisions of which shall apply to such suit so far as the same are applicable.

If the Court is satisfied, after an examination of the parties, or taking such evidence as it thinks fit,

(*a*) that the agreement was duly executed by them, and

(*b*) that they have a *bonâ fide* interest in the question stated therein, and

(*c*) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so given a decree shall follow, and shall be enforced in the manner provided in this Code for the execution of decrees.

This corresponds substantially with Act VIII of 1859, s. 331.

CHAPTER XXXIX.

OF SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS.

Institution of summary suits upon bills of exchange, &c.

532. (S.) In any Court to which this section applies all suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed under this chapter, be instituted by presenting a plaint in the form

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prescribed by this Code; but the summons shall be in the form contained in the fourth schedule hereto annexed, No. 172, or in such other form as the High Court may from time to time prescribe.

In any case in which the plaint and summons are in such forms respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter mentioned so to appear and defend;

and in default of his obtaining such leave or of appearance and defence in pursuance thereof, the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and a sum for costs to be fixed by a rule of the High Court, unless the plaintiff claim more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be enforced forthwith.

Payment into Court of sum mentioned in summons.

The defendant shall not be required to pay into Court the sum mentioned in the summons, or to give security therefor, unless the Court thinks his defence not to be *primâ facie* sustainable, or feels reasonable doubt as to its good faith.

Explanation.—This section is not confined to cases in which the bill, hundí or note sued upon, together with mere lapse of time, is sufficient to establish a *primâ facie* right to recover.

This chapter is substituted for the section relating to procedure in Act V of 1866 (Summary Procedure on Bills of Exchange). This Act was the extension of an English Act of Parliament, 18 and 19 Vict., c. 67, to this country.

The Courts to which this section applies are described in s. 538, and it appears that a summary suit of this nature can be brought in such Courts although the amount sued for is within the amount cognizable by a Small Cause Court, and that the

plaintiff would be entitled to his decree and the costs of an undefended case (*a*).

This section corresponds with Act V of 1866, s. 2. Phear, J., in dealing with the corresponding section in one case (*b*), adopted the principles laid down by Baron Bramwell in deciding a case (*c*) upon the corresponding Act of Parliament. The last named learned Judge says: "The intention of the Bills of Exchange Act (18 and 19 Vict., "c. 67) was, that where there was no pretence for a defence, the party "sued should not be allowed to defend, and the holder should have "judgment as of course; but that if the defendant had a real, I do "not say a good, defence, he should have leave to appear and set it "up. As cases, however, sometimes occur where an apparently real "defence is shown, but its sincerity is doubtful, there the defendant "is let in to defend only on the terms of his bringing the money "into Court. But further, it often happens that a man comes in "before the Judge, and shows a good defence as between the parties "to the bill, and also states his belief from certain circumstances "of more or less credit, that the plaintiff is not a holder for value. "Afterwards the plaintiff comes in and shows that belief to be "groundless. In such a case the leave to appear is rescinded, "because it appears that leave was given on a supposed state of "facts which is shown to be erroneous." After referring to which passage, his Lordship, Mr Justice Phear, observed: "The words of "the Indian Act are slightly larger than those of the English Act, "but in spirit the two Acts are precisely the same. It is only when "there is a doubt as to the *bona fides* of the defence set up, that "payment of money into Court should be ordered, or security for the "same be directed to be given. Restrictions as to the time of "pleading, or of the issues to be raised, may in any case be imposed, "whenever they may seem to the Court to be required for the pur-"pose of preventing unnecessary expense or delay; and, I think, the "Court has discretion to order security for costs to be given, not "only where it doubts the *bona fides* of the defence, but also when "it considers that matter of defence is raised which does not "appear to be strictly necessary, though it is not such as the "Court ought to disallow. If the plaintiff has not been heard "against the defendant's application, he may always be allowed to

(*a*) Duff *v.* Fischer, 8 B. L. R., Apx., 10, Phear, J.

(*b*) Vonlintzgy *v.* Narayan Sing, 6 B. L. R., Apx., 64, Phear, J.

(*c*) Agra and Masterman's Bank *v.* Leighton, L. R., 2 Exch., 56.

" come in afterwards for the purpose of showing that the leave to " appear and defend ought not to have been granted, or that the " terms on which it has been granted ought to have been made more " stringent than they were."

The explanation of this section apparently alters the law which was laid down by Phear, J., under the Act of 1866, in the case of *Remfry* v. *Shillingford* (*a*). It appears, therefore, that the Court may accept other evidence besides the bill or note, &c., and the plaint, *e. g.*, where the bill, &c., is payable by instalments, and contains a stipulation that, on default of payment of one instalment, the whole sum is to become due, a summary suit can be brought under this chapter on default of payment of one instalment to recover the whole amount, and evidence of the nonpayment of the first instalment can be given.

Defendant shewing defence on merits to have leave to appear.

533. The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon the defendant paying into Court the sum mentioned in the summons or upon affidavits satisfactory to the Court, which disclose a defence or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application, and on such terms as to security, framing and recording issues, or otherwise, as the Court thinks fit.

This corresponds with Act V of 1866, s. 3, see the note to the last section.

If there is good ground, the Court will let in the defendant to defend the suit. Where a Hindu defendant had a defence which went to the consideration, contending rightly, that by his law the note did not import consideration, he was let in to defend on paying into Court of the amount for which the plaintiff sued and ulti-

(*a*) I. L. R., 1 Cal., 130; see also *In re* Lachmipat Singh Dogar Roy Bahadur, 2 B. L R., O. C, 151, Peacock, C J., and Macpherson, J., on appeal from a decision of Phear, J., in a case under the Registration Act, XX of 1866, s. 53; *In re* Ganpat Manikji, 6 Bom. H. C. Rep., O. C., 64, Westropp, J.; and Venithithan Chetty v. Moothiroolandi Chetty, 6 Mad. H. C Rep, 4, Scotland, C. J. and Holloway, J. Also on the Registration Act; Chartered Mercantile Bank v Secondè, 3 B. L. R., O. C., 146, Phear J., a case on the Bills of Exchange Act. Summary Procedure, V of 1866.

mately succeeded in reducing the claim to what had been really advanced to him (*a*); but if the *bonâ fides* of the defendant is doubtful, the Court will, if it lets him in, order him to give security or pay money into Court. And it has a discretion as to ordering security to be given, even if the defence be a good one (*b*).

Leave to appear and defend must be applied for within ten days from the date of service of summons (*c*). The Act of 1866 allowed only seven days, and the form in sched. iv to this Act, No. 172, also allows but seven days for the defendant to come in and defend. The form, however, must be held to be superseded by the Limitation Act. In one case (*d*) Markby, J., allowed the defendant to come in after the seven days. The words of the Act were "the High Court shall, upon application within the period of seven days, &c., give leave" under certain circumstances. The matter is now regulated by the Limitation Act, which (s. 4) says, that every "application made after the period, &c., shall be dismissed," so that the Court has now no discretion to allow an extension of time, unless the case falls within some exception of the Limitation Act (XV of 1877). There is a provision in that Act (s. 5) allowing an appeal on application for a review of judgment to be admitted after time, where the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or applying for the review within the stated period, but there is no such corresponding provision enabling the Court to extend the time allowed for the defendant in a summary suit on a bill of exchange, &c., under this chapter to come in after the stated period. See further the note to s. 534, *post*.

Power to set aside decree.

534. After decree, the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to appear to the summons and to defend the suit, if it seem reasonable to the Court so to do, and on such terms as the Court thinks fit.

This corresponds with Act V of 1866, s. 4.

(*a*) Ram Lal Mookerjee *v.* Haran Chandra Dhar, 3 B. L. R., O. C., 131, Phear, J., and on appeal, Peacock, C. J., and Macpherson, J.

(*b*) Vonlintzgy *v.* Narayan Sing, 6 B. L. R., Apx., 64, Phear, J.; see note to s. 532.

(*c*) Act XV of 1877, sched. ii, div. 3, No. 159.

(*d*) Grob *v.* Palmer, 1 In. Jur., N. S., 395.

Where a bill had been given in respect of racing transactions, and the question was raised as to the legality of these matters and as to the validity of the consideration, the defendant was, after decree, let in to defend, and both sides were ordered to file written statements (*a*).

When the defendant is at such a distance as makes it impossible for him to put in an appearance within the seven or ten days allowed by Act, the Court may stay execution for a time long enough to enable him to appear (*b*). Phear, J., after consulting with the Chief Justice and some of the other Judges, said, that "it never "could have been contemplated by the Legislature that these sum-"mary suits should be brought against persons resident out of the "Court's jurisdiction. But they also thought that the language of "the Statute was so strong and general that they would not be "justified in refusing to apply it to any case, although the defend-"ant might reside out of the jurisdiction; and they determined, in "order to prevent injustice, that in all cases in which the defendant "resided so far off, that the whole or a considerable portion of the "time within which he might apply for leave to defend would be "consumed in the mere journey, execution should be stayed so as "to allow time to make an application to set aside the judgment," and this would seem to show that the Court cannot extend the time for the defendant in the first instance to come in and defend; but that the proper course is to stay execution and let him in to defend under this section.

Power to order bill to be deposited with officer of Court.

535. In any proceeding under this chapter the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

This corresponds with Act V of 1866, s. 5.

Recovery of cost of noting non-acceptance of dishonoured bill.

536. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same

(*a*) Joseph *v.* Solano, 9 B.L. R, 441, Macpherson, J.

(*b*) Chandrakant Roy *v.* Pogose, 3 B. L. R., O. C., 83, Phear, J.

for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this chapter for the recovery of the amount of such bill or note.

This corresponds with Act V of 1866, s. 6.

Procedure in suits under this chapter.

537. Except as provided by sections 532 to 536, both inclusive, the procedure in suits under this chapter shall be the same as the procedure in suits instituted under chapter V.

This is new.

Power to extend this chapter.

538. Sections 532 to 537 (both inclusive) apply only to—

(*a*) the High Courts of Judicature at Fort William, Madras, and Bombay;

(*b*) the Court of the Recorder of Rangoon ;

(*c*) the Courts of Small Causes in Calcutta, Madras, and Bombay;

(*d*) the Court of the Judge of Karáchi ; and

(*e*) any other Court having ordinary original civil jurisdiction to which the Local Government may, by notification in the Official Gazette, apply them.

In case of such application the Local Government may direct by whom any of the powers and duties incident to the provisions so applied shall be exercised and performed, and make any rules which it thinks requisite for carrying into operation the provisions so applied.

Within one month after such notification has been published, such provisions shall apply accordingly, and the rules so made shall have the force of law.

The Local Government may from time to time alter or cancel any such notification.

This corresponds with Act V of 1866, s. 8.

Sections 9 and 10 of Act V of 1866 relate to other matters, and are repealed by Act X of 1872. The Contract Act, ss. 11 and 12, relates to the general law of bills of exchange; s. 14 relates to suits on lost bills, and is omitted; and s. 15 relates to Policies of Insurance.

CHAPTER XL.

OF SUITS RELATING TO PUBLIC CHARITIES.

When suit relating to public charities may be brought.

539. In case of any alleged breach of any express or constructive trust created for public charitable purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General acting *ex-officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate General, may institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

(*a*) appointing new trustees of the charity:

(*b*) vesting any property in the trustees of the charity:

(*c*) declaring the proportions in which its objects are entitled:

(*d*) authorizing the whole or any part of its property to be let, sold, mortgaged, or exchanged:

(*e*) settling a scheme for its management ; or granting such further or other relief as the nature of the case may require.

The powers conferred by this section on the Advocate General may (where there is no Advocate General) be exercised by the Government Advocate, or (where there is no Government Advocate) by such officer as the Local Government may appoint in this behalf.

This is a new provision, and it is limited in its operation to proceedings in a High Court or a District Court. The cases are not frequent in which such questions arise in this country, and they have been hitherto dealt with by the High Courts in the exercise of their general powers as Courts of Equity (*a*).

(*a*) An instance of a case of this nature is that of the Mayor of Lyons *v.* Advocate-General of Bengal, L R., 3 I A., 32 ; see also Mayor of Lyons *v.* E I Co., 1 Moo. I. A., 175 ; Longbottom *v.* Satoor, 1 Mad. H. C. Rep., 429.

It will, probably, be thought advisable to institute these proceedings in the first instance always in a High Court, to save the expense of any appeal or reference, and because the limits of the jurisdiction of the District Court might not include wholly the limits of the trust. For information on the subject of equitable jurisdiction in matters of this nature refer to chap. xxxii of Story's Equity Jurisprudence.

PART VI.

OF APPEALS.

CHAPTER XLI.

OF APPEALS FROM ORIGINAL DECREES.

Appeal to lie from all original decrees, except when expressly prohibited.

540. Unless when otherwise expressly provided in this Code or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts.

This corresponds with Act VIII of 1859, s. 332, which section was repealed and re-enacted, with some additions as to the constitution of the appellate tribunal, by Act XXIII of 1861, s. 23.

It is a general principle of our law that no one is entitled to appeal unless the right to do so is clearly given to him (*a*). This principle does not prevail in all systems of law; it is not applied in the French or Canadian system (*b*).

The present section gives a general right to appeal from all decrees; and it will be observed that the word "decree," as defined by s. 2, means the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied, but not an order on appeal remanding a suit for re-trial. Chap. xlv, which treats of appeals to the Queen in Council, gives a wider signification to the word "decree," which is there said to include also a "judgment" or an "order;" and again the High Courts are empowered to hear appeals from the "judgments" of one Judge of the said High Court, or of one Judge of any Division Court, pursuant to s. 13 of the Act, 24 and 25 Vict., c. 104, &c. See the 15th clause of the Charter of 1865 of the High Court at

(*a*) The Attorney-General *v.* Sillem (the case of the Alexandra), 33 L J., N. S, Exch, 209; In the House of Lords, Henderson *v.* Bamber, 35 *ib*, C P., 65; *Ex parte* Imbichi Patama, 1 Mad H. C. Rep, 129.

(*b*) Mayor of Montreal *v.* Brown, L R., 2 Ap Ca., 184.

Fort William and the corresponding clause of the Charters of the Madras and Bombay High Courts, and the 10th clause of the Charter of the High Court of the North-Western Provinces, in all of which the word "judgment," and not the word "decree," is used. It was held by Bittleston, J., that this word "judgment," as used in the Charters, "cannot be limited to the final judgment in a suit, "nor, indeed, to a judgment in a suit at all, but must be held to "have the more general meaning of any decision or determination "affecting the rights of any suitor or applicant" (*a*). And again, "where the language giving the appeal is so general in its terms as "that contained in the 15th clause of the Charter, it is, we think, "impossible to prescribe any limits to the right of appeal founded "upon the nature of the order or decree appealed from." And it was agreed that an order made under cl. 12 of the Letters Patent, allowing the suit to be instituted in Madras, where only part of the cause of action arose, was appealable as a "judgment." In this conclusion the Calcutta High Court, in a subsequent case, concurred (*b*). The case of *Desouza* v. *Coles* was urged as an authority for an appeal from an order refusing to admit a review of judgment, but as that proceeding was expressly made final, the appeal was not allowed to proceed (*c*); and this accords with a further passage in the judgment of Bittleston, J.: "And we think it may "be stated as a general rule that when the determination com-"plained of is merely the result of the exercise of discretion on "the part of the Judge in a matter which was a proper sub-"ject for the exercise of that discretion, the Appellate Court "would rightly decline to interfere. This is the rule in the English "Court of Chancery (*d*), and it is founded on reasons and convenience," for, as was pointed out by Peacock, C. J., "the order "rejecting the review was not a function which could be per-"formed by the High Court generally, but merely by the Court "which passed the orginal decision," and "the order rejecting a "review is not a judgment within the meaning of the Letters Patent." In a subsequent case it was contended that neither did the word "judgment" in this connexion comprehend an order for the issue

(*a*) Desouza *v.* Coles, 3 Mad., 384, Bittleston and Holloway, JJ.

(*b*) Hadjee Ismail Hadjee Hubbeeb, *v.* Hadjee Mahomed Hadjee Joosub, 13 B. L. R., 41, Couch, C. J., and Pontifex, J.

(*c*) Raku Bibi *v.* Khaja Mahomed Musa Khan, 4 B. L R., A. C, 10, Peacock, C. J., Kemp and Macpherson, JJ.

(*d*) Daniell's Chancery Practice, 3rd edn., 113.

of a writ of *mandamus*, which was merely an initiatory proceeding; and it was held, that such an order was not appealable (*a*). After referring to the passages in the judgment of Bittleston, J., which have been already quoted, Couch, C. J., who delivered the judgment of the Court, stated—"We are not, however, prepared to go to this extent. "Such an interpretation would, as it seems to us, and as the learned "Judges in that case seem to admit, put it in the power of a vexatious "litigant to appeal against all the discretionary orders which the "Judge of original jurisdiction may make in the course of the "suit; and (as the learned Judges of the Madras High Court "point out) with no result, as such orders would have to be, as a "matter of course, confirmed. It would also give a far more "extensive right of appeal against the orders of a Judge of original "jurisdiction in this Court than exists against the orders of a "Judge of original jurisdiction in the mofussil, which we do not "think it at all probable that Her Majesty intended. We think "that 'judgment' in cl. 15 means a decision which affects the "merits of the question between the parties by determining some "right or liability. It may be either final, or preliminary, or "interlocutory, the difference between them being that a final "judgment determines only a part of it, leaving other matters to "be determined." Adopting this definition of the word "judgment," *viz.*, "a decision which affects the merits of the question between the "parties by determining some right or liability," there still appears to be a distinction between it and the definition of "decree" in s. 2, against which only this section (540) gives an appeal, for in the latter case a formal order must be drawn up embodying the result of the decision, *i. e.*, the judgment. This section, no doubt, goes further than the earlier enactment, for it allows an appeal against a part of a decree; and this will enable the Court to entertain an appeal when the decree has been drawn up. But when a decree has not been drawn up, the law appears to remain as it was.

It was decided that where a suit was brought in a Court in the mofussil against A., who was alleged to be a partner of the firm of W. and Co., and therefore liable to the plaintiff for a debt due by that firm, the determination of the preliminary issue whether A. was or was not a partner was not a matter which could be the subject of an appeal; but that the case must be fully

(*a*) Justices of the Peace *v.* Oriental Gas Co., 8 B. L. R., 433, Couch, C. J., and Markby, J.

determined, and the decree drawn up before an appeal could be presented. The issue had been found against A., and the Court of Wards as A.'s guardian applied to file an appeal. The law, however, allowed an appeal only against a decree. And it was held that the decree not having been drawn up, there could be no appeal. The Court, therefore, put a strict interpretation upon the words of the Act, which contained no interpretation clause, and treated the word "decree" as the actual order following on the judgment (*a*). It is obvious that such a case might involve considerable hardship, for A. being unable to get rid of the finding which fixes him with liability as a partner, might be compelled to go on and incur the expense of going into the partnership accounts, and generaly in defending the whole case, and might afterwards, when the decree is drawn up, succeed in showing that he was not a partner, and that consequently he was in no way liable. This case did, as a matter of fact, result in the reversal of the decision of the Court below, which found that A. was a partner, both on appeal to the High Court (*b*), and in the Judicial Committee (*c*). If, when the case came up on appeal upon the single issue of partnership, the learned Judge had thought that the objection could have been remedied by ordering a decree on that issue to be drawn up, he would probably have taken that course; but it appears from the judgment as reported that he considered the determination of that issue in favor of the plaintiff as an order prior to decree, and therefore not open to appeal. Had it been determined in favor of A. the suit must have been dismissed, and there would then have been an appeal. And the learned Judge distinguished this case from another (*d*), where the decision of the lower Appellate Court reversing the finding of the lower Court that the suit was barred by limitation, and remanding the case for re-trial, was held to be a decree, being the final determination of the suit, and therefore appealable.

As the law now stands, part of a decree being appealable, it would seem that the finding on a single issue might be embodied in a decree, and would, therefore, be appealable. The

(*a*) The Court of Wards, petitioners, 7 Suth. W. R., 222, L. S. Jackson, J.

(*b*) Raja Pratap Chandra Sing *v.* Mollwo, March, 3 B. L. R., A. C., 238, L. S. Jackson and Markby, JJ.

(*c*) Mollwo March *v.* the Court of Wards, 10 B. L. R., P. C., 312.

(*d*) Mirza Himmut Bahadoor *v.* Gobindo Panday, 5 Suth. W. R., 91, F. B.

case in 7 Suth. W. R. appears also to conflict with the decision on the 15th clause of the Charter already noticed. But be that as it may, where only a part of a case had been dealt with so as to dispose of it, and an enquiry had been ordered as to the rest, an appeal was allowable against the decree which had been drawn up (*a*); and clearly would be now.

Where the Court below has dealt merely with the question of its own jurisdiction to entertain the case, and has passed a decree to the effect that it has no such jurisdiction, there is an appeal (*b*); and where the Court below passes a decree which it has not jurisdiction to pass, an appeal lies on the question of jurisdiction (*c*).

An appeal will lie on a question of costs; but as the Court of first instance has a discretion in awarding them, the Appellate Court will not exercise its authority in the matter except upon very strong grounds (*d*), as where there has evidently been a mistake in law in awarding them (*e*). Thus, where the Court had exercised its discretion in a suit for defamation, and had given the plaintiff nominal damages, but had made him pay the costs of the suit, considering it a vexatious suit, the Appellate Court refused to interfere in the matter (*f*). And an appeal may lie on a question of costs alone where the main subject-matter of the suit is no longer in contest (*g*). In the same manner an appeal will lie if the Court below has exercised a wrong discretion in awarding interest (*h*).

The Appellate Court should not, except in a clear case, interfere with the decision of the Court below on a question of fact (*i*). It

(*a*) Ghasseram Mitter *v.* Williamson, 2 In. Jur., N. S., 205, Peacock, C. J., and Macpherson, J.

(*b*) Maharajah Dhee Raj Mahatub *v.* Modhoosoodun Mookerjee, Marsh., 572; Musst. Bibee Jahan Buksh *v.* Musst. Meher Bibee, 7 Suth. W. R., 183.

(*c*) Atlaf Hossein *v.* Grish Chunder Roy, 15 Suth. W. R., 556.

(*d*) Gridharilal Roy *v.* Sundar Bibi, B. L. R., F. B., 496, Macpherson, J., *dubitante*; Chithrayil *v.* Irumanom Vittil Kanhamath Haji, 3 Mad. H. C. Rep., 279; Amirsaheb Hafizulla *v.* Jamshedji Rustamji, 4 Bom H C. Rep., 41; Keshavrav Krishna Joshi *v.* Bhavanji bin Babaji, 8 *ib.*, 142; Richards *v.* Bisley, 2 Moo. P. C., N. S., 96.

(*e*) Yeo *v* Tatem, L. R., 3 P. C. 702; Cotterell *v.* Stratton, L R, 8 Ch., 295; Inglis *v.* Mansfield, 3 Cl. and F., 362; M'Aulay *v.* Adam, *ib*, 408.

(*f*) Futeek Parooee *v.* Mohender Nath Mozoomdar, I. L. R., 1 Cal., 385.

(*g*) Inchbald *v* Robinson, L. R., 4 Ch., 395.

(*h*) Juggomohun Ghose *v.* Manick Chund, 7 Moo. I. A., 263, see p. 281.

(*i*) *Ibid.*

was said by Sir Barnes Peacock, C. J. (*a*), sitting in appeal from a judgment of Wells, J., who had tried a case on the Original Side of the High Court, that the Court was guided to a great extent by the rule laid down by the Judicial Committee (*b*), "that that "Court would not disturb a judgment of a Court in India upon a "question of the credibility of witnesses, unless it was manifestly "clear from the probabilities attached to certain circumstances of "the case that the Court below was wrong in the conclusion drawn "from such evidence;" and he added that the "credibility of wit-"nesses was an important ingredient, and great weight was to be "given to the Judge's opinion trying questions of fact, and Courts "of Appeal ought not to interfere except upon the clearest grounds." And again in another case (*c*), the same learned Judge said:—"The "decision of a Court of original jurisdiction upon a question of fact "ought not to be reversed by a Court of Appeal, unless that Court "is satisfied beyond all reasonable doubt that the decision was "wrong." It has been said that the rule applied in the Privy Council, although it is, as above stated, to a great extent, applicable in India, is not wholly so, in so far that the Court of Appeal in India has power to take other evidence and has all the advantages to be derived from a personal acquaintance with the people, their feelings, habits, and character, as well as other local advantages (*d*); still the Appellate Court should not interfere with the judgment of the lower Court, unless it is perfectly satisfied that its conclusion is erroneous. There is a presumption of law that the judgment appealed against is right until the contrary is shown, and when there is a doubt about it, the benefit of the doubt should be given by the Appellate Court to the respondent (*e*). "No doubt, "the Appellate Court may make further enquiries; but such "enquiries ought to be made with discretion, and only in those "cases in which the Appellate Court finds itself unable to do "justice to the parties on the evidence and materials as they "stand upon the record" (*f*). When the Appellate Court does

(*a*) Heeraloll Chuckerbutty *v.* Mohes Chunder Ghosaul, 1 Hyde, 109.

(*b*) In Musadee Mahomed Cazum Sherazee *v.* Meeza Ally Mahomed Khan, 8 Moo. P. C., 110.

(*c*) Palmer *v.* Cohen, 1 Hyde, 123, Peacock, C. J., and Levinge, J.

(*d*) S. M. Sarodasoondery Dossee *v.* Tincowry Nundy, 1 Hyde, 223, see p. 252, Wells, Morgan, and Levinge, JJ.

(*e*) Tayubunnissa Bibi *v.* Kuwar Sham Kishore Roy, 7 B. L. R., 621, Bayley and Mitter, JJ.

(*f*) *Ibid.*

entertain a question of fact, it should come to an independent finding (*a*).

When the parties have plainly agreed not to appeal, an appeal should be rejected; and an application should in such a case be made to stay the proceedings on the appeal before the expense of preparing the case for hearing has been incurred; and where this had not been done, the Judicial Committee, in a case before them, reduced the costs of the respondents who should have made the application (*b*), and that course might be followed for the same reasons by a Court in India. But it must clearly appear that the right to appeal has been waived (*c*). An agreement not to appeal is not void by reason of s. 28 of the Indian Contract Act, IX of 1872, and where it has been notified to the Court by both parties, the Court will give effect to it (*d*). This notification appears to be necessary, or the agreement should appear upon the face of the proceedings (*e*).

It has been held under Act VIII of 1859, that as s. 208 recognized the assignment of a decree (and s. 232 of this Code does the same), the assignee by purchase or otherwise has the same rights as to appeal as his assignor (*f*); and this opinion has been followed in a subsequent case (*g*). But this does not extend to the assignee of the subject of litigation, so that where A. sold the property in suit pending the litigation, it was held that C. the purchaser could not appeal against the decree (*h*).

Although an issue may be decided on appeal in favor of a party to the suit who is no party to the appeal, and who, being satisfied with the decision in his favor does not choose to appeal upon the issue found against him (*i*), there is no reason why the successful party, if he thinks he can better his case, should not appeal against the decree (*j*); or a party who disclaims all rights in the

(*a*) Bigsley *v.* Dickinson, L. R., 4 Ch. Div., 24.

(*b*) Munshi Amir Alli *v.* Maharani Inderjit Koer, 9 B. L. R., P C., 460.

(*c*) Pisani *v.* A. G. of Gibraltar, L. R., 5 P. C., 516.

(*d*) Anant Das *v.* Ashburner, I. L. R., 1 All, 267, Stuart, C. J., Turner, Spankie, and Oldfield, JJ.

(*e*) Morris *v.* Davies, 5 Cl. and F. 224.

(*f*) Huro Lall Dass *v.* Soojawut Ali 8 Suth. W. R., 197.

(*g*) Tara Chand Hajrah *v.* Doorga Churn Hajrah, 10 Suth. W. R., 205.

(*h*) Gajadhar Prasad *v.* Ganesh Tewari, 7 B. L. R., 149, Glover and Mookerjee, JJ., citing Judooputtee Chatterjee *v.* Chunder Kant Bhuttacharjee, 9 Suth. W. R., 309.

(*i*) Prannath Roy Chowdry *v.* Rookea Begum, 7 Moo. I. A., 323, see p. 350.

(*j*) Soroop Chunder Paul *v.* Durup de Dombal, 1 Suth. W. R., 72; Stephenson *v.* Unnoda Dossee, 6 *ib.*, Mis., 18.

original suit, if judgment has been given against him with costs (*a*). An appeal lies against the decree of the Court below, not against its decision; so that where a decree was absolutely in the favor of the defendant, but some of the issues were decided against him, he was held to have no right to appeal against that portion of the decision of the lower Court which was against him (*b*). An appeal was, however, allowed at the instance of a defendant in whose favor the decree had been made, "dismissing the suit in its present form;" he contended that it ought to have been dismissed absolutely (*c*). If an appeal is not allowed, the decision, not the decree, may bar a second suit on the same matter under s. 13 of this Act.

It is necessary to consider the effect of the introduction of a new Code of Procedure upon the right to appeal, and also upon the procedure to be followed in the appeal. The question, whether or not an appeal will lie, was held, in a case decided in 1866 (*d*) by Couch, C. J., Newton and Sargent, JJ., to be a question of procedure, and to be governed by the law existing when the appeal is made, not a right which having existed would still remain unless the law expressly took it away. In that case two Judges of the High Court at Bombay had concurred in giving judgment for the defendant in a suit in 1865. Under the then existing Charter of that High Court, s. 14, an appeal from their decision lay first to the High Court and afterwards to the Queen in Council. In December, 1865, however, fresh Letters Patent came into operation, by the 15th section of which it was provided that no appeal could be brought in the High Court from the decision of two Judges, unless they differed in opinion, but an appeal lay at once to the Queen in Council. It was contended that, notwithstanding this change in the procedure, the right to appeal still existed, as it had not been expressly taken away. But it was held that this was not so. The question was determined upon the authority of a case decided in the Court of Exchequer (*e*), in which case the plaintiff had

(*a*) Nund Coomer Singh *v.* Gunga Persaud Narain Singh, 10 Suth. W. R., 94.

(*b*) Shama Soonderee Debia *v.* Degamburee Debia, 13 Suth. W. R, 1, Bayley and Hobhouse, JJ.; and see Pan Kooer *v.* Bhugwunt Kooer, H. C. R, N. W. P., 1875, p 19, F. B.

(*c*) Ram Gholam *v* Sheo Tahal, I. L. R., 1 All., 266, Turner and Spankie, JJ., July 7th, 1876.

(*d*) Framji Bamanji *v.* Harmasji Barjorji, 3 Bom. H. C. Rep., O. C. J., 49.

(*e*) Wright *v.* Hale, 30 L. J., Exch., 40.

commenced an action before the Common Law Procedure Act came into operation, and was entitled, if he succeeded, to recover his costs under the then existing law; but the Common Law Procedure Act enacted that when a plaintiff, in such an action as this was, has recovered less than 5*l*, he should not be entitled to costs if the Judge should certify that the action was not brought to try a right; and a power was held to be thus vested in the Court, in regard to cases brought before the Common Law Procedure Act came into operation, to certify that the plaintiff should not have his costs in a certain event, although, as the law stood when the plaintiff brought his action, he was entitled to have his costs, and although he might have commenced proceedings in the full expectation that he would have those costs if he succeeded. The question was, whether this provision was to have a retrospective effect, and was to apply to actions brought before the passing of the Act. Baron Wilde stated the principle upon which that case was decided as follows: "The principle that seems to me "applicable to the case is this, that where you are dealing with a "right of action, and an Act of Parliament passes, unless something "express is contained in that Act, the right of action is not taken "away; but where you are dealing with mere procedure, unless "something is said to the contrary, and the language in its "terms applies to all action whether before or after the Act, there, "I think, the principle is, that the Act does apply without reference "to the former law or procedure. Now that that is the prin-"ciple appears from the cases that have been cited on both sides." And further on: "What is the right the suitor has? The "right of action is a right to bring an action. And what is the "right to bring an action? Why, to have it conducted in the way "and according to the practice of the Court in which he brings "it: and if any Act of Parliament, or any rule founded on the "authority of an Act of Parliament, alters the mode of pro-"cedure, then he has a right to have it conducted in that altered "mode." Some doubt was thrown by the Court of Queen's Bench in a subsequent case (*a*) upon this decision, and it was questioned whether the canon of construction had been properly applied. In the Bombay case very little appears from the report to have been said in argument. It was stated by the counsel for the appellant, and it was taken, that the question was one of mere

(*a*) Kimbray *v.* Draper, 37 L. J., Q. B., 80.

procedure. The Common Law Procedure Act, in which the decision was based, enacted in s. 43, that "the provisions of this Act "shall come into operation on the 10th of October, 1860." The case decided in Bombay was so decided before the passing of the General Clauses Act, I of 1868, s. 6 of which enacts that "the repeal "of any Statute, Act, or Regulation shall not affect anything done. "or any offence committed, or any fine or penalty incurred, or any "proceedings commenced before the repealing Act shall have come "into operation." On reference to s. 3 of this present Code it will be seen that it is stated in the last clause that "nothing herein "contained shall affect the procedure prior to decree in any suit "instituted or appeal presented before this Act comes into force." The word "decree" in this clause seems to apply to the decree in the original suit in the case of a suit brought before this Act came into force, or to the decree in appeal in the case of an appeal presented before this Act came into force; therefore it might be argued that, unless an appeal be given by this Act, no appeal can be entertained unless it has been presented before this Act came into force. The 6th section of the General Clauses Act, which uses the word "proceedings," and not "procedure," has been, however, considered in a case also determined by the High Court in Bombay, sufficiently comprehensive to include a suit in which a decree has been given; the suit itself being a judicial proceeding must be taken to include all the proceedings in the suit from the date of its institution to its final disposal, and therefore to include proceedings in appeal (*a*). In the case of *Ranjit Singh* v. *Meharban Koer* and other suits referred to a Full Bench in Calcutta, and decided on 18th of June 1878, Sir R. Garth, C. J., adopted this construction, and held that the proceedings in a suit instituted before the new Code of Civil Procedure came into operation, including a special appeal from an order of an Appellate Court made in a proceeding in execution, which would be inadmissible under this Code (see s. 558, *post*) and which was an essential part of the "proceedings" in the suit, go on until the final end of the suit, notwithstanding the repeal of the old Code which gave the appeal; but the "procedure" after decree is, by virtue of s. 3, to be regulated by the new Code, and if there is no machinery by which this procedure can be conducted, the procedure of the old Code must be

(*a*) Ratanchand Shrichand *v.* Hanmantrav Shivbakas, 6 Bom., 166, Couch, C. J., Warden, Gibbs, and Melville, JJ.

applied. L. S. Jackson, J., also took a view of the construction of s. 3 of this Act and of the 6th section of the General Clauses Act, I of 1868, which would establish that an appeal would lie where the suit had been commenced before the repeal of the old Code and the coming into operation of the new. His Lordship was observing on the subject of appeals from orders made in execution of decrees: "The difficulty created by s. 3 arises mainly from "the use of the ambiguous word 'procedure,' which evidently has "two senses, and is employed in this very Code sometimes in "one and sometimes in the other sense In one of the two, it "includes all the remedies or modes of relief to which a suitor is "entitled; and in the other, it denotes merely the steps which are "to be taken by the Court or its officers in ascertaining the rights "of the litigants, in putting them into possession of that which "is found to be their due, in conducting its own proceedings, or "enforcing its own decisions. The embarrassment which has arisen "entirely disappears if we limit the word 'procedure' to that "meaning which, I apprehend, it was intended to bear, and generally "does now in most places where it occurs in the Code, *viz.*, the rules "of practice whereby 'rights are effectuated through the successful "application of the proper remedies.' I conceive that the Code is "chiefly meant to contain as complete a collection as possible of "those rules, and that although we find in it here and there decla-"rations as to those cases in which appeals shall or shall not lie, "this is done for the sake of convenience, and not because those "provisions form a part of procedure strictly so called. Those "declarations govern the cases to which they are expressly appli-"cable, and as to other cases they will depend either on the words "of actual preservative enactments or on the general principles "applicable to the retrospective force of Statutes. If this be "so, it follows that the last clause of s. 3 taken by itself has "really no effect upon this question, but relates only to the appli-"cation of the rules of practice contained in the Code." And his Lordship summed up his conclusions as follows: (1) the procedure in suits instituted after the Code came into force will be wholly subject to its provisions; (2) the procedure in suits commenced before it came into force and pending at that time will be regulated by the previous law up to decree, and by the Code after decree; (3) the procedure after decree in suits determined before the Code came into force would thereafter be governed entirely by the Code as to new proceedings, but not as to proceedings already com-

menced. Markby, J., who, with Ainslie and Mitter, JJ., for a different reason, held that an appeal would lie, subsequently, for the sake of uniformity of practice, adopted the view of L. S. Jackson, J. (*a*); and it must now be considered to rule the practice of the Court in Calcutta with regard to this matter. A further reference to these cases will be found in the note to s. 588. It will be observed, on reference to s. 342, *ante*, that it has been decided in Bombay that a judgment-debtor who has been imprisoned in execution of a decree under the old Procedure, which allowed his judgment-creditor to detain him in prison for two years, cannot obtain his release from such imprisonment on the ground that he has been in prison for a longer period than six months, the limit of the term of imprisonment in execution of a decree allowed by the present Code; that was on the ground that the creditor had acquired a right to detain his debtor in prison, that right was not taken away by this Act, that it was not a question of procedure, and that even if it were a question of procedure, the new Code was inapplicable, its application being in this instance prevented by the 6th section of the General Clauses Act, I of 1868 (*b*).

Form of appeal.

541. The appeal shall be made in the form of a memorandum in writing presented by the appellant, and shall be accompanied by a copy of the decree appealed against and (unless the appellate Court dispenses therewith) of the judgment on which it is founded.

Memorandum to be accompanied by copy of decree and judgment.

Memorandum of appeal.

Such memorandum shall set forth concisely, and under distinct heads, the grounds of objection to the decree appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

The first part of this section corresponds with Act VIII of 1859, s. 333, omitting that part which related to the time within which the memorandum of appeal was to be presented, that matter being regulated by the Limitation Act (*c*), which provides that the appeal shall be dismissed unless it be presented in due time.

(*a*) Nadir Hossein *v.* Bissen Chand, No. 70 of 1878, Markby and Princep, JJ., 24th June, 1878.

(*b*) Ratanji Kaliansi and others, petitioners, I. L. R., 2 Bom. 148, Sargent and Bayley, JJ., dissenting; and see the note to s. 588, *post*.

(*c*) XV of 1877, s. 4.

An appeal from a decree of a High Court, in its Original Jurisdiction, must be made within twenty days from the date of the decree; an appeal to a District Court, within thirty days; and to a High Court as a Court of Appeal from the Courts in the Mofussil, within sixty days (*a*). If, however, due cause be shown for not presenting the appeal within the proper time, the Court may admit it afterwards (s. 5); time is to be allowed for obtaining copies of the decree and judgment (s. 12); and it will be observed that a copy of the decree must accompany the memorandum. A change in the construction put upon the law since the determination of suit in the first instance, is no ground for admitting the appeal after time (*b*); but if the appeal be admitted, the new construction applies (*c*). On the question whether good cause is shown for the delay, it has been held that if a party present an application for a review of judgment within the time limited for appealing, the period occupied by the Court in disposing of such application will not be reckoned among the number of days limited for appealing, but will be added thereto; and a memorandum of appeal presented within such extended period will be received as put in within time. But where the appellant took his full time for presenting a petition of review, and after that application was rejected took his full time for presenting his memorandum of appeal, counting from the date of the rejection of his petition of review as from the date of the decree, it was held that he was too late; he should have presented his memorandum of appeal without delay after his petition for review had been disposed of (*d*). This was according to the practice established in Madras; it follows that if the decree is on the face of it erroneous, and an application is made to the Court which made it to correct the error on settling the minutes of decree, &c., the time so occupied ought to be allowed. By Act XV of 1877, s. 5, the time during which the Court is closed is allowed; the memorandum of appeal may be admitted when it re-opens.

(*a*) See Act XV of 1877, sched. ii, div. 2, Nos. 151, 152, and 155.

(*b*) Makhan Naikin *v.* Manchand Ladhabhai, 5 Bom. H. C. Rep, 107; Mowri Bewa *v.* Surendarnath Roy, 2 B. L. R., A. C., 184; S. C., 10 Suth. W. R., 178, Phear and Hobhouse, JJ., applying the rule laid down by a Full Bench in the case of Shamacharan Chuckerbutty *v.* Bindabun Chunder Roy, B. L. R., F. B., 892; Dhurm Doss *v.* Mahomed Aman, S. D. A., N. W. P., 1864, p. 134, F. B.

(*c*) *Ibid.*

(*d*) Nobbo Kissen Singh *v.* Kaminee Dassee, B. L. R., F. B., 349; Brojendro Coomar Roy *v.* Radhagobind Shaha, 4 Wym., 23, F. B; S. C., 7 Suth. W. R., 529; Kuller Singh *v.* Jewan Singh, 22 *ib.*, 79, Phear and Morris, JJ.

This includes a closing of the Court not only on a holiday or Sunday (*a*), but where the Judge has closed the Court for his own convenience (*b*). In calculating the period allowed for an appeal, the period between the date on which judgment was pronounced and that on which the decree was signed by the Judge is to be deducted as coming within the words "such time as may be requisite for obtaining a copy of the decree" (*c*); the appellant will be entitled to deduct the time between the date on which he puts in the requisite stamp for the copy of the decree and the time when he obtains the copy (*d*). This was a decision regarding a case appealed from a Court in the mofussil obliged to record its judgment in a specified manner. The practice of the High Court in recording judgments is to some extent different, and the counsel engaged in the case is expected to make a note of the judgment on his brief. It used to be held that, in an appeal from a decree on the Original Side of the Court, the time required for obtaining a copy of the judgment was, for this reason, not to be deducted (*e*); but the 12th section of the Limitation Act is applicable to all cases, and draws no distinction in this respect between decrees of the High Courts and decrees of the Courts in the mofussil. It was held by the late Sudder Court at Agra, that a special appeal, *i. e.*, an appeal on a point of law only, corresponding with an 'appeal from an appellate decree,' would lie against the order of the lower Appellate Court admitting an appeal after time (*f*); and if it appeared upon the face of the proceedings that there was no enquiry as to the cause of the delay, no cause shown, and no evidence given, it would amount to a defect in law, and such an appeal might properly be entertained; but where it appears that there has been such enquiry, &c., and the Judge has exercised his discretion in the matter, he is the judge of the facts necessary to enable him to enlarge the time, and no appeal as from an error in law should be entertained (*g*). There is no appeal against an order admitting an appeal after time,

(*a*) Gopee Nath Roy *v.* Gopee Nath Chuttopadhya, 2 Wym., 281, 8 Sev, 99.

(*b*) Bishen Perkash Narian Singh *v.* Baboon Misser, 8 Suth. W. R., 73, Kemp and Glover, JJ.; Secy. of State *v.* Mutu Sawmy, 4 B. L. R, Apx., 84, Norman, Offg. C. J., and Bayley, J.

(*c*) *In re* Chowdhry Mohendro Narain Roy, 18 Suth. W. R., 512, Phear and Ainslie, JJ.; Harrak Sing *v.* Tulsi Ram Sahu, 5 B. L. R., 47, F. B.

(*d*) Lal Gopalnath Sahee Deo *v.* Musst. Pudum Koonwur, 5 Suth. W. R., Mis., 44, Peacock, C. J., and L. S. Jackson, J.

(*e*) Elias *v.* Habool Mooshee Moorhee, 1 In Jur., N. S., 18, Norman, J.

(*f*) Dhurm Doss *v.* Mahomed Aman, S. D. A., N. W. P., 1864, p. 134, F. B.

(*g*) Raj Coomar Roy *v.* Shaikh Mahomed Waris, 7 Suth. W. R., 337, L. S. Jackson, J.

see s. 588, *post*; but as s. 4 of Act XV of 1877 directs the Court of Appeal to dismiss the appeal, if it appear that it was presented after the period of limitation prescribed by that enactment, even although limitation has not been set up as a defence, it is necessary that a note should be made by the Judge admitting the appeal after time on the face of the proceedings, showing under what circumstances, for what cause, and upon what evidence it has been so admitted. If this is not done, the order admitting the appeal would be on the face of it without jurisdiction, and would be an order such as the High Court could set aside under s. 622 or under cl. 15 of the Charter Act.

It will be noticed that the Limitation Act directs the Court to dismiss the appeal if it is presented after the proper time. But other questions of limitation may arise, questions which are not apparent upon the face of the proceedings. It may be objected that the suit itself was barred by lapse of time, and if this was apparent on the plaint, the Court of first instance should, in the same manner, have dismissed the suit at once; but it may not have done so, or it may be that the question arises upon the evidence. Where that is so, and the point is beyond dispute, the Court is equally called upon to dismiss the suit on appeal, whether the point is taken by the parties or not. But the parties should take the objection where it arises upon the first opportunity, otherwise if it is necessary to go into evidence, they may be shut out when they raise it on the appeal (*a*). That was a decision on the old Act of Limitation. It used to be considered that if the Statute of Limitations is relied on, it ought to be pleaded in every case. This was, however, a matter about which there existed considerable doubt, and, in the case of suits in Small Cause Courts, was expressly negatived (*b*). It was held, even where that principle was allowed to prevail, that whenever the other side has an opportunity of meeting the objection by evidence, it may be made (*c*); and when the lower Court decided the point of limitation against, but other

(*a*) Ramanatha Mudali *v.* Vaithalinga Mudali, 2 Mad. H. C. Rep., 238, Frere and Holloway, JJ.

(*b*) Payne *v.* Constable, 1 B. L. R, O. J., 49, Peacock, C. J., and Norman, J., dissentiente, Markby, J.; see also Mukvana Saluji Kesraji *v.* Raj Sangji Jalam Sangji, 2 Bom. H. C. Rep., 169, Couch and Tucker, JJ.; Doolee Chund *v.* Puriag Singh, 2 Wym., 24, Trevor and Bayley, JJ.

(*c*) Narasu Reddi *v.* Krishna Padayachi, 1 Mad. H. C. Rep., 358, Scotland, C. J., and Frere, J.; see also Maharaja Dheeraj Mahtab Chund Bahadoor *v.* The Bengal Govt., 4 Moo. I. A., 466—508; Musst. Imam Bandi *v.* Hurgobind Ghose, *ib.*, 414.

issues in favor of the defendant, and the plaintiff appealed, and the Appellate Court remanded the case without passing any judgment on the issue of limitation, it was held that the Appellate Court could, when the case came up again, try the question of limitation (*a*).

It was held by L. S. Jackson, J., that the Court of Appeal may allow objections made to a defective plaint (*b*). Hobhouse, J., expressed a doubt; such objections should not certainly be allowed except for very cogent reasons. And in a later case L. S. Jackson and Markby, JJ., concurred in thinking that, in that particular case, the objection ought not to be entertained at the hearing of the appeal: it had not been urged in the Court of first appeal (*c*). Where the plaint did not disclose a cause of action, but the case had been tried, and in the course of it, the evidence had shown that there was a cause of action, it was held that the Appellate Court ought not to dismiss the suit on account of the defect in the plaint (*d*).

Where an appeal has been admitted by inadvertence, being improperly stamped, although the objection might have been urged as good ground for the rejection of the appeal in the first instance, yet the appeal having been admitted and heard, it has been held that the Court must deal with it on its merits, and cannot limit the relief to the amount covered by the stamp (*e*). But in a later case the appeal was dismissed without prejudice to the appellant bringing a fresh appeal within twenty days on a proper stamp (*f*). The proper course would seem to be to direct the right stamp to be affixed (*g*), where this can be done. And this was the course pointed out by the Judicial Committee in a case the circumstance of which were somewhat peculiar. The plaintiff sued his brother for his share of family property; the brother set up a release by deed, which the plaintiff denied. The document was not stamped, although on the face of it it was stated that it was stamped. No objection was taken to the document, and it was admitted in

(*a*) Phool Koomaree Bibee *v.* Woonkar Pershad Rustoby, 2 In. Jur., N. S., 50.; S. C., 7 Suth. W. R., 67, Peacock, C. J., and L. S. Jackson, J.; Saluji Kesraji *v.* Rajsanji Jalamsangji, 2 Bom H. C. Rep., 162, Couch, C.J., and Tucker, J.

(*b*) Colvin, Cowie, and Co. *v.* Elias, 2 B. L. R., A. C., 212; but see Abdul Gufoor *v.* Musst. Nur Banu, 1 *ib.*, A. C., 78, L. S. Jackson and Mitter, JJ.

(*c*) Durgaram Roy *v.* Raja Nursing Deb, 2 B. L. R., 254.

(*d*) Lallah Mahtab Roy *v.* Debee Dutt Singh, 25 Suth. W. R., 204.

(*e*) Buloram Sircar *v.* Ramnarain Banerjee, 10 Suth. W. R., 242.

(*f*) Syad Wali Alam *v.* Musst. Bibi Nasran, 3 B. L. R., Apx., 104, Kemp and Glover, JJ.

(*g*) See Court Fees Act, 1870, s. 28

evidence by the lower Court. After its production, however, a two-anna stamp was put upon it. When the case came before the High Court on appeal, that Court took notice that two annas was an insufficient sum to cover the amount of the property at stake The Court left the deed as part of the evidence in the case. giving it operation so as to release so much of the claim as would be covered by the two-anna stamp. This unusual course was condemned by the Judicial Committee who held, that the High Court ought to have required the document to be properly stamped. It might, in such a case, reject the document altogether. But this course would be open to objection as it had been admitted without objection in the lower Court (*a*). In the appeal before them, the Judicial Committee acted on the unstamped document. The question of the sufficiency of the stamp is a matter regarding the revenue, and has nothing to do with the merits of the trial. Where a document offered in evidence, and bearing an insufficient stamp, has, in like manner, been admitted wrongly,—it has been held in Bengal that the Appellate Court has no power to reverse the judgment of the Court of first instance merely on that ground. The reason of this has been stated to be, that the admission of the unstamped or improperly stamped document is an irregularity not affecting the merits of the case (*b*). But in Madras it has been held that the Court of Appeal should require the document to be stamped, or it should reject it as evidence, and that the Court ought to take the objection although it was not taken in the grounds of appeal. All these cases were decided upon the Stamp Act X of 1862, which provides (s. 14), that unstamped documents shall not be received in evidence. The subsequent Act, XVIII of 1869, contains in s. 18 a similar provision (*c*). If the suit

(*a*) Mantappa Nadgowa *v.* Baswantro Nadgowa, 15 Suth. W. R., P. C., 32.

(*b*) Srinath Saha *v* Saroda Gobindo Chowdhry, 5 B. L. R, Apx., 10, Norman and E Jackson, JJ.; Currie *v.* S. V. Muthu Ramen Chetty, 3 *ib*, 126; S C., 11 Suth. W. R., 520, Peacock, C J., and Mitter, J.; Lalji Sing *v.* Syad Akram Ser, 3 B. L. R, 235; S. C., 12 Suth. W. R, 47, Kemp and Glover, JJ.; Enayetoollah *v.* Shaik Meajan, 16 *ib.*, 6, Bayley and Ainslie, JJ.; Haran Chunder Bhooree *v.* Russick Chunder Neogy, 20 *ib.*, 63, Couch, C. J, and Glover, J; Noor Bibee *v.* Shaikh Rumzan, 24 *ib.*, 198; Roy Luchmeeput Singh *v.* Shaikh Moshuruff Ali, 25 *ib.*, 80, Garth, C. J., and Birch, J; Ibrahim Azim *v.* Cruickshank, 7 B. L. R, 653, Macpherson and Ainslie, JJ.; Syed Wajid Ali Khan *v.* Lala Hanuman Prasad, 4 *ib.*, A. C., 139, Kemp and Glover, JJ.

(*c*) See also Adinarayana Setti *v.* Minchin, 3 Mad. H. C. Rep., 297, Scotland, C. J., and Innes, J.

has been improperly valued, it has been held that it can be rejected on appeal; but that the plaintiff should have the plaint returned to him in order that he may present it in the proper Court with a proper stamp (*a*). Where a Judge passes a decree against a plaintiff on the ground that the document is inadmissible in evidence for want of a proper stamp, his decision may be reviewed in appeal (*b*). An objection which, if taken in the Court below, might have been cured, and which has not been taken in the Court below, cannot be taken in the Court of Appeal (*c*); and where a point has been abandoned in the lower Court, and is not raised in the grounds of appeal, it cannot be raised on the hearing of the appeal (*d*), nor can an appellant set up new matter, such as a new title, which has not been investigated by the Court below (*e*).

An advocate or vakeel cannot be heard on the Appellate Side of the High Court, Calcutta, in support of an appeal, unless the grounds are certified by an advocate or vakeel of the Court (*f*); and the whole of the grounds must be fully stated in the memorandum (*g*).

The second part of this section corresponds with s. 334 of Act VIII of 1859, and a form of the memorandum of appeal is given in the 4th schedule to this Act, No. 173.

Appellant confined to grounds set out.

542. The appellant shall not, without the leave of the Court, urge or be heard in support of any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant:

Provided that the Court shall not rest its decision on any ground not set forth by the appellant, unless the res-

(*a*) Musst. Iadu *v.* Sheik Hifazut Hossein, 5 B. L. R., Apx., 15, Bayley and Markby, JJ., following Nussurut Ali Chowdhry *v.* Mahomed Kanoo Sikdar, 11 Suth. W. R., 541, Bayley and Hobhouse, JJ.; see also The Collector of Sylhet *v.* Kalli Kumar Dutt, 7 B. L. R., 663, F. B. But see also Emauddin Khan *v.* Ramkissore Kowar, 5 *ib.*, Apx., 30, Loch and Hobhouse, JJ.

(*b*) Royal Bank of India *v.* Hormasji Kharsedji, 3 Bom. H. C. Rep., 153, Couch, C. J., and Sarjent, J.

(*c*) Dhurm Das Pandey *v.* Musst. Shama Soondri Dibia, 3 Moo. I. A., 229, see p. 242; Hilliard *v.* Gifle, L. R., 7 H. L., 39; Forbes *v.* Meer Mahomed Hossein, 12 B. L. R., P. C., 211.

(*d*) S. M. Pabitra Dasi *v.* Damudar Jana, 7 B. L. R., 697, Kemp and Glover, JJ.; and see the next section.

(*e*) Ambika Churn Dutt *v.* Nadir Hossein, 2 B. L. R., 258, L. S. Jackson and Markby, JJ.

(*f*) Kishen Chunder Roy *v.* Hurish Chunder Bose, 3 Suth. W. R, 216.

(*g*) Ramkristo Deb *v.* Rajchunder Surmah, 11 Suth. W. R., 246.

pondent has had sufficient opportunity of contesting the case on that ground.

This is taken from the second part of s. 334 of Act VIII of 1859. Where a defendant has, by his answer, put his defence upon a certain ground, and issues for trial are framed by the Court to meet the case so pleaded, the Court of Appeal should not determine the appeal upon any other issues or grounds which have not been taken in the Court below (*a*). This was a decision of the Judicial Committee of the Privy Council. But, as has been remarked in the note to s. 540, *ante*, the Court of Appeal in India is not in the same position as the final Court of Appeal in England; it has opportunities of calling for fresh evidence and other facilities which do not exist where the case has been removed from this country; and this section expressly points to exceptions to the general rule. An instance of the Court taking an objection under the stamp law, when brought to its notice, is given in the note to the last section, and others in which the Appellate Court declined to allow an objection at the hearing. This section, however, expressly allows the Court to permit other grounds to be heard, as was done in the case of a review (*b*); and where a legitimate objection has been omitted by a mistake, the Court will allow it to be added (*c*).

Rejection of memorandum or grounds of objection.

543. If the memorandum of appeal be not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court, or be amended then and there.

When the Court rejects under this section any memorandum, it shall record the reasons for such rejection.

When a memorandum of appeal is amended under this section, the Judge, or such officer as he appoints in this behalf, shall attest the amendment by his signature.

This section corresponds with Act VIII of 1859, s. 336. The

(*a*) Sreemutty Dossee *v.* Ranee Lalunmonee, 12 Moo. I. A., 470; and see Shah Mukhun Lall *v.* Baboo Sree Kishen Singh, *ib*, 189; Gopee Loll *v.* Musst. Sree Chundraolee Buhoojee, 11 B. L. R., P. C., 391.

(*b*) Bhugwandeen Doobey *v.* Myna Baee, 11 Moo. I. A., 487, see p. 498.

(*c*) Joyprokash Bhuggut *v.* Bhugwan Doss, Marsh., 589, Peacock, C. J., and Levinge, J.

second paragraph and the last are new; the former is in accordance with the practice of the High Court at Calcutta (*a*). The Appellate Court should fix a time within which the amended memorandum of appeal is to be presented; if it does not do so, and the memorandum, originally presented within the period prescribed, is presented again after that period, it cannot be said to be barred by lapse of time (*b*).

One of several plaintiffs or defendants may obtain reversal of whole decree if it proceed on ground common to all.

544. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed against proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal against the whole decree, and the Appellate Court may reverse or modify the decree in favour of all the plaintiffs or defendants as the case may be.

This corresponds with Act VIII of 1859, s. 337, under which section it was held that, where a suit was brought against A., B., and C. for damages for an assault, and the original Court found against A. only, and awarded damages against him, and A. only appealed, the Appellate Court could award damages against all three (*c*). Where A. and B. were sued on a joint liability to pay rent, A. did not defend, B. did; and a decree passed against both, and B. appealed,—it was held that it was competent to the Judge, on appeal, to reverse the decree, on the ground that there was no joint liability, but that B. occupied a separate estate at a separate rent (*d*). Where A. sued B. for rent, and B. answered that he had paid the rent to C., who was his immediate landlord, and the lower Court held that C. was properly made a party, and the decision

(*a*) Lalla Jugseb Sahoy *v.* Kassenath Sein, In. Jur., O. S., 121.

(*b*) Jagannath *v.* Lalman, I. L. R., 1 All., 260, Turner and Spankie, JJ. See several cases quoted in the note to this case, p. 261.

(*c*) Anund Chunder Goopto *v.* Mohesh Chunder Mozoomdar, 1 Suth. W. R., 229; see also Badul Singh *v.* Chutterdaree Singh, 9 Suth. W. R. 558 (a case in which the grounds were common to all parties as members of a Hindu family claiming family property), L. S. Jackson and Mitter, JJ.; see also Mohunt Rung Lall Gossami *v.* Gouree Mundul, 10 *ib.*, 286, L. S. Jackson and Glover, JJ.; Shaikh Mahomed Saefoolah *v.* Shaikh Anwar Ali, 21 *ib.*, 112; Jadumani Dasi *v.* Fadu Bibi, 7 B. L. R., Apx., 28.

(*d*) Lukhy Kant Sein *v.* Ramdoyal Dass, Marsh., 281.

being partly adverse to him he appealed,—it was held that the whole decree might be dealt with by the Court of Appeal (*a*). A plaintiff sued on a mortgage bond executed by A.; B., who claimed the property under a mortgage from A., was admitted as a defendant on his own application, but afterwards B.'s claim being satisfied by A., he withdrew, or was excluded from the suit. Before this was done, B. had incurred costs, and by the decree of the Court of first instance, which ordered A. to pay the debt and costs of the plaintiff, B. was ordered to pay his own costs. Upon appeal by A. alone, the Appellate Court found that the mortgage bond was not proved, and dismissed the suit, ordering the plaintiff to pay the costs of both defendants. It was held that this was a reasonable order which the Judge had, under s. 337 of Act VIII of 1859, power to make (*b*). But where the original Court decrees against two defendants on a ground not common to both, the Appellate Court cannot, on appeal by one of the defendants only, reverse the whole decree (*c*). And where one defendant relied upon the defence of the Statute of Limitations, and the others set up a substantial defence on the merits of the case, and the Court decreed in favor of the plaintiffs, one defendant appealed, and the Court of Appeal reversed the whole decree and dismissed the claim of the plaintiffs,—the High Court overruled this decision of the Appellate Court, as the original decision had not proceeded on grounds common to all the defendants (*d*). A plaintiff sued for possession of certain lands as the self-acquired and exclusive property of the vendor B., on the allegation of the execution of a deed of sale in his favor. He made the alleged vendor and other parties claiming to be co-partners with the vendor defendants. The alleged vendor denied having sold the property to the plaintiff; he denied the execution of the deed, and pleaded that the property was the joint property of a joint Hindu family, and therefore he could not sell it. The other defendants pleaded to the same effect.

(*a*) Dyal Chand Sahoy *v.* Nabin Chandra Adhikari, 8 B. L. R., 180, Kemp and Ainslie, JJ.

(*b*) Yerrabalu Virargava Reddi *v.* Abdul Khadir Sahib, 4 Mad. H.C. Rep., 26, Bittleston and Ellis, JJ.

(*c*) Musst. Jariut-ool-Butool *v.* Musst. Hoseince Begum, 11 Moo. I. A., 194, see p. 207; Musst. Mulleeka *v.* Musst. Jumeela, 11 B. L R, P.-C., 375, see p. 384; Abdool Ali *v.* Syed Banoo, 2 Suth. W. R., 287; Bugwun Doss *v.* Musst. Shib Koer, S. D. A., N. W. P., 1862, p. 422.

(*d*) S. M. Doymonee Dossee *v.* Eshur Chunder Muttyloll, 1 Suth. W. R., 203.

The first Court upheld the deed, and decreed for the plaintiff. B. did not appeal, but the other defendants did, on the ground that the property was joint, and that the deed was not executed as alleged. B. was made a respondent by his co-defendants who appealed, and he made an objection by way of cross-appeal under s. 348 of Act VIII of 1859, corresponding with s. 561 of this Code, to the decree of the Court of first instance. The lower Appellate Court found as a fact that the property was joint, and reversed the decree. It was held, on special appeal, that the appellants could only appeal in the lower Court regarding their own rights, and that they could not open out any questions as to the genuineness of the deed executed by B., who did not appeal (*a*).

So also where one of several defendants appeals not against the whole decree, but only against that portion of it which affects him, and his defence in the lower Court is not a defence common to the other defendants, the decree of the lower Court cannot be reversed in favour of those defendants who have not appealed (*b*).

In a case decided by L. S. Jackson, J., the learned Judge said: "I think it now quite clear that the decree which may be "the subject of such an appeal (*i. e.*, in which any one of the "plaintiffs or defendants might appeal, and the Appellate Court "might reverse or modify the decree in favor of all the plain-"tiffs or defendants) must be one affecting in the same manner "the whole of the plaintiffs or defendants,—that is to say, a decree "incapable of division, and upon which it would be impossible for "the Court to find in one sense for some of the plaintiffs or defendants, "and in an opposite sense for the other plaintiffs or defendants; for "instance, where the suit relates to property in which all the plaintiffs "or all the defendants are co-sharers or joint owners;" and the learned Judge instanced the case of *Kali Prasad Sing* v. *Jai Narayan Roy* (*c*), in which a person set up a claim to certain lands as lying within a certain estate, and he commenced a suit against the person whom he described as the owner of another estate in which those lands were said, in opposition to the plaintiff's statement, to be situate. After the suit had been commenced certain other persons

(*a*) Trevor and Phear, JJ., (*dissentiente* Bayley, J.) S. M. Khermukuree Dossee *v.* Nilambur Mundul, 2 Suth. W. R., 227; see also Woomesh Chunder Bose *v.* Matungmee Debia, *ib.*, 170.

(*b*) Ram Chunder Paul *v.* Omora Churn Deb, 18 Suth. W. R., 26, Kemp and Glover, JJ.

(*c*) 3 B. L. R., A. C., 23, L. S. Jackson and Markby, JJ.

came in representing themselves to be co-sharers with the original defendant, and they were made parties to the suit, and it so happened that the Court made a decree for the plaintiff as against some of the defendants, but dismissed the suit as against others; so that, as the finding stood, it resulted that, as against certain of the parties, the land was found to be within a certain estate, and as against others, not to be within that same estate. That was a decree which was capable of being brought on as a whole on appeal before the Appellate Court, and it was accordingly appealed by some of the defendants, and the whole decree was reversed. But where it is quite possible that the decree may be in favor of some defendants and against others, the learned Judge held that the case was different; and thus, where the suit was upon a bond, and was decreed against two defendants, but one appealed and succeeded in his appeal, on the ground that he was not jointly or severally liable, it was held, that the Judge of appeal had no power to reverse the whole decree upon that appeal (*a*).

Of staying and executing Decrees under Appeal.

Execution of decree not stayed solely by reason of appeal.

545. Execution of a decree shall not be stayed by reason only of an appeal having been preferred against the decree; but the Appellate Court may for sufficient cause order the execution to be stayed:

Stay of execution of appealable decree before time for appealing has expired.

If an application be made for stay of execution of an appealable decree before the expiry of the time allowed for appealing therefrom, the Court which passed the decree may for sufficient cause order the execution to be stayed:

Provided that no order shall be made under this section unless the Court making it is satisfied—

(*a*) that substantial loss may result to the party applying for stay of execution unless the order is made;

(*a*) Shiram Ghatak *v.* Brajamohan Ghosal, 3 B. L. R., Apx., 41, L. S. Jackson and Mitter, JJ.; see also Woomesh Chunder Bose *v.* Matunginee Debia, 2 Suth. W. R., 170, Kemp and Glover, JJ.

(*b*) that the application has been made without unreasonable delay; and

(*c*) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

Security required before making order to stay execution.

This corresponds with Act VIII of 1859, s. 338. The provisos (a) and (b) are added in conformity with the decisions in the case of *Nawab Sidhee Nuzur Ali Khan* v. *Rajah Ojoodhyram Khan* (*a*). The three conditions must all exist. Execution of a decree will not be stayed merely because security is given; good cause for stay of execution must be shown; and this applies to all decrees (*b*).

Execution may be had, although similar cases which have been tried together with the case in which execution is asked for have been appealed and the decrees reversed, all the cases in the Court of original jurisdiction having been, by consent, governed, so far as the decree in the original Court was concerned, by the evidence in one of them, and the case in which execution is sought not having been appealed, only because it was under appealable value (*c*). A former judgment by a Court of competent jurisdiction upon the same matter is conclusive between the same parties in a subsequent suit brought in another Court, notwithstanding the pendency of an appeal against it; but the Judge passing the decree in the subsequent suit may, on application made to him and security being given, stay the execution of it until the appeal in the former suit is decided; and may, if the former decree be reversed, entertain an application for a review of his own decision in the subsequent suit (*d*). Where the lower Court has demanded security pending an appeal, and the Judge on appeal reverses the decision of the lower Court, he ought not to stay execution of his own decree. Thus, where D. obtained a decree against K. in the Court of a Subordinate Judge, and in execution of it attached K.'s property, and on appeal the appellate Judge reversed

(*a*) 10 Moo. I. A., 322; S C., 1 In. Jur., N. S., 185.

(*b*) *In re* Ranee Ismaid Koer, 5 Wym. Rep, 264, F B.; S. C., B. L. R., F. B., 1007; 9 Suth. W. R., 448.

(*c*) Nga Bike *v.* Snadden, 9 Suth. W. R., 276, Peacock, C. J., and Hobhouse, J.

(*d*) Bulkiram Nathuram *v.* The Guzerat Mercantile Association, Limited, 4 Bom. H. C. Rep., A. C., 81, Couch, C. J., Newton and Warden, JJ.

the decree, and stayed execution, so that the defendant's property was still kept under attachment,—his order was set aside on the ground that the plaintiff having lost his decree was then in no better position than a plaintiff before judgment, so that the effect of the appellate Judge's order was to give the plaintiff an attachment before judgment without any proof of circumstances entitling him to such an attachment (*a*). There is no appeal against an order of the lower Court declining to stay execution, see s. 588, *post;* but when the appeal has been preferred, the application may be renewed in the Court of Appeal. It has been held that an Appellate Court had power, under s. 388 of Act VIII of 1859, which corresponds with s. 561, coupled with s. 38 of Act XXIII of 1861, which corresponds with s. 647 of this Code, to stay execution pending the determination of an appeal against an order passed in execution of a decree (*b*).

The order of the Civil Court directing proceedings to be taken against any of the parties or witnesses in a civil suit on a criminal charge, cannot properly form part of the decree disposing of the suit, and should not, therefore, be embodied in the decree. It was held, therefore, that an order of that nature cannot be stayed under this section (*c*).

Where an appeal to the Judicial Committee is pending, it is for the Court which admitted the appeal to stay execution, not for the lower Court to do so (*d*),—that is to say, the Court where the decree is complained of (ss. 598 and 608, *post*) must be asked to stay execution.

It was held that where a person became a surety under Act VIII of 1859, s. 338, to pay all such sums as might be decreed against the plaintiff on appeal, the decree, when passed, could be executed against the surety under s. 204 of that Code; and that an appeal would lie from an order made in execution of such decree against the surety (*e*). Section 204 of Act VIII of 1859 has, however, been replaced by s. 253 of this Code, which enables the Court to

(*a*) Kavasji Bhimji *v.* Dhondiraj Vinayak, 10 Bom. H. C. Rep., 411, Melvill, J.

(*b*) Harshankar Parshad, petitioner, I. L. R., 1 All, 178, F. B.; and see ss. 590 and 647, *post.*

(*c*) Ram Churn, petitioner, S. D. A., N. W. P., 1863, p. 363.

(*d*) Muttealaummal *v.* Chellayammal, 5 Mad. H. C. Rep., 98, Scotland, C. J., and Innes, J.

(*e*) Akhut Ramana *v.* Ahmed Yousaffji, 7 B. L. R., 81, Norman, Offg. C. J., and E Jackson, J, following *Ex parte* Bhikaji Vithal Ambekar, 4 Bom. H. C. Rep., A. C, 119, Couch, C. J., Newton and Warden, JJ.; and Ghoree Lal Jha *v.* Sheo Naram Sing, 8 Suth. W. R., 24, L. S. Jackson and Hobhouse, JJ.

execute the decree against the surety only where he has become surety before the passing of the decree in the original suit. In the case of *Akhut Ramana* v. *Ahmed Yousaffji* (*a*), a person became surety and gave a bond, undertaking to pay all sums that might be decreed against the plaintiff on the defendants' appeal, and the appeal was dismissed for default, and on the application of the plaintiff the Court of first instance made an order cancelling the bond, and returned it to the surety, without notice to the defendants, and afterwards the defendants' appeal was, on application, restored and a decree passed against the plaintiff. It was held that the order of the Judge cancelling the security was invalid, and execution could issue against the surety notwithstanding that order. Should it be considered that s. 253 ought to be strictly construed, the defendant, in a similar case, would be without remedy; he could not issue execution against the surety, and the bond being cancelled he could not proceed by suit upon it. Section 583 provides for the execution of a decree in appeal in the same way as a decree in an original suit; but s. 253, containing as it does an express alteration of the law, limiting the execution against a surety to the case of a surety who has become so before the passing of the original decree, seems to preclude execution against a surety in any other case. Should this view prevail, it will be necessary that the form of the surety bond should be carefully attended to, as it will be upon that only that the respondent will have to rely. It ought to provide for the fulfilment of the decree not only in the Court of first appeal, but also of the Court of subsequent appeal (*b*).

Security in case of order for execution of decree appealed against.

546. If an order is made for the execution of a decree against which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be given for the restitution of any property which may be taken in execution of the decree, or for the payment of the value of such property, and for the due performance of the decree or order of the Appellate Court,

or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(*a*) *Supra.*

(*b*) Narayan Dev v. Gajanan Dikshit, 10 Bom. H. C. Rep., 1, Lloyd and Kemball, JJ.

And when an order has been passed for the sale of immoveable property in execution of a decree for money, and an appeal is pending against such decree, the sale shall, on the application of the judgment-debtor, be stayed until the appeal is disposed of, on such terms as to giving security or otherwise as the Court which passed the decree thinks fit.

This corresponds with Act XXIII of 1861, s. 36. The last proviso as to the stay of the sale of immoveable property is added. When the decree of the lower Court is reversed on appeal, the lower Court should, on application, order the property to be restored if it has already been taken in execution; and if the lower Court refuses, it can be ordered to do so by the High Court under s. 622, *post*, or s. 15 of 24 and 25 Vict, c. 114, in the case of a Chartered High Court (*a*).

The section applies only when an order is made for execution, not where an order is made for restitution of the property to a defendant who has succeeded in the getting a decree reversed; the plaintiff in such a case, instituting an appeal from the appellate decree under chap. xlii, *post*, cannot ask that the defendant on being restored to possession shall give security (*b*). Peacock, C. J., there explained the object of the law requiring security to be given in these cases as follows:—"Even if the decree reversing the decision "of the lower Court had not contained an order for restitution, the "defendants would be entitled to be restored to the property of "which they had been turned out of possession under the decree "which was reversed. A writ of restitution cannot properly be said "to be a writ of execution of the decree of reversal, and such a "writ is never classed under the head of writs of execution. If a "man is turned out of possession of property under a decree which "is afterwards reversed on appeal, it would be very unjust and "inequitable to allow the party who obtained possession under that "decree to retain possession of the property pending his appeal

(*a*) Gobindo Coomar Chowdhry *v.* Kristo Coomar Chowdhry, 2 In. Jur., N.S., F. B., 199.

(*b*) See Rajah Rajkisto Roy *v.* Baroda Dabee, 2 Wym., 290, F. B.; S. C., Rajkissen Singh *v.* Baroda Dabee, 6 Suth. W. R., F. B., Mis., 111; Nil Kishen Thakoor *v.* Beer Chunder Thakoor Gossain, 2 Suth. W. R., Mis., 22, Norman, Offg. C. J., and Shumbhoonath Pundit, J.

"against the decree of reversal even upon his giving security; it "would also be unjust and inequitable to refuse restitution of the "property to the party who had been turned out unless he should "give security. It is very just that where the execution of a "decree would change the state of things as they existed at the "commencement of litigation, the party wishing to enforce that "decree should give security, or that the party against whom an "existing decree is given should not be allowed to remain in pos-"session of the property decreed against him pending an appeal "against that decree without security. These are the cases "intended to be provided for under the Regulation above quoted (*a*). "Here there is no decree now in existence against the defendants "who were in possession at the time the litigation commenced; "the decree under which they were turned out by the plaintiff having "been reversed. Why then should the plaintiffs retain the defend-"ants' property upon giving security, or why should not the "defendants have their property restored to them without giving "security? There being now no decree against the defendants, "they ought to be put in the same position as they were in before "the decree of the lower Court was given. This will not be the case "if they be required to give security, which they may be unable to do, "or if the plaintiff be allowed, upon giving security, to retain pos-"session of that which by the decree of reversal now appears not to "be his. The defendants must be restored, without security, to all "that was taken from them in execution of the decree of the lower "Court" (*b*). The security which is deposited for the due execution of the decree cannot be withdrawn on the application of the appellant if the decree is affirmed and thus remains in force against him, even although the decree-holder cannot execute his decree in the ordinary way on the ground that it is barred by the Limitation Act (*c*).

It has been held that the Appellate Court cannot direct the lower Court to take security until the appeal has been preferred (*d*),

(*a*) Reg. XVI of 1797, s. 4, which, like this section, empowered the Court to issue execution, taking security in certain cases.

(*b*) See also Nil Kishen Thakoor *v.* Beer Chunder Thakoor Gossain, 2 Suth. W. R., Mis., 22; Nawab Sidhee Nuzeer Ali Khan *v.* Ojoodhyaram Khan, 5 Wym., 31.

(*c*) Sheo Gholam Sahee *v.* Khub Lal, 2 Cal. Rep., 206, Ainslie and McDonell, JJ.

(*d*) Bhugwan Chunder Ghose, petitioner, 6 Suth. W. R., Mis., 15, L. S. Jackson and Markby, JJ.

nor where the lower Court fairly exercises its discretion in so refusing, would the case come within the provisions of s. 622, *post*, nor is there an appeal against the order of refusal, s. 588, *post*. It has been held, that when property had passed into the possession of the successful party under a decree in respect of which an appeal had been preferred, it was not in the power of the Appellate Court to exact security for the restitution of the property in the event of the decree appealed against being reversed. The application came too late (*a*). And where execution is once issued out of the High Court, and the case has been appealed to the Judicial Committee, it is too late to ask the High Court to stay its own execution. It is then beyond the power of the High Court to do so, and the case is not within the scope of Reg. XVI of 1797, s. 4 (*b*). The application should be made not later than the admission of the appeal, see s. 608, *post*. The Regulation above referred to relates to cases in which the execution would change the possession of the property to which the decree relates only (*c*). And in another case, where a plaintiff before judgment attached the defendant's property, but the suit was dismissed by the High Court on appeal, and the plaintiff filed an appeal to the Privy Council, on his application the High Court held that it could not continue the attachment over the defendant's property pending the appeal to the Privy Council, nor call on the defendant to give security for the value of the property attached before being allowed to remove it (*d*). In a case before the Judicial Committee (*e*), tried five years before the Full Bench case, and in which it appeared that the property in suit was being wasted, their Lordships, however, held that it was competent to the Sudder Court in India to make an order for security notwithstanding that it had already issued execution and had made over the property to the respondent; and it was ordered "that the appellant "be at liberty to apply to the Sudder Dewanny Adawlut for such "security to be given, or such provision be made for the protection "and security of the property in question pending this appeal as

(*a*) Mansukhram Purshotam *v.* Javarevohu, 7 Bom. H. C. Rep., A. C., 122, Westropp, C. J., Lloyd and Melvill, JJ.

(*b*) Joynarain Pattur *v* Russeek Mohun Banerjee, 4 Wym, 104, F. B.

(*c*) Nowab Shidhee Nazeer Ali Khan *v* Rajah Ojoodhyran Khan, 6 Wym, 31, L. S Jackson, J.

(*d*) *In re* Ditta Harakaman Sing, 1 B. L. R, F. B., 45.

(*e*) Musst. Jariut-ool-Butool *v.* Musst. Hosseinee Begum, 10 Moo. I. A., 196.

"she may be advised, whereof the Judges, &c., and all other persons, "whom it may concern, are to take notice and govern themselves "accordingly."

Money paid into Court by an unsuccessful defendant, that execution may be stayed pending his appeal, carries no interest (*a*).

No such security to be required from Government or public officers.

547. No such security as is mentioned in sections 545 and 546 shall be required from the Secretary of State for India in Council, or (when Government has undertaken the defence of the suit), from any public officer sued in respect of an act alleged to be done by him in his official capacity.

This corresponds with Act VIII of 1859, s. 340.

Of Procedure in Appeal from Decrees.

Registry of memorandum of appeal.

548. When a memorandum of appeal is admitted the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Register of appeals.

Such book shall be called the Register of Appeals.

This corresponds with Act VIII of 1859, s. 341. The form of the register is given in the schedule of forms, No. 174.

An appeal presented after the proper time must be dismissed even although it has been registered (*b*), and the first presentation is to be reckoned for the purposes of limitation (*c*); but it may be presented after time, if the time has been extended; or on the first day after the Court opens, if the time expired on a day when the Court was closed (*d*). When an appeal has been admitted and registered, and notices issued to the respondent, it would be a great injustice to an appellant to reject his appeal, as presented after time, when it came up to be heard after he has been put

(*a*) Ashruf-un-nissa Begum *v.* Musst. Kham Jan, 2 Wym. Rep., 359; S. C., 6 Suth. W. R., 285, Peacock, C. J., and L. S. Jackson, J.

(*b*) Act XV of 1877, s. 4 (b).

(*c*) Jagan Nath *v.* Lalman, I. L. R., 1 All., 260, Turner and Spankie, JJ.

(*d*) Act XV of 1877, s. 5.

to great expense in preparing for the hearing (*a*). As the law is now altered, these considerations ought to make the Court look closely into the matter when the appeal is first presented, and avoid, as far as possible, putting the parties to unnecessary expense; but where a Court of Appeal has admitted an appeal after time for reasons which appeared sufficient, it is still able, if it seem that the appellant has obtained leave by any misrepresentation or suppression of fact, or if it can be shown that there was no sufficient cause of any kind, to cancel the leave it has given and reject the appeal. The registration of an appeal is a merely ministerial act, and if it has been wrongly admitted it can be removed from the register (*b*); as the removal of the appeal is a matter within the discretion of the Court, it would seem that there is no appeal against such a proceeding. That was the opinion of a Full Bench of the High Court at Calcutta in a case (*c*) decided upon s. 347 of Act VIII of 1859. There were several conflicting decisions on the point cited on that occasion. No appeal is given by s. 588, *post*.

Appellate Court may require appellant to give security for costs.

549. The Appellate Court may, at its discretion, either before the respondent is called upon to appear and answer, or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both:

When appellant resides out of British India.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India independent of the property (if any) to which the appeal relates.

(*a*) See the case of Bharrut Chunder Roy *v.* Issur Chunder Sircar, 2 W. R., 141, Peacock, C. J., Kemp and Glover, JJ.

(*b*) Sibnarain Ghose *v.* Hullodhur Doss, 6 Moo. I. A., 207; Mowri Bewa *v.* Surendra Nath Roy, 2 B. L. R., A. C., 184, *note*, Phear and Hobhouse, JJ.; Secy. of State *v.* Mutu Sawmy, 4 *ib.*, Apx., 84, Norman, Offg. C. J., and Bayley, J.; Syed Jafer Hossein *v.* Sheikh Mahomed Amir, 4 *ib.*, Apx., 103, Bayley and Mitter, JJ.

(*c*) Amiruddin *v.* Jiban Bibi, 1 B. L. R., F. B., 101.

If such security be not furnished within such time as the Court orders, the Court shall reject the appeal.

This corresponds with Act VIII of 1859, s. 342, which was, however, confined to calling on the appellant for security before the respondent was called on to answer. This section also includes security for payment of the costs of both Courts.

This discretion of the High Court in appeals from that Court in its original jurisdiction may be exercised by a single Judge (*a*).

By the expression "before the respondent is called upon to appear and answer" in this section, as compared with the use of similar words in ss. 553 and 556, corresponding with ss. 345 and 346 of Act VIII of 1859, is meant not the date mentioned in the notice, but the date on which the appeal is called on to be heard, and the Court has a discretion at any time before the hearing to make an order demanding security for costs from the appellant (*b*). As an illustration of the grounds on which security for costs will be ordered, the reader is referred to the following case, which was brought by a plaintiff as relator against forty-five defendants to obtain a declaration that certain property was subject to a trust for the support of a mosque; the decree was for the defendants, and the plaintiff entered an appeal, and orders had been made on the plaintiff requiring him to give security for the costs of appeal in respect of several of the defendants. Afterwards, a *rule nisi* was obtained on behalf of another of the defendants, calling on the plaintiff to show cause why he should not give security for the taxed costs of suit of that defendant, and also for his costs of appeal, and in default, that the appeal should be struck out, or the hearing stayed until such security should be given. The plaintiff, it appeared, was a person of no property, and a former suit had been brought for the same cause of action against other parties, which, after coming to a hearing, had been withdrawn. Peacock, C.J., in giving judgment, observed on this case:—"We think the plaintiff ought "to be restrained from bringing his appeal unless he gives security "for the costs of the appeal, though we will not order him to give "security for the costs previously incurred. The grounds on which

(*a*) Monohur Doss *v.* Coulsun Beebee, MSS., Peacock, C.J., Morgan and Phear, JJ., 20th Feb., 1865. See Monohur Doss *v.* Khodrum Begum, 1 Bourke, 111; and Norman, J., in Cazee Muzhur Hossain *v.* Denobundo Sen, *ib.*, 119.

(*b*) Jogendro Deb Roykut *v.* Funindro Deb Roykut, 18 Suth. W. R., 102, Markby, J.

"the former application were granted, and upon which the Court "now acts, are not the poverty of the plaintiff alone, nor his "absence from the jurisdiction; but we think that, under the peculiar "circumstances of the case, we ought to make the order. In addi-"tion to the poverty of the plaintiff, we take into consideration "the unusual number of defendants joined in the suit, the length of "time it had occupied, and the fact that it was brought for the same "cause as an action which had been brought before Mr. Justice "Wells by the same plaintiff and withdrawn after being nearly "tried out. It is true that the present applicant was not a party "to that suit, but we cannot shut our eyes to the fact. The next "ground upon which we proceed is, that the plaintiff has not paid "the costs of the original suit, or certain interlocutory costs which "he has been ordered to pay another defendant, and in respect of "which an attachment has issued. The last and most important "ground is the nature of the suit which is brought by the plaintiff, "not in assertion of any rights of his own, but to recover certain "property for religious purposes. He is a poor man, and has not "paid costs that have been awarded against him. A person who "comes in as a relator, not to enforce his own rights, but to maintain "what he considers a public right, ought to be compelled to provide "for the costs of the persons against whom he proceeds" (*a*). The mere fact that the appellant is poor is not of itself a sufficient ground for demanding security for costs (*b*), and it has been held that a pauper appellant cannot be called on to furnish security (*c*). But where the appellant was, according to his own statement, a pauper. and it appeared that others presumably able to furnish the necessary security were interested in the matter, the case was considered a proper one for security to be given (*d*).

An order was made by the Court (pursuant to an agreement between the parties after a decree for the plaintiff), that the defendant who had appealed should pay into Court to the credit of the cause a certain sum of money for decree, costs, &c., including a sum of money for costs to be incurred on appeal. On an applica-

(*a*) Cazee Muzhur Hossein *v.* Dinobundoo Sen, on appeal, 1 Bourke, 41; see also Bamasundari Dasi *v.* Ramnarayan Mitter, 7 B. L. R., Apx., 59, Phear, J.

(*b*) S. M. Nistarini Dasi *v.* Makhanlal Dutt, 9 B. L. R., 11, see p. 26.

(*c*) Nusseeruddeen Biswas *v.* Ujjul Biswas, 17 Suth. W. R., 68.

(*d*) Jogendro Deb Roykut *v.* Funindro Deb Roykut, 18 Suth. W. R., 102, Markby, J.

tion by the plaintiff that the case be struck off for default of deposit, and that the defendant pay costs already incurred at the time of the application, it was ordered that the defendant should deposit a sum to cover costs of the future appeal, and in default that the case should be struck off (*a*).

This section does not apply to appeals from the orders of a Judge sitting as a Commissioner of the Insolvent Court under 11 and 12 Vict., cap. xxi. Section 73 of that Act gives an appeal, but there is no power to order security for costs (*b*).

Appellate Court to give notice to Court whose decree is appealed against.

550. When the memorandum of appeal is registered, the Appellate Court shall send notice of the appeal to the Court against whose decree the appeal is made.

Transmission of papers to Appellate Court.

If the appeal be from a Court the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

Copies of exhibits in Court whose decree is appealed against.

Either party may apply in writing to the Court against whose decree the appeal is made, specifying any of such papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of the applicant, and shall be deposited accordingly.

This section corresponds with Act VIII of 1859, s. 343. The copies mentioned in the last sentence were required by that section to be deposited in the lower Court.

Power to confirm decision of lower Court without sending it notice.

551. The Appellate Court may, if it thinks fit, after fixing a time for hearing the appellant or his pleader, and hearing him accordingly if he appears at such time, confirm the decision of the Court against whose decree the appeal is made, without sending notice of the appeal to

(*a*) Elias *v.* Chuckerbutty, 1 In. Jur., N S., 223.

(*b*) *In re* Ramsebak Misser, 5 B. L. R., 179, Norman, J.

such Court and without serving notice on the respondent or his pleader ; but in such case the confirmation shall be notified to the same Court.

This section is new. It is taken from s. 7 of Act IX of 1873 (Punjab Appeals).

Day for hearing appeal.

552. The Appellate Court, unless where it confirms, under section 551, the decision of the lower Court, shall fix a day for hearing the appeal.

Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

This corresponds with Act VIII of 1859, s. 344.

Publication and service of notice of day for hearing appeal.

553. Notice of the day so fixed shall be stuck up in the appellate court-house, and a like notice shall be sent by the Appellate Court to the Court against whose decree the appeal is made, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided in Chapter VI for the service on a defendant of a summons to appear and answer ; and all rules applicable to such summons and to proceedings with reference to the service thereof, shall apply to the service of such notice.

Appellate Court may itself cause notice to be served.

Instead of sending the notice to the Court against whose decree the appeal is made, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the rules above referred to.

This and the following section correspond with Act VIII of 1859, s. 345. The last paragraph of this section is added. The hearing of an appeal should be postponed if the notice is not duly served, or the case should be sent back for re-hearing (*a*). But, as the object of the notice is only to bring the parties before the

(*a*) Saouk Ram *v.* Ajoodhia Persaud, S. D. A., N. W. P., 1861, p. 656.

Court on a particular day and to enable them to prepare for the hearing, the appeal can be heard before the day fixed, if both parties appear and consent (*a*). See form No. 175 and s. 556, *post.*

Contents of notice.

554. The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex parte.*

This corresponds with the second paragraph of s. 345 of Act VIII of 1859; see form No. 175 in the 4th schedule, and s. 556, *post.*

Procedure on Hearing.

Right to begin.

555. On the day so fixed, or on any other day to which the hearing may be adjourned, the party having the right to begin shall be heard in support of or against the appeal, as the case may be. The other party shall then be heard, and the party having the right to begin shall then be entitled to reply.

Explanation.—If the appeal is from the whole decree, or if there are cross-appeals, the party having the right to begin is the party who had the right to begin on the hearing in the Court whose decree is appealed from.

If the appeal is from only a portion of the decree, and there is no cross-appeal, the appellant has the right to begin.

This section is new; see s. 179, Explan., as to who has the right to begin.

Dismissal of appeal for appellant's default.

556. If on the day so fixed, or any other day to which the hearing may be adjourned, the appellant does not attend in person or by his pleader, the appeal shall be dismissed for default.

Hearing appeal *ex parte.*

If the appellant attends and the respondent does not attend, the appeal shall be heard *ex parte* in his absence.

This corresponds with Act VIII of 1859, s. 346. If both

(*a*) Musst. Hukeemunissa *v.* Musst. Bibee Muckdoonum, 1 Suth. W. R., 246.

parties make default, the appeal must be dismissed (*a*). A case having been remanded to the lower Appellate Court, the appellant did not put in any appearance and took no steps to produce evidence, but while the Judge was writing his decision, the pleader appeared and stated that he had received no instruction,—it was held, that the Judge was perfectly right in dismissing the appeal for default with costs, and that the remedy lay under Act VIII of 1859, s. 347, corresponding with s. 558 of this Act (*b*). Where a Judge, on the non-appearance of the appellant in person or by pleader, instead of observing the directions of this section, goes into the merits of the case and gives judgment against the appellant, the appeal must be considered as dismissed for default of the appellant in appearing; and an application for re-admission and re-hearing cannot be treated as one for review, but must be entertained under s. 558 (*c*). It would seem that a further appeal would lie upon a question of law, &c., against a decree *ex parte* passed under this section (*d*).

Dismissal of appeal where notice has not been served in consequence of appellant's failure to deposit cost of notice.

557. If on the day so fixed, or any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed by the Court, the sum required to defray the cost of issuing the notice, the Court may order that the appeal be dismissed:

Proviso.

Provided that no such order shall be passed, although the notice has not been served upon the respondent, if on the day fixed for hearing the appeal the respondent appears in person or by a pleader, or by a duly authorized agent.

This section is new.

(*a*) Munickram *v.* Roopnarain Singh, Marsh., 5.

(*b*) Triloke Chunder Sen *v.* Aukhil Chunder Sen, 21 Suth. W. R., 65, Kemp and Ainslie, JJ.

(*c*) Mohesh Chunder Bose *v.* Thakoor Dass Gossamee, 20 Suth. W R., 425, Couch, C. J., and Glover, J.

(*d*) Chinnappa Chetti *v.* Nadarajee Pillai, 6 Mad. H. C. Rep., 1, Scotland, C. J., and Innes, J.

Re-admission of appeal dismissed for default.

558. If an appeal be dismissed under section 556 or section 557, the appellant may apply to the Appellate Court for the re-admission of the appeal; and if it be proved that he was prevented by any sufficient cause from attending when the appeal was called on for hearing or from depositing the sum so required, the Court may re-admit the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him.

This corresponds with Act VIII of 1859, s. 347, omitting the part relating to limitation, which is now transferred to the Limitation Act, sched. ii, 3rd div., No. 168. The application must be made within thirty days. An appeal against an order refusing to re-admit an appeal is given by s. 588 (v). Such an order was not appealable under the Code of 1859 (*a*).

Power to adjourn hearing, and direct persons appearing interested to be made respondents.

559. If it appear to the Court at the hearing that any person who was a party to the suit in the Court against whose decree the appeal is made, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court, and direct that such person be made a respondent.

This section is new.

Re-hearing on application of respondent against whom *ex parte* decree is made.

560. When an appeal is heard *ex parte* in the absence of the respondent, and judgment is given against him, he may apply to the Appellate Court to re-hear the appeal; and if it be proved that the respondent was prevented by sufficient cause from attending when the appeal was called on for hearing, the Court may re-hear the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him.

This is new. An appeal is given by s. 588 (v) against an

(*a*) Amiruddin *v.* Jiban Bibee, 1 B. L. R., F. B., 101.

order refusing to re-hear an appeal. The application for a re-hearing must be made within thirty days (*a*).

Upon hearing respondent may object to decree as if he had preferred separate appeal.

561. Any respondent, though he may not have appealed against any part of the decree, may upon the hearing not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal, provided he has given to the appellant or his pleader seven days' notice of such objection.

Form of notice and provisions applicable thereto.

Such objection shall be in the form of a memorandum, and the provisions of section 541, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

This corresponds with Act VIII of 1859, s. 348; but obliges the cross-appellant to file a written memorandum, which was held to be necessary in some cases under the old Procedure. This memorandum must be stamped as directed by the Court Fees Act, VII of 1870, s. 16; this payment of stamp duty has been held to be necessary even although the cross-appellant appealed as a pauper (*b*). He ought to apply for leave to appeal as a pauper, and prefer a separate appeal. If he has originally sued as a pauper, there need be no fresh enquiry into his pauperism, unless the Judge see special reason for making such an enquiry (see *post*, s. 593). It was held, however, by a Full Bench of the Sudder Court of Agra, under the 348th section of Act VIII of 1859, that if he fails in his application to sue as a pauper, he may still urge his claim to be allowed to do so as a cross-appellant (*c*). Section 16 of the Court Fees Act directs the respondent, cross-appellant, to pay the additional fee, which would have been payable had the appeal (supposing it to relate to only a portion of the decree) comprised also the part of the decisions to which he objects. If then the appellant appeals on the full value,

(*a*) Act XV of 1877, sched. ii, div. 3, No. 169.

(*b*) Rashmonee Dossee *v.* Chowdhry Junmojoy Mullick, 9 Suth. W. R, 356; Babaji Hari *v.* Rajaram Ballal, I. L. R., 1 Bomb., 75.

(*c*) Bhugwandeen Pattuck *v.* Runnoo Pattuck, S D A., N. W. P., 1864, p 64, F. B.

no stamp is payable by the cross-appellant (*a*). These were all decisions upon the earlier Stamp Act, No. XXVI of 1867, which contained in s. 6, sched. B., note (e), a provision similar to s. 16 of Act VII of 1870. If the case be remanded on the cross-objection, the value of the stamp should be included in the ultimate order for costs (*b*).

A cross-appeal must be urged at the hearing, it cannot be entertained afterwards (*c*); and the cross-appellant is entitled to be heard, although the appellant, in the course of the hearing, desire to withdraw from the appeal (*d*). But if, before the hearing, the memorandum of cross-appeal having been filed, the appellant be allowed to withdraw, the cross-appellant cannot insist upon being heard (*e*). In these cases the appellant applied to be allowed to withdraw on the case being called on for hearing, but if the appellant ask at the hearing, when the cross-appeal has been made, to be allowed to withdraw, he should not be allowed to do so, but the cross-appeal should be heard (*f*). If the appellant die before the hearing, and the appeal abates, the respondent, cross-appellant, cannot revive it by getting a representative of the appellant placed on the record (*g*).

The object of the cross-appeal is to allow the discussion of the whole case, and permit each party to urge what he can against the original decision, in order that the Court of Appeal may decide the whole case as justice may demand (*h*); but if one defendant, out of many, appeals really in the interest of the plaintiff, the plaintiff himself cannot come in and ask to be heard as a cross-

(*a*) Fagan *v.* Chunder Kant Banerjee, 7 Suth. W. R., 452, Norman and Seton-Karr, JJ.; Sreenath Roy Chowdhry, petitioner, *ib.*, 462, L. S. Jackson and Markby, JJ.; Anund Mohun Chatterjee *v.* Sutto Ram Muzoomdar, 8 *ib.*, 124, Norman and Seton-Karr, JJ.

(*b*) Mackintosh *v.* Bengal Indigo Co., 8 Sev., 178.

(*c*) Khajah Abdool Gunnee *v.* Gour Monee Debia, 9 Suth. W. R., 375.

(*d*) Nana Narain Rao *v.* Hurree Punt Bhao, 6 Moo. I. A., 464; Venkataramanaiya *v.* Kuppi, 3 Mad. H. C. Rep., 302.

(*e*) Rampershad Ojha *v.* Bhurosa Koonwar, 5 Wym., 172; S. C., 9 Suth. W. R., 328, Loch and Hobhouse, JJ.; Shama Churn Ghose *v.* Radha Kristo Chaklanuvis, 14 Suth. W. R., 210; and Coomar Puresh Narain Roy *v.* Watson, 23 *ib.*, 229.

(*f*) Venkataramanaiya *v.* Kuppi, 3 Mad. H. C. Rep., 302, Scotland, C. J., and Collett, J.

(*g*) Jaita bin Kalu *v.* Balu bin Raghu, 3 Bom. H. C. Rep., A. C., 81, Newton and Warden, JJ.

(*h*) Isshore Ghose *v.* Hills, Hay, 351; S. C., Suth. F. B. Cases, 48.

appellant (*a*); and a respondent is not allowed to be heard in cross-appeal against another respondent in the same interest (*b*); and a defendant who has been made so *pro formâ*, but who is in the same interest as the plaintiff, appellant, cannot urge objections on cross-appeal (*c*).

The objection that the appeal is barred by limitation is now one which the Court itself is bound to take on the institution of the suit, and also if the appeal is out of time (*d*); and a respondent may take the objection without filing a separate appeal (*e*); but it seems that, under this section, he ought to give notice of his objection. Where a suit was dismissed on the merits, the plea of limitation being decided against the defendant, and the case was appealed, but no cross-appeal was made on the point of limitation, it was held that the plea of limitation could afterwards be raised (*f*).

A. sued B. to recover a one-third share in certain property, and C. and D. likewise claiming a share intervened and were made defendants; they contended that they were each entitled to one-nineth and A. to only one-nineth. A., however, got a decree for the one-third. B. appealed against this decree, but he did not make C. and D. respondents, and C. and D. did not themselves appeal within the time limited for their doing so. When the appeal came on for hearing, C. and D. applied to be allowed to appeal, or to be heard as respondents, and urge a cross-appeal. It was held that they could do neither (*g*).

It was held in a case (*h*) decided by Norman, Offg. C. J., and Campbell, J., that an appellant on cross-appeal might re-open the whole case, and that the Court could assess damages against defendants who had succeeded in the original suit and who were not

(*a*) Sabetoollah Meah *v.* Rohim Dewan, 9 Suth. W. R., 273.

(*b*) Maharajah Tarucknath Roy *v.* Tuboorunnissa Chowdhrain, 7 Suth. W. R., 39; Lall Chand *v.* Musst. Kudmoo Koonwar, *ib.*, 532; Mukbool Ali *v.* Zur Banoo Bibee, 9 *ib.*, 78; S C., 5 Wym., 48; Goonomonee Dassia *v.* Parbutty Dassia, 10 Suth. W. R., 326.

(*c*) Muddoosoodun Roy *v.* Surnomoyee Dabee, 1 Wym, 160, Bayley and Sumbhoonath Pundit, JJ; Gudadhur Banerjee *v.* Musst. Man Mohinee Dossea, 7 Suth. W. R., 366, Kemp and Glover, JJ.

(*d*) Act XV of 1877, s. 4.

(*e*) Okheetoonissa *v.* Koochil Sirdar, 2 Suth. W. R., 45, Trevor and Campbell, JJ.; Mirza Heenmut Bahadoor *v.* Gobind Pauray, 1 Wym., 156, F. B.; S. C., 5 Suth. W. R., 91; see also Saluji Kesraji *v.* Rajsanji Jalmsangji, 2 Bom. H. C. Rep, 162, Couch and Tucker, JJ.

(*f*) Phool Koomaree Bibi *v.* Woonkar Pershad Rustoby, 7 Suth. W. R., 67.

(*g*) Bipro Pershad Mytee *v.* Musst. Kanye Deyee, 1 Suth. W. R., 341.

(*h*) Anund Chunder Goopto *v.* Moheschunder Mozoomdar, 1 Suth. W. R., 229.

parties to the appeal. In that case A. sued B. and C. for damages for an assault, the Court gave a decree against B., and Rs. 100 damages. B. appealed, and A. filed a cross-appeal, on the ground that the damages were inadequate, and that C. should have been made jointly liable. The Court of Appeal cited C., increased the damages, and assessed them against B. and C. jointly. It was held that the Court could do this. That was a case, however, in which the appeal was on a ground common to all the defendants, and consequently coming under the 337th section of Act VIII of 1859, corresponding with s. 544 of this Code; but where that is not the case, it seems that the case is only re-opened so far as regards the appellant and the cross-appellant; and their interests, not those of other parties to the original suit who are not parties to the appeal or cross-appeal, ought alone to be considered (*a*).

A question having arisen in the execution of a decree as to assessing wasilat, the first Court held that the decree-holders were entitled to wasilat of a 2-anna 13-gunda share. The Judge held on the appeal of some of the judgment-debtors, that the decree-holders were entitled to 1-anna 10-gunda share, and rejected the objections raised by the decree-holders in cross-appeal. It was held, that the Judge was wrong in amending the Moonsiff's decree with reference to the share, as the objection was not raised in the Court of first instance; and it was also held, that the Judge was bound to dispose of the objections taken by the decree-holders in cross-appeal, and if there was any difficulty arising from the absence of some of the judgment-debtors, he ought to have directed that they should be made respondents (*b*).

The lower Appellate Court was held to be justified in refusing to enter into an objection raised by the respondent under s. 348 of the old Code in the absence of one of the parties interested in the decision of the first Court (*c*).

(*a*) Hossein Buksh Patooah *v.* Sheikh Baroo Baparee, 5 Suth. W. R., 50, Seton-Karr and Macpherson, JJ.; Mukbool Ali *v.* Zur Banoo Bibee, 9 Suth. W. R., 78; S. C, 5 Wym., 48, Loch and Dwarkanath Mitter, JJ.; Syed Mooshruf Ali *v.* Chunderdeen, S. D. A., N. W. P., 1861, p. 306; Chote Lall *v.* Kissen Suhoy, S. D. A., N. W. P., 1863, p. 306; Greeschunder Singh *v.* Gour Mohun Banerjee, 7 Suth. W. R., 49, Trevor and Glover, JJ.; Gudadhur Banerjee *v.* Musst. Mun Mohinee Dossea, *ib.*, 366, Kemp and Glover, JJ.; Sabetoollah Meah *v.* Rohim Dewan, 9 *ib.*, 273, Seton-Karr and Macpherson, JJ.

(*b*) Pran Kishore Deb *v.* Mahomed Ameer, 21 Suth. W. R., 338.

(*c*) Moizzunissa *v.* Mooraree Dhur Dey, 22 Suth. W. R., 314, Mitter, J.

Remand of case by Appellate Court.

562. If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point so as to exclude any evidence of fact which appears to the Appellate Court essential to the determination of the rights of the parties, and the decree upon such preliminary point is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, together with a copy of the order in appeal, to the Court against whose decree the appeal is made, with directions to re-admit the suit under its original number in the register and proceed to investigate the suit on the merits.

The Appellate Court may, if it thinks fit, direct what issue or issues shall be tried in any case so remanded.

This section corresponds with Act VIII of 1859, s. 351. The proviso at the end of the section is new, but merely declares what had been the practice of the Courts founded on s. 354, which corresponds with s. 566 of this Code. When a case is remanded, no fresh vakalutnamah is necessary (*a*).

In order that a suit may be remanded, the Court must have disposed of the suit upon a preliminary point so as to exclude evidence, not otherwise (*b*). Where, under a mistaken view of the law applicable, it summarily dismisses a suit on a point which does not in fact arise, while it ought to have tried the suit, the case should be remanded (*c*). And the case when remanded must be gone into with reference to the grounds on which it was originally based. A respondent, for instance, who got a remand for the purpose of putting forward his evidence, was not allowed to go into a new case (*d*). If the order of remand does not restrict the Judge to the evidence on the record, he is

(*a*) S. M. Nobinmonee Dossee *v.* Joy Gopal Gossur, 1 Suth. W. R., 277, Kemp and Glover, JJ.

(*b*) Nund Coomar Bannerjee *v.* Barry, Marsh., 121, Phear and Hobhouse, JJ.; Mahesh Chandra Das *v.* Madhab Chandra Sirdar, 2 B. L. R., S. N, 13; Majoram Ojha *v.* Raja Nil Money Singh Deo, 13 *ib*, 198; and s 564 and s. 566, *post*.

(*c*) Sabir Khan *v.* Ram Luckhee Chowdhrain, 10 Suth W. R., 438, Peacock, C. J., and Mitter, J.; Joog Maya Debia *v* Ram Chunder Chatterjee, 10 Suth. W. R., 378; S. C., In. Jur, 121, Steer and Morgan, JJ.

(*d*) Radha Kishore Bose *v.* Maharajah Mahtab Chand Bahadoor, 3 Suth. W. R., Mis., 5, Loch and Seton-Karr, JJ.

at liberty to examine new witnesses (*a*). When fresh issues are directed, fresh evidence may be adduced, and a day should be fixed for the purpose of its reception (*b*). Where the Court of original jurisdiction found for the plaintiff, who claimed as a purchaser from a Hindoo widow, and against the defendant, who claimed under a gift from her late husband, and also as his adopted son; the defendant appealed, and the plaintiff took a cross-objection under s. 348 of Act VIII, corresponding with s. 561 of this Act; the Appellate Court remanded the case to the Court of original jurisdiction with instructions to fix new issues and to decide the case *de novo*,—it was held that this was wrong. The lower Appellate Court should, under s. 354 of Act VIII of 1859, corresponding with s. 566, *post*, have remanded the case for trial on any issues it might think proper to raise itself. The issues having then been tried and the record returned, the Appellate Court should have pronounced the final decision (*c*). Where a Subordinate Judge in appeal framed an issue, and remanded the case to the first Court for trial, but instead of directing that the finding should be returned to his own Court, he directed the Moonsiff to give the plaintiff a decree in accordance with the finding at which he might arrive, and the Moonsiff having decided the case accordingly, it went up in appeal before the Additional Judge,—it was held, that, although the course pursued by the Subordinate Judge was wrong, the proper course for the Additional Judge was simply to confine himself to considering whether the decision of the Court below on the issue directed was correct or not; he had no power to go behind the order of the Subordinate Judge on the previous occasion (*d*). An order remanding a case to a lower Court implies a reversal of the first judgment of that Court (*e*), and the parties can appeal from the decision on remand, on the whole case (*f*). A remand order made on an appeal on a point of law (see chap. xlii) is, unless a review of it be obtained within the prescribed time, a conclusive determination of the points of law determined in it;

(*a*) Ram Sunkur Sein *v.* Nilkant, 9 W. R., 392, Kemp and E. Jackson, JJ.

(*b*) Watson *v.* Kunhye Bahadoor, 9 Suth. W. R., 294.

(*c*) Chundernauth Surma *v.* Ramanauth Surma, 1 Suth. W. R., 69, Morgan and Sumbhoonath Pundit, JJ.

(*d*) Bodun Burooah *v.* Abdool Gunny, 19 Suth. W. R., 281, L. S. Jackson and Mitter, JJ.

(*e*) Kebul Kishen Muzoomdar *v.* Musst. Ambala, 7 Suth. W. R., 326, Seton-Karr and L. S. Jackson, JJ.

(*f*) Rughoonundun Pershad Singh *v.* Chuttur Saul Singh, 10 Suth. W. R., 335, Phear and Hobhouse, JJ.

and the correctness of the law laid down cannot be questioned on a second appeal, nor is the fact of the Court's adopting a different view of the law after an order has been made, a good ground for allowing a review of such order after the time for a review has elapsed (*a*). If the suit is ordered to be remanded, the Appellate Court must grant a certificate to the appellant to receive back from the Collector the stamp fee paid on the memorandum of appeal (*b*). An order remanding a case under this section is subject to appeal, see s. 588 (w), *post*.

When further evidence barred.

563. When a case is remanded with directions to take any evidence so excluded, the Court to which the case is remanded shall not take any other evidence in the case, except evidence tendered to contradict the evidence so taken.

This section follows the decision in the case of *Ram Jewan Lall* v. *Arjun Chowbey* (*c*), adding that counter-evidence may be received; and the Appellate Court should prescribe points to which the evidence should be confined (*d*). But where a case was wrongly dismissed upon a preliminary point, and the Appellate Court remanded the whole case for trial on its merits, it was held competent to a defendant, who had not appeared in the first instance, to appear when the case came on for trial again and to adduce evidence (*e*).

Limit to remand.

564. The Appellate Court shall not remand a case for a second decision, except as provided in section 562.

This corresponds with Act VIII of 1859, s 352. It was held by L. S. Jackson, J., that a suit could not be remanded to try an issue over again. Markby, J., *contra* (*f*). See the note to the next section. Where no issue has been left untried and undecided, no

(*a*) Ramkuvar Bai *v.* Damodhar Narbheram, 6 Bom. H. C Rep, A. C., 147, Couch, C. J., and Warden, J.

(*b*) Act VII of 1873, s. 13.

(*c*) 10 Suth. W. R, 303.

(*d*) Narasimhaiar Krishnarav *v.* Antaji Virupaksh, 2 Bom. H. C. Rep., 64.

(*e*) Koonj Beharee Awastee *v* Tarinee Kant Lahoree, 8 Suth W. R., 285.

(*f*) Umbica Churn Mundle *v* Ramdhun Mohurur, 11 Suth W R, 35; Runpal Singh *v.* Maharajah Joy Mungul Singh, *ib.*, 106.

remand can be made (a). Where the first Court decided the case on the first and second issues, but expressed no opinion upon the third issue on which evidence had been adduced, and which had reference to the rights of the parties,—it was held that the lower Appellate Court had no power to remand the case, but should have decided it on the evidence on the record (b).

When evidence on record sufficient, Appellate Court shall determine case finally.

565. When the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court shall, after re-settling the issues, if necessary, finally determine the case notwithstanding that the judgment of the Court against whose decree the appeal is made has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

This corresponds with Act VIII of 1859, s. 353; but the words "after re-settling the issues, if necessary" are introduced.

The Court is not at liberty to remand the suit where there is evidence on which it can decide it (c). Where a Court of original jurisdiction has dismissed a suit as barred after taking all the evidence offered on the merits, the lower Appellate Court is not competent to remand the case for re-trial (d). Where the question of limitation is decided by an Appellate Court after it has taken evidence and gone into the whole case, the decision is not one within the terms of this section, and the Court is not competent to remand the case, but ought to try it on the evidence (e). Where a Moonsiff has taken evidence fully in a case, and gone into the merits, a Subordinate Judge may refer a fresh issue back

(a) Mohesh Chunder Doss v. Madhub Chunder Sirdar, 10 Suth. W. R., 388, Phear and Hobhouse, JJ.

(b) Obhoy Churn Deo v. Ram Doollub Deo, 25 Suth. W. R, 131, Morris, J.

(c) See Wright v. Sudasookh, S. D. A., N. W. P, 1863, p. 468; Ram Joy Sein v. Nundo Moyee Debia, 10 Suth. W. R., 374; Mohesh Chunder Doss v. Madhub Chunder Sirdar, ib., 388; Punchanun Koonwur v. Luckee Preea Dabea, 3 ib., Act X Rul., 154; Herrikosima v. Stephenson, 1 ib., 298; Brojo Soondur Hoom Roy v. Gour Kishore Hoom Roy, 2 ib., 161.

(d) Musst. Rama Kooer v. Lalla Bhugwan Lall, 22 Suth. W. R., 224, Phear and Morris, JJ.

(e) Syud Hussun Ali Chowdhry v. Manoowar Ali, 21 Suth. W. R., 413, Couch, C. J., and Birch, J.

for trial to the Moonsiff, retaining the case upon his own file; but cannot remand the whole case for further evidence on a point already considered or for re-trial (*a*).

When Appellate Court may frame issues and refer them for trial to Court whose decree is appealed against.

566. If the Court against whose decree the appeal is made has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue or question, the Appellate Court may frame issues for trial, and may refer the same for trial to the Court against whose decree the appeal is made, and in such case shall direct such Court to take the additional evidence required,

and such Court shall proceed to try such issue, and shall return to the Appellate Court its finding thereon together with the evidence.

This corresponds with the first and second paragraphs of s. 354 of Act VIII of 1859. Where the Court below has neglected to try an issue, the Court of Appeal, if it can, may decide the case without referring it (*b*). If the Court below has decided an issue which is material, but in the opinion of the Court of Appeal, by shutting out evidence, or on insufficient evidence, the Court of Appeal should direct fresh evidence, or should take fresh evidence itself, but it should not remand the case to the Court below to try the issue over again (*c*). But it has been held that where the Court below

(*a*) Goluck Chunder Sen *v.* Puresh Mahomed, 25 Suth. W. R., 284; Bama Churn Dutt *v.* Puddo Mookhee Goopta, 25 Suth. W. R., 389; but see Sheikh Futtehoollah *v.* Oomdanissa Bibee, 14 Suth. W. R., 69, L. S. Jackson and Glover, JJ.; where it was held that he ought to decide the case himself and not remand it.

(*b*) Brojo Soondar Hoom Roy *v.* Gourkishore Hoom Roy, 2 Suth., 161, Kemp and Glover, JJ.; Fuzeelun Beebee *v.* Omda Beebee, 10 *ib*, 469, Peacock, C. J., and Mitter, J.

(*c*) Hills *v.* Osman Biswas, 25 Suth. W. R., 35, L. S. Jackson and McDonell, JJ., and Bungo Chunder Banerjee *v.* Chunder Nath Chuckerbutty, *ib.*, 47, same Judges; Umbica Churn Mundle *v.* Ramdhun Mohurur, 11 Suth. W. R., 35, L. S. Jackson, and Markby, JJ.; Runpal Singh *v.* Joy Mungul Singh, *ib.*, 106, Norman and E. Jackson, JJ.; see note to s. 562 and s. 564, *ante*.

has not taken into consideration a presumption of fact arising out of the circumstances of the case, an issue may be directed under this section (*a*). When the case is referred, the Court below is to take evidence on the issues, not to determine them on evidence already taken; the Court of Appeal could do that for itself; but where evidence might have been adduced at the original hearing, and was withheld, it may be proper to exclude it (*b*). The result of sending down an issue in pursuance of this section is not to remand the case to the first Court for re-trial. The whole matter in dispute between the parties does not thereby become open for the consideration or determination of the first Court, that Court being *functus officio* so far as the matters on appeal are concerned (*c*).

An Appellate Court in referring a case under this section has no power to order the first Court to call upon the parties to the suit to agree to arbitration, or, on their failing to do so, to appoint arbitrators. But where this is done and the parties waive the irregularity and consent to the matter being tried by arbitrators, they cannot afterwards, on a further appeal, object to the proceedings (*d*). It was held that the corresponding section of Act VIII of 1859 applied only to Courts hearing regular appeals, not appeals on points of law, &c., only; see s. 584 (*e*). But a High Court hearing an appeal on points of law, having remanded a case for trial *de novo*, can call it up again and treat it as a regular appeal (*f*); and it can order the lower Appellate Court to correct the error and take fresh evidence itself (*g*); in this case the Original Court had wrongly admitted secondary proof of an existing document.

(*a*) Nilatatchi *v.* Venkatachala Mudali, 1 Mad. H. C. Rep., 131.

(*b*) Abdool Khyrat *v* Jumalooddeen Hossein, 10 Suth. W. R., 244, Norman and Mitter, JJ.

(*c*) Gossain Dowlut Geer *v.* Bissessur Geer, 22 Suth. W. R., 207, Phear and Ainslie, JJ.

(*d*) Puna Bibee *v.* Khoda Buksh Beparee, 22 Suth. W. R., 396, Couch, C. J., and Ainslie, J.

(*e*) Kali Kristo Tagore *v.* Judoo Lall Mullick, 24 Suth. W. R., 20; explaining Ram Pershad Sookul *v.* Rajunder Sahoy, 6 *ib.*, 262, Peacock, C.J., and Bayley, J., which appears to have been misunderstood: there the Court refused to remand the case for the purpose of admitting wholly fresh evidence; but it was not held that a Court of Special Appeal could, under any circumstances, remand a case for fresh evidence.

(*f*) Munshi Ishan Chandra Das *v.* Rukimuddin Sowdagur, 2 B. L. R., 326, *note*. Peacock, C. J., and Mitter, J.

(*g*) Azur Ali *v.* Kali Kumar Chuckerbutty, 2 B. L. R., A. C., 315, L. S. Jackson and Markby, JJ.

Where a case was disposed of by the lower Appellate Court on the question of limitation, summarily, without going into evidence upon that issue, the High Court, on a further appeal, remanded the case to the lower Appellate Court with directions to send it to the Court of first instance to try the issue of limitation; and stated that, upon the decision of that issue, it would be open to the parties, if they desired it, to appeal upon the whole case notwithstanding the appeal which had already been had (*a*). That would apparently be by filing such a memorandum as is described in the following section. The decision of the Court below on the point remanded to it for trial is only a finding on which the Court of Appeal gives judgment, and the judgment is the judgment of the Court of Appeal and not of the lower Court: and an order of remand implies a judgment of reversal (*b*).

Finding and evidence to be put on record.

Objections to finding.

567. Such finding and evidence shall become part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to the finding.

Determination of appeal.

After the expiration of the period fixed for presenting such memorandum, the Appellate Court shall proceed to determine the appeal.

This corresponds with the last paragraph of s. 354 of Act VIII of 1859.

The memorandum of objections must be filed within the time limited by the Court; if it be not, it should be rejected (*c*), and where an Appellate Court refers issues for trial to a lower Court, and fixes a time within which after the return of the finding either party to the appeal may file a memorandum of objections to the same neither party is entitled without the leave of the Court to take any objection to the finding orally or otherwise, after the expiry of the period so fixed without having filed such memorandum; but it has been held that, with the leave of the Court, he may do so (*d*).

(*a*) Rughoonundun Pershad Singh *v.* Chuttur Saul Singh, 10 Suth. W. R., 335.

(*b*) Kebul Kishen Muzoomdar *v.* Musst. Ambala, 7 Suth. W. R., 326.

(*c*) Ashrufoonissa Begum *v.* Stewart, 9 Suth. W. R., 438, Loch and Macpherson, JJ.

(*d*) Ratan Singh *v.* Wazir Mahomed, L. R., 1 All., 165, F. B.

Production of additional evidence in Appellate Court.

568. The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if

(*a*) the Court against whose decree the appeal is made refused to admit evidence which ought to have been admitted, or,

(*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause,

the Appellate Court may allow such evidence to be produced, or document to be received, or witness to be examined.

Whenever additional evidence is admitted by an Appellate Court, the Court shall record on its proceedings the reason for such admission.

This corresponds with Act VIII of 1859, s. 355. The lower Court, in taking evidence under this section, acts in a ministerial capacity, and an objection may be made to a document in the Appellate Court although not made in the lower Court (*a*).

Where a lower Court disposes of the case on the merits on inadmissible evidence, the Appellate Court may either take fresh evidence itself, or may send the case back for the lower Court to do so as provided in s. 569 (*b*).

The making of an order for the production of additional evidence being a matter entirely within the discretion of the Court of Appeal, the High Court will not interfere where that discretion has been exercised (*c*); but it is a discretion that ought to be carefully exercised, reasons for its exercise being recorded. It has been pointed out by the Judicial Committee that there is generally great danger in a Court of ultimate appeal lightly introducing evidence that has not been under the consideration of the Court below, but no general rule can be laid down. The power to

(*a*) Buroda Debia *v.* Rajah Prankissen Singh, 2 Suth. W. R., 80.

(*b*) Ramjoy Surmah Mozoomdar *v.* Rajah Puran Kissen Singh, Suth. F. B., 125.

(*c*) Mohesh Chunder Sheet *v.* Shoshee Mookhee Debia, 6 Suth. W. R., 196; Golam Mukdoom *v.* Musst. Hafeezoonissa, 7 Suth. W. R., 489.

take fresh evidence is there described by Lord Westbury as "a power "which may be very wholesome; but it is desirable that the "reasons for exercising that power should always be recorded or "minuted by the Court on the proceedings. A power of that "character should be exercised very sparingly, because, where it "is done not at the instance of the parties, but at the suggestion "of the Court itself, witnesses may be called who are not the "witnesses the parties themselves would have thought fit to "adduce, and it is possible that the new original enquiry by "the Court may be itself imperfect and not sufficiently extensive "to answer the purposes of justice" (*a*). The fact that reasons for ordering the reception of fresh evidence have not been recorded does not, however, render the evidence inadmissible (*b*). Where the record was lost in transit, an order under the corresponding section of Act VIII of 1859 was made to the lower Court to receive secondary evidence from both parties of the papers which made up the entire record, or failing this, fresh evidence (*c*). The Court set aside the decision, in the two cases noted below (*d*), on the ground that the lower Appellate Court was not authorized to introduce into the record substantially new evidence to mend the case of either party, and ought, unless some special reason to the contrary occurs, to decide the matter in dispute between the litigants on those materials alone which they think proper to furnish, which was the construction put upon s. 355 of Act VIII of 1859 by the Judicial Committee (*e*). Where the plaintiff applied to the Court of first instance for a postponement of the case in

(*a*) Sreeman Chunder Dey *v.* Gopaul Chunder Chuckerbutty, 11 Moo. I. A., 28, see pp. 48 and 49; Gobind Sundari Debia *v.* Jagadamba Debia, 3 B. L. R., P. C., 25; Snadden *v.* Todd, Finlay, & Co., 7 Suth. W. R., 313; Nga Bike *v.* Snadden, 5 Wym. S. C. C. Ref., 43; Maharajah Jagadindra *v.* Bhaba Tarini Dasi, 5 B. L R., Apx., 54.

(*b*) Gunga Gobind Mundul *v.* The Collector of the 24-Pergunnahs, 11 Moo. I. A., 345; S. C., 7 W. R., P. C., 21; Parasun Singh *v.* Bhoop Singh, S. D. A., N. W. P., 1863, p. 45; see also Radhanath Dhubi *v.* Ramgobind Paul, 3 B. L. R., A. C., 218, Bayley and Hobhouse, JJ.; Bihari Lal Nandi *v.* S. M. Trailakhomoyi Barmani, *ib.*, 346, L. S. Jackson and Markby, JJ.; and Maharaja Jagadindra *v.* Bhabatarini Dasi, 5 *ib.*, Apx., 54, Phear, J.

(*c*) Baboo Gooroo Dyal Sing *v.* Durbaree Lall Tewarree, 7 Suth. W. R., 18, Peacock, C. J., and L. S. Jackson, J.

(*d*) In Jugobundhoo Deb *v.* Goluck Chunder Holdar, 10 Suth. W. R., 228, Phear and Hobhouse, JJ.; and Joog Maya Debia *v.* Ramchunder Chatterjee, *ib.*, 378, same Judges.

(*e*) See also Ram Pershad Sookul *v.* Rajunder Sahoy, 6 Suth. W. R., 262, per Peacock, C. J., at p. 265.

order that five witnesses who had not been summoned might be summoned, and the Judge postponed the trial for ten days although fifteen of the plaintiff's witnesses were present and ready to be examined, but refused to issue the summons which the plaintiff asked for,—it was held by the High Court that the omission of the Judge to summon the witnesses was, under the circumstances of the case, a sufficient reason within this section for the lower Appellate Court to send for and take their evidence (*a*). It has been held in one case (*b*) that the High Court can, on an appeal on points of law, examine the evidence of a witness summoned by the lower Appellate Court under this section, which was not before the first Court. This seems to be opposed to the current of decisions under the Code of 1859, but it may be that it can be done now under the powers given by s. 587, coupled with the direction in s. 571, which would seem to enable the Court in special appeal to go into evidence, although the parties could not insist upon its doing so.

Mode of taking additional evidence.

569. Whenever additional evidence is allowed to be received, the Appellate Court may either take such evidence, or direct the Court against whose decree the appeal is made, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

This corresponds with Act VIII of 1859, s. 356.

Points to be defined and recorded.

570. In all cases where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

This corresponds with Act VIII of 1859, s. 357.

Of the Judgment in Appeal.

Judgment when and where pronounced.

571. The Appellate Court, after hearing the parties or their pleaders, and referring to any part of the proceedings, whether on appeal or in the Court against whose decree the appeal is

(*a*) Abelakh Roy *v.* Guggun Bhuggut, 22 Suth. W. R., 268, Phear and Morris, JJ.

(*b*) Abdool Luteef *v.* Mahomed Kamil, 22 Suth. W. R., 369, Kemp, J.

made, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day, of which notice shall be given to the parties or their pleaders.

This corresponds with Act VIII of 1859, s. 349, and the first sentence of s. 359. Section 349 directed the Court of Appeal to give judgment in the manner prescribed for giving judgments in Courts of original jurisdiction as described in ss. 183 to 188 of that Act. The manner in which the Appellate Court is to give its judgment is now prescribed in the following sections; and the direction to refer to any part of the proceedings, whether on appeal or in the Court against whose decree the appeal is made, is new. This direction would enable a Court hearing an appeal upon a point of law under chap. xlii, *post*, which applies these provisions generally to those appeals, to look into the facts and to pronounce judgment upon them, as was decided by Peacock, C. J., under the old Procedure Code, Bayley, J., dissenting (*a*).

It was a general rule that when a Judge, after writing his judgment, but before delivering it in open Court, dies, or leaves the bench, his written judgment is not to be considered a judgment, but merely as an opinion (*b*); and this rule was adopted in India (*c*). The judgment of a Bench of Judges, being a judicial act, ought to be completed in the presence of them all (*d*). And where a Judge died after deciding a case, but left no record of his decision except an entry in the Court order book, the High Court remanded the case for re-hearing on appeal from the decision of a Judge of co-ordinate jurisdiction who had taken up the case and given judgment on the materials left by the deceased Judge (*e*) In this last case the course above indicated would still be proper, but it would seem, on reference to s. 199 of this Code, coupled with s. 582, that a Judge on appeal can, equally with a Judge of a Court of first instance, pronounce a judgment written by his predecessor. The distinction lies between a case where the new Judge finds the judgment completed and the reasons of

(*a*) Ram Pershad Sookul *v.* Rajunder Sahoy, 6 Suth. W. R., 262.

(*b*) Brand *v.* Hammersmith Railway Company, 36 L. J, N. S., Q. B., 139.

(*c*) Mahomed Akil *v.* Asadunnissa Bibee, 5 Wym, F. B., 69; S. C., B L. R., F. B, 774; Khelut Chunder Ghose *v.* Tarachurn Koondoo Chowdhry, 2 Wym., 326, Peacock, C. J., and L. S. Jackson, J.

(*d*) *Ibid.*

(*e*) Sukram *v.* Kala Kahar, 3 B. L. R., A. C., 105.

his predecessor expressed, and where the mere act of making the formal order or delivering judgment alone remains to be done, and the case where the succeeding Judge has to form an opinion for himself and write his own judgment: thus, where a Judge, on appeal from the decision of the lower Court, omitted to give his reasons sufficiently fully in his judgment, and the case was sent down to him on appeal from his decision, with directions to do so, and in the meantime the Judge left India, and his successor, without any fresh order from the Court, decided the case, it was held, that he had no jurisdiction to do so (*a*). But it has also been held under the old Code, that where a Judge wrote out his judgment a year after he delivered it in Court, and after he had ceased to be a Judge, this was not such a defect in procedure as affected the case upon the merits so as to give a right to a special appeal. It would, therefore, give no right to an appeal from an appeal under s. 584 (*c*), *post* (*b*).

The fact that no reasons are given in the judgment of a lower Appellate Court cannot be considered as a ground for an appeal from the appellate decree on a point of law, when it has not produced error or defect in the decision upon the merits, s. 584, *post*. Where a lower Appellate Court has omitted to state reasons, and it appears to the High Court that reasons should have been stated, the proper course is to retain the case on the second appeal, but to return the proceedings and require the omission to be supplied (*c*).

Language of judgment.

572. The judgment shall be written in English; provided that if English is not the mother-tongue of the Judge, and he is not able to write an intelligible judgment in English, the judgment shall be written in his mother-tongue or in the language of the Court.

This corresponds with the third paragraph of s. 359 of Act VIII of 1859. As to the "language of the Court," see s. 645, *post*.

Translation of judgment.

573. When the language in which the judgment is written is not the language of the Court, the judgment shall, if any party so

(*a*) Lalla Bhoyro Lal *v.* Lalla Mokoond Lal, 2 Suth. W. R., 275; Manick Sett *v.* Khetter Mohun Gossamee, 1 In. Jur, N. S., 101, Seton-Kair and Macpherson, JJ.

(*b*) Bhagvatsangji *v.* Partabsangji, 4 Bom. H. C., A. C. Rep., 105.

(*c*) Doolee Chund *v.* Musst. Oomda Begum, 18 Suth. W. R., 473, Couch, C. J., and Ainslie, J.

require, be translated into such language, and the translation, after it has been ascertained to be correct, shall be signed by the Judge or such officer as he appoints in this behalf.

This corresponds with the fourth paragraph of s. 359 of Act VIII of 1859, adding the words "if any party so require" an "after it has been ascertained to be correct."

574. The judgment of the Appellate Court shall state—

Contents of judgment.

(*a*) the points for determination;

(*b*) the decision thereupon;

(*c*) the reasons for the decision; and

(*d*) when the decree appealed against is reversed or varied, the relief to which the appellant is entitled.

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

Date and signature.

This corresponds with the second paragraph of s. 359 of Act VIII of 1859; cl (d) being adopted from the opinion on the construction of that Act expressed by Peacock, C J, and Mitter, J. (*a*); the object being to enable the proceedings in execution to be carried out without a reference to past proceedings to ascertain what is to be done. When the Court merely states (as was not unusual) "appeal decreed" or "decree reversed," it is often impossible to find out what is to be done in execution of the decree without making a fresh enquiry. For example, where both plaintiff and defendant claimed land deriving title through M., both the Court of original jurisdiction and the Court of the Principal Sudder Ameen, on appeal, found the plaintiff's title-deeds to be earlier in date, and the plaintiff to have been in possession; but the Principal Sudder Ameen stated little more than that on the plaintiff's evidence he found the fact in plaintiff's favour, and that the defendant's evidence, even if it proved the defendant's title-deeds to be good, could not avail him against the plaintiff's earlier deed,—it was held by the High Court that the Judge should also state what that evidence consists of, and in which way, and for what specific reasons, it proves the plaintiff's

(*a*) Bell *v.* Gurudas Roy, 1 B. L. R, A. C, 50.

case (*a*). So again, where, in a suit for a share of ancestral property, the first Court gave the plaintiff a decree, and the Judge, on appeal, confirmed the same, simply remarking that "the decision, which seems to me an excellent one, is confirmed "with costs and interest against the appellant," the High Court, holding this to be no judgment at all, remitted the case to the Judge, with directions that he clearly and at length take up the several points in issue between the parties, and come to a distinct finding on each and every one of them (*b*). Although the case may be sent back to the Judge of appeal, if he does not state the grounds of appeal and expressly adjudicate upon them (*c*), it is not necessary that he should decide all the points at issue in the Court below if he thinks it sufficient to frame one issue and decide the case upon it (*d*). Whatever points he fixes for decision he must decide (*e*). Reasons must be given; but where the suit has been decided on a simple question of fact, and the Judge, without giving any detailed reasons, endorses the opinion of the Court below, that course is not generally open to objection; but in a case of a complicated nature it is necessary that detailed reasons should be given (*f*), and the Court need not meet all the arguments used by the pleader for the appellant (*g*). Where the father of the appellant filed an appeal describing his son as a minor,—it was held, that the Appellate Court could allow the appeal to be treated as an appeal by the appellant (*h*). And even where the Appellate Court alters a decree of a lower Court on the question of costs, it should give

(*a*) Trilochun Dutt *v.* Ishen Chunder Chowdry, 3 Suth. W. R., 176; see also Korban Ali *v.* Ashan Ali, 4 Suth. W. R., 4; Shamee Mahomed *v.* Prodhan Palee, 5 Suth. W. R., 178; Hem Chunder *v.* Syed Ahmed Reza, Marsh., 332; and Mahadheo Ojha *v.* Parmeswar Pandey, 2 B. L. R., Apx., 20.

(*b*) Bhagbut Khan *v.* Puddo Bewa, 3 Suth. W. R., 192; see also Chunder Kant Chowdry *v.* Hurish Chunder Chowdry, 1 Suth. W. R., 214; Sheik Goburdhun *v.* Sheikh Sadoo, 1 Suth W. R., 244; and Ommutul Fatima Begum *v.* Musst. Janee Khanun, 1 Suth. W. R., 294.

(*c*) Dookhut Panday v. Sheobum, S. D. A., N. W. P., 1863, p. 450.

(*d*) Moti Bhagvan *v.* Harjivan Girdhardas, 2 Bom. H. C. Rep., 34.

(*e*) Ramdas Sakharlal *v.* Gangadhar Dongre, 2 Bom. H. C. Rep., 186.

(*f*) Khettur Mohun Gossain *v.* Bhyrub Chunder Sheet, 3 Suth. W. R., 126.

(*g*) Kishnendro Roy Chowdhry *v.* Degumburee Debia Chowdhrain, 16 Suth. W. R., 15.

(*h*) Sama Charan Ghose *v.* Tarak Nath Mukhopadhya, 3 B. L. R., Apx. 115, Jackson and Markby, JJ.

its reasons for so doing (*a*); but the omission of the Judge on appeal to give his reasons for believing witnesses disbelieved by the Court of first instance is not an error which will of itself enable the party against whom he decides to prefer an appeal from his decree under chap. xlii, *post* (*b*); nor is the fact that he did not fully set forth his reasons, where he does so sufficiently to show that he has adopted the conclusion and the reasoning of the Court below (*c*).

Decision when appeal is heard by two or more Judges.

575. When the appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

If there be no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed:

Provided that if the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, the appeal may be referred to one or more of the other Judges of the same Court, and shall be decided according to the opinion of the majority (if any) of all the Judges who have heard the appeal, including those who first heard it.

When there is no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed.

The High Court may from time to time make rules consistent with this Code to regulate references under this section.

This corresponds with Act XXIII of 1861, s. 23.

In a Court where the concurrence of two or more Judges is necessary to a judicial determination, the Judges should confer

(*a*) The Government *v.* Maharajah Mahtab Chund Bahadoor, 3 Suth. W. R., 109; Khelluck Chunder Ghose *v.* Nund Ram Sein, 2 Suth. W. R., 7; Kartick Nepit *v.* Personomoyee Neptinee, 2 Suth. W. R., 77.

(*b*) Luckhee Monee Dossia *v.* Rajkisore Paul, 3 Suth. W. R., 106.

(*c*) Shamee Mahomed *v.* Prodhan Palee, 5 Suth. W. R., 178.

together; all acts of a judicial nature to be performed by several persons ought to be performed when they are all present together and a final determination to decide or refer the case should not be come to until they have discussed together the points on which they differ. If they do not take this course, and from any cause, such as the removal of one of them to another Court, they cannot afterwards do so, the case cannot be referred to a third or more Judges on their separate memoranda of opinion, but must be heard *de novo* (*a*). And this defect does not appear to be cured by the provisions of the Code alluded to in the note to s. 571, the essential point being that the Judges, where there are two or more, should confer together.

Dissent to be recorded.

576. When the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

This follows the last paragraph of Act VIII of 1859, s. 359, which directed the dissentient Judge to state his opinion merely in writing.

What judgment may direct.

577. The judgment may be for confirming, varying or reversing the decree of the Court against which the appeal is made, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be passed in appeal, the Appellate Court may pass a decree or order accordingly.

This follows the first part of s. 350 of Act VIII of 1859. The words from "or, if the parties, &c." are new.

The High Court will, in dealing with a case on appeal, adopt the rule applied in the Privy Council in this respect, that it will not "disturb a judgment upon a question as to the credibility of "a witness, unless it be manifestly clear, from the probabilities

(*a*) Khelut Chunder Ghose *v.* Tarachurn Koondoo Chowdhry, 2 Wym, 326; S.C., 6 Suth. W. R., 269; Mahomed Akil *v.* Asadun-nissa Bibee, 5 Wym. F. B., 69; Brand *v.* The Hammersmith Railway Company, 36 L. J., N. S., Q. B., 139; and see sec. 571 and note, *ante*.

"attached to certain circumstances of the case, that the Court was "wrong in the conclusion drawn from such evidence" (*a*). Though this rule would not, perhaps, be extended with the same strictness to Courts in India as is necessary in the Privy Council (*b*), as the Courts hearing the first appeal from the Court of original jurisdiction and having power to take fresh evidence or direct it to be taken, have more satisfactory materials for dealing with questions of fact.

No decree to be reversed or modified for error or irregularity, not affecting merits or jurisdiction.

578. No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal, on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the Court.

This follows the latter part of s. 350 of Act VIII of 1859.

An error in the valuation of a claim is not an error, defect, or irregularity which affects the merits of the case, and an Appellate Court is restrained, under this section, from ordering the reversal of a decree on account of any such error which does not also affect the jurisdiction of the Court which originally tried the suit although it may affect the Government revenue (*c*). In this case it was held that the Appellate Court should allow the plaintiff to supply any necessary stamps; but where the error does affect the jurisdiction of the original Court, the Appellate Court should dismiss the case (*d*). A Court can entertain the question of jurisdiction on appeal, and set aside the lower Court's decree where the matter has been, in point of value, beyond its jurisdiction; but, in doing so, it should return the plaint to be stamped with a proper stamp

(*a*) Heeralall Chuckerbutty *v.* Mohesh Chunder Ghosaul, 1 Hyde, 105; and Musadee Mahomed Cazum Sherazee *v.* Mirza Ally Mahomed Shoostry, 8 Moo. P. C., 90; and Palmer *v.* Cohen, 1 Hyde, 123.

(*b*) See the remarks in the judgment in S. M. Sarodasoondery Dosee *v.* Tincowry Nundy, 1 Hyde, 223.

(*c*) Navsabin Biba *v* Rababin Bahiru, 1 Bom. H. C. Rep, 163; Currie *v.* S. M. Mutu Ramen Chetty, 3 B. L. R., 130; Lalji Sing *v.* Syad Akram Ser, *ib*, 235; Srinath Saha *v.* Saroda Gobindo Chowdhry, 5 *ib*, Apx., 10; Syed Wajid Ali Khan *v.* Lala Hanuman Prasad, 4 *ib.*, A. C., 139; and Huriee Panday *v.* Bassoo, 11 Suth. W. R., 257.

(*d*) Augopura Chowdhry *v.* Meah Bibee, 10 Suth. W. R., 207, Glover and Mitter, JJ.

and presented to the proper Court (*a*). But where both parties acquiesced in the jurisdiction of the Civil Court in a suit which ought to have been brought in the Revenue Courts, the High Court refused to disturb the decree (*b*).

The striking out of a plaintiff's name at the settlement of the issues, where a decree was passed in favor of the other plaintiffs, was held to be, although erroneous, no ground of appeal. The proper course would have been to amend the issues and have the plaintiffs all on the record; the decree would then bind them all; and if the plaintiffs failed, the defendant would have them all to resort to for his costs. So that if the name of one or more was thus removed, and the plaintiffs failed, it might be an irregularity which, causing substantial injury to the defendants, would thus affect the merits (*c*).

Where a Judge had given judgment partly on evidence taken before another Judge and partly before himself, and where the irregularity was waived, the judgment was upheld (*d*).

Of the Decree in Appeal.

Contents of decree.

579. The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

The decree shall contain the number of the appeal, and the memorandum of appeal, including the names and description of the appellant and respondent, and shall specify clearly the relief granted or other determination of the appeal.

The decree shall also state the amount of costs incurred in the appeal, and by what parties and in what proportions such costs and the costs in the suit are to be paid.

The decree shall be signed and dated by the Judge or Judges who passed it :

(*a*) Musst. Jadu *v.* Sheikh Hifayat Hossein. 5 B L. R., Apx., 15, Bayley and Markby, JJ.

(*b*) Teekum Lall Dass *v.* MacArthur, 1 Suth. W. R., 279.

(*c*) E. I. Ry. Co. *v* Jordan, 4 B. L. R., O. C., 97, Peacock, C. J., and Macpherson, J.

(*d*) Nararbhai Vrijbhukandas *v* Naroshankar Chandroshankar, 4 Bom. H. C. Rep., App., F. B. 98.

Provided that where there are more Judges than one, if there be a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

Judge dissenting from judgment need not sign decree.

This follows the first part of s. 360 of Act VIII of 1859. The Judges must date as well as sign the judgment; and it is not necessary under this Code for the opinion of the dissentient Judge or Judges to be recited in the decree, as Act VIII of 1859 required. He should state in the judgment what order he thinks should be passed. See s. 576, *ante*.

This section only requires the Judge of an Appellate Court to state in his decree by what parties (and in what proportions, if necessary) the costs of the original suit are to be paid; but not to go into particulars, or append to his judgment a schedule setting forth the different items which make up the costs of the first Court (*a*). Appellants, with a common interest, although separately appealing, will be allowed but one set of costs in equal shares (*b*).

580. Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Court and at their expense.

Copies of judgment and decree to be furnished to parties.

This corresponds with the last part of s. 360 of Act VIII of 1859.

581. A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed against, and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

Certified copy of decree to be sent to Court whose decree is appealed against.

This corresponds with Act VIII of 1859, s. 361; but a copy of the judgment, as well as of the decree, is now to be sent to the lower Court.

(*a*) Mothoora Mohun Roy *v.* Hury Kishore Roy, 18 Suth. W. R., 286, Kemp and Glover, JJ.

(*b*) Shah Mukhun Lall *v.* Baboo Sree Kishen Singh, 12 M. I. A., 157.

582. The Appellate Court shall have the same powers in appeals under this chapter as are vested by this Code in Courts of original jurisdiction in respect of suits instituted under Chapter V.

Appellate Court to have same powers as Courts of original jurisdiction.

The provisions hereinbefore contained shall apply to appeals under this chapter so far as such provisions are applicable.

This corresponds with s. 37 of Act XXIII of 1861, which superseded s. 358 of Act VIII of 1859. The latter gave the Appellate Court the same powers as original Courts in regard to the granting of time, adjourning the hearing, examining the parties or their pleaders, and awarding costs or otherwise. Act XXIII of 1861, s. 37, gave the Appellate Court all the powers of a Court of original jurisdiction, unless when otherwise provided. The present section, in like manner, includes all the powers of Courts of original jurisdiction. It seems to have been, however, doubted whether a Court of Appeal could allow a plaint to be amended (*a*), or call for a written statement (*b*). It may be questioned, however, whether the former of these cases goes further than to point out the impropriety of allowing these matters to be done at so late a stage in the suit. Phear, J., in one case (*c*) put a limited construction upon the words of s. 37, considering, "that the "giving to the Appellate Court the same powers in cases of "appeal as are vested in Courts of original jurisdiction in respect "of original suits, does not apply to cases where the subject which "is being dealt with by the Court is not the actual appeal itself, "and cannot, therefore, be rightly treated as standing in an analo-"gous position to that of the original suit." And the learned Judge was of opinion "that the section did not have the effect of "making s. 7 of the Act allowing a fresh suit to be brought "within 30 days applicable to cases where the Appellate "Court has passed an order under s. 5 and s. 6, dismissing "the appeal." And "that the powers vested in Courts of origi-"nal jurisdiction spoken of in s. 37, mean powers vested in them

(*a*) Abdool Gofoor *v.* Musst. Nur Banu, 1 B. L. R., A. C., 78.

(*b*) Jugessur Mookerjee *v.* Goopee-kishen Sein, 5 Suth. W. R., 50, Seton-Karr and Macpherson, JJ.

(*c*) Kalikrishna Chandra *v.* Harihar Chuckerbutty, 1 B. L. R., A. C., 155, see p. 158; S. C., 10 Suth. W. R., 160.

"otherwise than by the words of the Act." And Hobhouse, J., in the same case held, that the word "powers," as used in s. 37, did not include "jurisdiction." In a later case (*a*), Couch, C.J., allowed a plaint to be amended on appeal on the authority of a decision of the Privy Council (*b*); and it was held on the same authority that the issues can be amended on an appeal (*c*). Where an Appellate Court decides that a lower Court had no jurisdiction to entertain a suit, it should return the plaint to the plaintiff in order that it may be presented to the proper Court (*d*). The Appellate Court could allow the case to be withdrawn with power to bring a fresh suit (*e*). When the hearing has commenced or costs incurred, an applicant cannot withdraw without leave (*f*); but where the hearing has not been commenced, he can withdraw (*g*). It has been held that a party may apply to the Court to set aside an *ex parte* judgment on appeal (*h*); but there was some doubt about this, and it was held that a respondent who holds a decree in his favor is in a different position from a defendant who has never put in any appearance, and that he might lie by at the hearing of the first appeal, and afterwards appeal on a point of law, and was not bound to get the *ex parte* decree against him in the first appeal set aside (*i*); and that was the practice in Calcutta (*j*). An Appellate Court has jurisdiction also to separate suits which have been misjoined, and try them separately (*k*). When an appellant

(*a*) Joseph *v.* Solano, 9 B. L. R., 441; S. C., 18 Suth. W. R., 424.

(*b*) Mahomed Zahoor Ali Khan *v.* Musst. Thakooranee Rutta Koer, 11 Moo. I. A., 468.

(*c*) Ram Doyal Khan *v.* Rajah Ojoodhia Ram Khan, 25 Suth. W. R., 425, Markby and Mitter, JJ.; and see now s. 565.

(*d*) Bai Mahor *v.* Bula Khi Chaku, I. L. R., 1 Bom., 538, Kemball and Nanabhai Haridas, JJ.

(*e*) Kalikrishna Chundra *v.* Harihar Chuckerbutty, *supra*. See also Ram Pershad Ojha *v.* Bhurosa Koonwar, 9 Suth. W. R., 328; Bombay City Bank *v.* Moonjee Hurry Doss, Bourke's Rep., 1865, App., 99.

(*f*) Venkataramanaiya *v.* Kuppi, 3 Mad. H. C. Rep., 302; Kareem Bee *v.* Beegam Bee, *ib.*, 369.

(*g*) 9 Suth. W. R., 328; Shama Churn Ghose *v.* Radha Kristo Chaklanuvis, 14 *ib.*, 210; Coomar Puresh Narain Roy *v.* Watson, 23 *ib.*, 229.

(*h*) Devappa Setti *v.* Ramanadha Bhatt, 3 Mad. H. C. Rep., 109, Innes and Collett, JJ.

(*i*) Ramshetbin Bachashet *v.* Balkrishnabin Ababhat, 6 Bom. H. C. Rep., F. B, 161.

(*j*) Omda Bibee *v.* Acowrie Singh, 7 Suth W. R., 425; Tarachand Ghose *v.* Anund Chunder Chowdhry, 10 *ib.*, 450; Poran Chunder Ghose *v.* Chukkhun Lall Roy, 20 *ib.*, 402, see p. 675, *post*.

(*k*) Shoroop Chunder Paul *v.* Mothoor Mohun Paul Chowdhry, 4 Suth. W. R., 109.

dies, application may be made to substitute his legal representatives; but if no such application be made, the suit will abate (*a*). An Appellate Court has no power under this section to refer a case to arbitration, even by consent of the parties. It must be referred before "judgment,"—*i. e.*, before the final judgment of the original Court (*b*).

Execution of decree of Appellate Court.

583. When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits.

This corresponds with Act VIII of 1859, s. 362. Restitution of property after reversal of a decree under which the successful party had been put in possession by proceedings in execution being now enforceable in the same way as execution.

The Court below must carry out the decree as it is sent down. The judgment and decree in the case become for most purposes the judgment of the Court of Appeal (*c*). Thus the lower Court cannot alter or vary the decree (*d*), even by consent (*e*); but for some purposes it is otherwise, as for instance, for the purpose of execution, the Court executing the decree being bound by the rules which govern the execution of its own decrees (*f*). A decree of a District Court, materially altered on appeal by the High Court, becomes a decree of the High Court (*g*); and also, if it be affirmed

(*a*) Jaitabin Kalu *v.* Balubin Raghu, 3 Bom. H. C. Rep., App., 81.

(*b*) Juggessur Dey *v.* Krithartho Moyee Dossee, 12 B. L. R., F. B., 266; and see s. 506, *ante*.

(*c*) Kisto Kinker Ghose Roy *v.* Burrodacaunt Singh Roy, 14 Moo. I. A., 465; S. C., 10 B. L. R., P. C., 101; Onraet *v.* Sanker Dutt Sing, 5 B. L. R., Apx., 60; Bahnu Shankar Gopal Ram *v.* Rughonath Ram Mungal Ram, 2 Bom. H. C., A. C. Rep., 106.

(*d*) Krishna Kamal Singh *v.* Hiru Sirdar, 4 B. L. R., 101.

(*e*) Azim Nulla Moodeen *v.* Cruikshank, 11 B. L. R., 67.

(*f*) Act XV of 1877, sched. ii, div. 3, Nos. 179 and 180.

(*g*) Chowdhry Wahid Ali *v.* Mullick Inayet Ali, 6 B. L. R., 52, Bayley and Kemp, JJ.

by the Appellate Court (*a*); but when such decree is transmitted for execution to the lower Court, it is now held that it is governed as regards limitation by the law applicable to the decrees of Courts not established by Royal Charter (*b*); and these two propositions were confirmed by the Judicial Committee,—namely, that the decree, whether affirmed, modified, or reversed by the Appellate Court, becomes a decree of the Appellate Court, but that the Court which has to execute it should be governed by the rules which govern the execution of its own decrees (*c*). It has been held that Indian Acts relating to limitation do not apply to decrees of the Privy Council; that they are to be executed subject to such conditions and limitation as the Privy Council may direct under 3 and 4 Wm. IV, c. 41, s. 21. It has also been held that it is not competent to the Indian Legislature to fix any limitation, as it would be an interference with the Queen's prerogative (*d*), on the ground that such a decree is neither a decree of a Court established by Royal Charter, nor a decree of a Court not so established, within the meaning of the Indian Limitation Act (*e*). But doubt has been thrown upon the correctness of this opinion as to the powers of the Indian Legislature by the Judicial Committee (*f*), on appeal from the decision of the High Court (*g*). The final termination of the appeal to the Judicial Committee is not, properly speaking, a decree at all, but an order of the Queen in Council made on the report of the Judicial Committee.

A decree-holder may bind himself not to execute his decree, or not to do so within a certain period, but he cannot by doing so add to the time which the law allows him to execute it. If he binds himself not to execute his decree within a certain period and does not intend to give up his right altogether, he must take care that the period does not exceed the period allowed by the

(*a*) Arunachellathudayan *v.* Veludyan, 5 Mad. H. C. Rep., F. B., 215; Bapurav Krishna *v.* Madhavrav Ramrav, 5 Bom. H. C. Rep., 214, Newton and Tucker, JJ.; Joy Narain Giree *v.* Goluck Chunder Mytee, 22 Suth. W. R., 102, Markby, J.

(*b*) Ram Charan Bysak *v.* Laki Kant Bannik, 7 B. L. R., 704; S. C., 16 Suth. W. R., F. B., 1.

(*c*) Kisto Kinkur Ghose Roy *v.* Burrodacaunt Sing Roy, 14 Moo. I. A., 465; S. C., 10 B. L. R, P. C., 101.

(*d*) See 2 & 3 Wm. IV, c. 85, s. 443.

(*e*) Anundmoyee Dassee *v.* Poornoochunder Roy, 2 Wym. Rep., F. B., 202.

(*f*) Kisto Kinkur Ghose Roy *v.* Burrodacaunt Sing Roy, 10 B. L. R., P. C., 115.

(*g*) *Ibid*, 5 Wym., 15, L. S. Jackson and Hobhouse, JJ.

law of limitation (*a*); but if the parties agree that the decree shall be executed, for example, by payments of money by instalments, the Court executing the decree can carry out the agreement (*b*).

CHAPTER XLII.

OF APPEALS FROM APPELLATE DECREES.

Second appeals to High Court.

584. Unless when otherwise provided in this Code or by any other law, from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds, (namely)—

Grounds of second appeal.

(*a*) the decision being contrary to some specified law or usage having the force of law;

(*b*) the decision having failed to determine some material issue of law or usage having the force of law;

(*c*) a substantial error or defect in the procedure as prescribed by this Code or any other law, which may have produced error or defect in the decision of the case upon the merits.

This section corresponds with s. 372 of Act VIII of 1859, cl. (b) being added. These appeals were, under the former Procedure Code, called "special," as distinguished from "regular," appeals, and were only admissible upon the grounds specified in this section.

It has been held in Bengal that where the Court of first appeal passes a decree on a hearing *ex parte*, a special appeal may be heard on proper grounds (*c*); and in the same way it has been held

(*a*) Krishna Kamal Singh *v.* Huru Sirdar, 4 B. L. R., F. B., 101; Onraet *v.* Sankar Dutt Sing, 5 *ib.*, Apx., 60; Azim Nulla Moodeen *v.* Cruikshank, 11 *ib.*, 70.

(*b*) Chunder Nauth Misser *v.* Gouree Komul Bhuttacharjee, 10 *ib.*, Apx., 28.

(*c*) Omda Bibee *v.* Acowrie Singh, 7 Suth. W. R., 425; Tara Chand Ghose *v.* Anund Chunder Chowdhry, 10 Suth. W. R., 450; S. C., 2 B. L. R., A. C., 110, Bayley and Macpherson, JJ.; Paran Chunder Ghose *v.* Chukkun Lall Roy, 20 Suth. W. R., 402, Markby and Birch, JJ.

in Bombay by a Full Bench, that a plaintiff or defendant who has not appeared on the first appeal is not thereby debarred from appearing and urging objections on a second appeal (*a*). In Madras it was held otherwise (*b*) under the Code of 1859, and that it was necessary for the party to get the *ex parte* decree set aside, and that he could not appeal without doing so, applying s. 119 of Act VIII of 1859 to appeals as well as to original cases. It is not necessary now, even in original suits, to take this preliminary step.

In appeals from appellate decrees, the Court cannot, as a general rule, go into questions of fact or allow objections to be made on such questions (*c*), or interfere with a finding of fact depending on the weight of evidence (*d*), even with the consent of parties (*e*), although it might do so when the Court finds a fact on no evidence or upon evidence which is not legally admissible (*f*),—that is to say, the appellant cannot make a finding on a question of fact a ground of appeal except in the last case. But it has been held, that where the appeal from an appellate decree is properly before it, the Court, in dealing with the case, is not precluded from looking at the facts, and pronouncing judgment upon them (*g*); and s. 571, which directs the Court to refer to any part of the proceedings, including the evidence, if necessary, and then to pronounce judgment, would

(*a*) Ramshet bin Bachashet *v.* Balkrisna bin Aababhat, 6 Bom. H. C. Rep., 161, F. B.

(*b*) Devappa Setti *v.* Ramanadha Bhatt, 3 Mad. H. C. Rep., 109, Innes and Collett, JJ.

(*c*) Eshenchunder Singh *v.* Shamachurn Bhutto, 11 Moo. I. A., 7, see p. 19.

(*d*) Mandahatta *v.* Nawab Najabool Nissa, S. D. A., N. W. P., 1861, p. 108; Lullo Mull *v.* Gungaram, *ib.*, 4; Subhanjee bin Baherji *v.* Bhowanrav bin Anandrav, 1 Bom. H. C. R., 173; Dwarkadas Lalubhai *v.* Adam Ali Sultan Ali, 3 *ib.*, App., 1; Bykuntnath Goopto *v.* Prosunno Moyee Dabia, 5 Suth. W. R., 196; Dwarkanath Doss Biswas *v.* Moddun Mohun Chuckerbutty, 6 *ib.*, 292; Toolsee Doss Kobeeraj *v.* Bhyrub Lall Tewaree, 8 *ib.*, 311; Heera Chand Banerjee *v.* Banee Madhub Chatterjee, 10 *ib.*, 164; Satooram Mojoomdar *v.* Preonath Banerjee, 10 *ib.*, 424; Munee Dutt Singh *v.* Campbell, 11 *ib.*, 278; Abdool Azeez *v.* Shumsunissa, 11 *ib.*, 263; Doorga Churn Sett *v.* Shamanund Gossain, 12 *ib.*, 376; Gour Huree Doss Mohunt *v.* Hyagrib Doss Mohunt, 14 *ib.*, 425; Rumeezooddeen Bhooyan *v.* Joymala, 15 *ib.*, 303; and Doomdh Bahadoor Singh *v.* Priag Singh, 17 *ib.*, 314.

(*e*) Kadombinee Dossee *v.* Doorga Churn Dutt, Marsh., 4.

(*f*) Mohun Chunder Dhur *v.* Kidge, Marsh., 381; Ramsoonder Sircar *v.* Kistobag Bag, Marsh., 322; Syud Azur Ali *v.* Kali Kumar Chuckerbutty, 2 B. L. R., A. C., 315; Kristnasamy Tatacharry *v.* Gomatum Rungacharry, 4 Mad. H. C. Rep., 63.

(*g*) Ram Pershaud Sookul *v.* Rajunder Sahoy, 6 Suth. W. R., 262, Peacock, C. J., Bayley, J., dissenting.

enable it to give judgment on the facts, s. 571 being, by virtue of s. 587, applicable to these appeals.

The construction of the depositions of witnesses is not a question of law, but of fact, and therefore a special appeal is not allowed in order to obtain a reversal of such construction. Nor is it a ground for such an appeal that the Court has not passed an opinion upon the report of a person deputed by it to make an investigation and report, as for example, an ameen. But where an assumption is made by the Court without any evidence, that is an error of law warranting a special appeal (*a*); and where an ameen was directed to draw up a map, and the Court below founded its opinion wholly on the map, disregarding all the other evidence, it was held that this was a good ground for a special appeal (*b*). And it has been held that where an Appellate Court ignores the great body of evidence on the record, and places reliance upon what can be shown either to be no evidence at all or which points conclusively the other way, and where it lays down the law wrongly, these matters may be dealt with by the Court in special appeal, although the Court below ostensibly bases its judgment upon the evidence (*c*); or where a Judge imports into the case, and decides it upon matters within his own personal knowledge, but not in evidence (*d*). A finding of fact may be the subject of special appeal, if in arriving at the fact the Court made an error in law (*e*). A special appeal will lie when the Judge has drawn a wrong inference from the facts, so that had the case been tried by a jury, and had he directed them to make the same inference, it would have amounted to a misdirection (*f*). Thus, a further appeal will lie where the Appellate Court inferred against a marriage on the probabilities without adverting to the evidence adduced (*g*), or where it inferred from the fact of a man being the ostensible owner of a business that

(*a*) Himmut Ali Khadim *v.* Nyamut-oollah Khadim, 23 Suth. W. R., 250, Couch, C. J., and Birch, J.

(*b*) Bustee Sahoo *v.* Jeo Narain Singh, 24 Suth. W. R, 338, Glover and Mitter, JJ.

(*c*) Musst. Roopnarainee Kooer *v.* Ressal Tewaree, 24 Suth. W. R., 119, Glover and Mitter, JJ.

(*d*) Sooraj Kant Acharjee *v.* Khooder Narain Manna, 22 Suth. W. R., 9, Couch, C. J., and Amslie, J.

(*e*) Hunsa Kooer *v.* Sheo Gobind Raoot, 24 Suth. W R., 431.

(*f*) Sevvaji Vijaya Raghununada Valoji Kristnan Gopalar *v.* Chinna Nayana Chetti, 10 Moo. I. A., 151.

(*g*) Wise *v.* Sunduloonissa Chowdranee, 11 Moo. I. A., 177; Musst. Degumber Dosse *v.* Kissen Dhur Nundy, 1 In Jur., N. S., 35, Peacock, C. J., and Sumbhoonath Pundit, J.; Ranee Surnomoyee *v.* Lutchmeeput Doogur, 9 Suth. W. R., 338.

he could not have partners (*a*), or where the Court does not notice a presumption arising out of the circumstances of the case, such as the presumption that a document thirty years old and coming from the proper custody proves itself, unless there are real grounds to suspect its genuineness (*b*), or a presumption that the person whose title was affected by a sale, acquiesced in it, the presumption arising out of his lying by and putting forward no claim when he might have done so (*c*), or where the lower Appellate Court has drawn conclusions from the evidence not warranted by law or reason, and has failed to try a material issue in the case, such for instance as a question of title, wrongly holding the issue to be immaterial (*d*). A judgment which shows on the face of it want of due consideration of evidence and the introduction of foreign matters into the case, may be brought up before the High Court on special appeal (*e*). The plaintiff complained that the Courts below had found a certain issue against him without evidence. The finding on the issue in question was not material to the decree which had been passed, but the plaintiff brought a special appeal in order to be protected against the possibility of the finding being used against him in any future suit between himself and the defendants, and the Court being of opinion that the finding of the lower Court was upon improper evidence, set it aside, and declared that it should not, in any future suit between the same parties, operate as a bar to the issue being raised again (*f*). The deputation of an ameen to ascertain the respective liabilities of several judgment-debtors is not an improper course to pursue, and is not at all events a ground for interfering in special appeal with the concurrent judgments of Courts below (*g*). The objection that the depositions of the witnesses were not taken in the manner prescribed by the Code, but that notes of the evidence only were taken, is not one

(*a*) Shoobul Chunder Kulleah *v.* Koylash Chunder Mal, 14 Suth. W. R, 23, Couch, C. J, and Kemp, J.

(*b*) Mahomed Aizadi Shaha *v* Shaffi Mulla, 8 B. L. R., 26, Mitter and Paul, JJ.

(*c*) Nilatatchi *v* Venkatachala Mudali, 1 Mad. H. C. Rep., 131, Scotland, C. J., and Frere, J.

(*d*) Maharam Sheikh *v.* Nakowr Das Mahaldar, 7 B. L. R, Apx., 17, Bayley and Mitter, JJ.

(*e*) Sooraj Kant Acharje *v.* Khoodee Narain Manna, 22 Suth. W. R., 9, Couch, C. J., and Ainslie, J.; Sheo Purshun Pandey *v.* Brun Pandey, 24 *ib.*, 251, Glover and Mitter, JJ.

(*f*) Chowdhry Ajoodhya Pershad Singh *v.* Hur Buksh Singh, 22 Suth. W. R., 170, Phear and Morris, JJ.

(*g*) Kristo Chunder Goopto *v.* Brojo Mohun Dey Chowdhry, 22 Suth. W. R., 183.

that can be taken in special appeal where no material evidence has been omitted from the notes (*a*).

An appellant ought to raise his objections at the earliest stage: were he allowed to bring them forward at any stage of the case, great injustice might often be done to his opponent, who might be put to unnecessary expense by his delay. It has consequently been held, as a general rule, that the appellant should not be allowed to urge on special (*i. e.*, further) appeal points which are not raised in the original suit or in the first Court of Appeal (*b*). The decision of the Court of Appeal on a point of law must be based upon the allegations of the plaint and the facts adduced in evidence (*c*). A case is not to be decided in further appeal upon a question which was not raised, or tried, or considered by the lower Courts (*d*). Thus an objection that an *ex parte* decree in favor of the plaintiff has been wrongly set aside cannot be raised on the second appeal if it has not been made in the lower Appellate Court (*e*). An objection as to the competency of the plaintiff to sue, if not taken in the earlier stages of the suit, ought not to be entertained on special appeal (*f*). Where a Moonsiff's decision as to whether the value of a suit exceeds the limits of his jurisdiction is not appealed against in the lower Appellate Court, it was held that the question cannot be rightly entertained anew by the High Court (*g*). But where the Court of original jurisdiction dismissed the suit on the ground that it was barred by the Act of Limitation, but on appeal

(*a*) Shaikh Lall Mahomed *v.* Shaikh Peer Nuzur, 18 Suth. W. R., 112, Couch, C. J., and Ainslie, J.

(*b*) Meer Bahadoor Ali *v.* Musst. Suneechuroo, 6 Suth. W. R., 157; Shaikh Ahmed Mundul *v.* Shaikh Sonaoolla, 8 Suth. W. R., 5; Benode Putnaik *v.* Doyanidhee Bullior Singh, 9 Suth. W. R., 493; Ram Dhun Doss *v.* Ram Ruttun Dutt, 10 Suth. W. R., 425; Kaladdin Guru Bakas *v.* Raghoji, 1 Bom. H. C. Rep., 62; Shiu Das Narayan Singh *v.* Bhagwan Dutt, 2 B. L. R., Apx., 15; Mohima Chunder Roy Chowdhry *v.* Ramkishore Acharjee Chowdhry, 15 B. L. R., 142, Couch, C. J., and Ainslie, J.

(*c*) Esen Chunder Singh *v.* Shamachurn Bhutto, 11 Moo. I. A., 7; see Ramdoyal Khan *v.* Ajoodhia Ram Khan, I. L. R., 2 Cal., 1, see p. 15, where this case is commented as well as the case of Mohummed Zahoor Ali Khan *v.* Musst. Thakooranee Rutter Koer, 11 Moo. I. A., 468.

(*d*) Shib Suhaye Singh *v.* Nursingh Lall, 22 Suth. W. R., 352, Couch, C. J., and L. S. Jackson and McDonell, JJ.

(*e*) Boro Khasia *v.* Jata Sirdar, 8 B. L R., 78, Norman, offg. C. J., L. S. Jackson and Macpherson, JJ.

(*f*) Soorendronath Roy *v.* Rughoobur Dyal Awustee, 15 Suth. W. R., 392, Ainslie and Paul, JJ.

(*g*) Raj Narain *v.* Rowshun Mull, 22 Suth. W. R., 124, Phear and Morris, JJ.

by the plaintiff, the Appellate Court, holding that limitation did not apply, sent it down for trial on the merits, and the defendant not having appealed, the case was tried on its merits, and a decree given for the plaintiff; but the defendant having then appealed on the merits, the decree for the plaintiff was reversed; and the plaintiff then appealed to the High Court, the defendant on this appeal raised the question of limitation by way of cross-appeal,—it was decided that he could do so (*a*).

There have been numerous decisions to the effect that the Act of Limitation can be set up for the first time on appeal (*b*). Scotland, C. J., held, that the Statute of Limitations might be set up for the first time in appeal wherever the opposite side had an opportunity of meeting the plea by evidence (*c*); but that, on special appeal, the objection cannot be urged for the first time unless the facts which raise the plea and appear in the case are admitted When the lower Court decided the issue of limitation against, but the other issues in favor, of the defendant, and the plaintiff appealed, and the Appellate Court remanded the case without passing any judgment on the issue of limitation, it was held that the Appellate Court had jurisdiction when the case came up again to go into the question of limitation (*d*). The Limitation Act XV of 1877, s. 4, expressly requires the Court to dismiss the suit where it appears that it has been instituted, or that the appeal has been presented, after the proper time. But it may be that this fact does not appear on the face of the proceedings; it may depend upon matters to be proved; and although this new provision reverses the decision (*e*) of the Judges in a case decided in Bengal, who agreed that it was not a point of jurisdic-

(*a*) Mirza Heenmut Bahadoor *v.* Gobind Pauray, 1 Wym., 156, F. B.; Phool Coomaree Beebee *v.* Oonkur Pershad Rustobi, 2 In. Jur., N. S, 50.

(*b*) Maharajah Dheeraj Mahtab Chund Bahadoor *v.* The Bengal Government, 4 Moo. I. A., 466; Bishonath Surma *v.* Sreemutty Shoshi Mookhee, 11 B. L. R., Apx., 1, L. S. Jackson and Mitter, JJ.; Anundee Koonwar *v.* Thakoor Pandey, 4 Suth. W. R., Mis., 21; Taroo Mytee *v.* Obhoy Kooyla, 11 *ib.*, 288.

(*c*) Narasu Reddi *v.* Krishna Padayachi, 1 Mad. H. C. Rep, 358, Scotland, C. J., and Frere, J.; citing Maharajah Dheeraj Rajah Mahtab Chund Bahadoor *v.* The Bengal Government, 4 Moo. I. A, 466, see p. 508; see also Musst. Imam Bandi *v.* Hurgovind Ghose, *ib*, 414; but see Ramanatha Mudali *v.* Vaithalinga Mudali, 2 *ib.*, 238 (where Holloway, J., expressed a doubt).

(*d*) Musst. Phool Koomaree Bibee *v.* Woonkar Pershad Rustoby, 7 Suth. W. R., 67, Peacock, C. J., and L. S. Jackson, J.

(*e*) Payne *v.* Constable, 1 B. L. R., O. O. C. J., 49.

tion, still, where the point arises in the Court of Appeal, and depends on an issue of fact which has not been tried, the Court can send the case down for trial of that issue (*a*). It had, indeed, been held by Couch, C. J., in another case (*b*), that it is not necessary for the defendant, under the Indian Procedure, to put forward the point; if it appears on the proceedings, the Court should notice it; but the written statement of the defendant need not do so. His Lordship thought that the rule that the parties were in general considered as having mutually put the fate of the cause upon the questions which they had by their pleading elected for decision, does not appear to be applicable to the present procedure. He referred to *Maddocks* v. *Holmes* (*c*) as showing that the defence is a fair one, and to the judgment of Lord Ellenborough in *LeBret* v. *Papillon* (*d*) as showing that the Judge of either an Original or an Appellate Court ought to notice and deal with the question when it is apparent on the case before him: his omitting to do so is a matter producing error or defect upon the merits, and is a ground of further appeal (*e*). There are, however, other cases in which it has been held that the point of limitation ought not to be allowed to be raised on a second appeal, and which would be applicable where the point is not apparent upon the face of the proceedings (*f*); also where the objection was overruled in the Court of first instance and had not been taken in the first appeal (*g*).

As to the question of jurisdiction, it was held by Peacock, C. J., that "such an appeal will not lie upon a question of jurisdiction "depending upon a question of fact which has not been determined "by the lower Court or admitted by both parties. It is very doubt-"ful whether, if the fact appeared, it would lie, unless the error in "procedure might have affected the merits" (*h*). In many instances

(*a*) Kishen Chunder Ghose *v.* Musst. Ashoorun, Marsh., 647.

(*b*) Mukvana Saluji Kesraji *v.* Rajsanji Jalamsanji, 2 Bom. H. C. R., 162.

(*c*) 1 B. and P., 128.

(*d*) 10 East, 508.

(*e*) Mozaffur Ally *v.* Grish Chandra Das, 1 B. L. R., A. C., 25; Kedarnath Mookerjee *v.* Mathooranath Dutt, *ib.*, 17; S. C., 10 Suth. W. R., 59.

(*f*) Beechoo Misser *v.* Ramadheen Misser, Suth. W. R., 1864, p. 212; Brindabun Chunder Sircar Chowdhry *v.* Clarke, *ib.*, Rent Suits, 9; Kashee Chunder Thurkobhusan *v.* Kally Prosunno Chowdhry, 9 *ib.*, 452, Bayley and Phear, JJ.; Kedarnath Mookerjee *v.* Mothuranath Dutt, 1 B. L. R., A. C., 17; 10 Suth. W. R., 59, Loch and Glover, JJ.

(*g*) Kistomohun Kurmocar *v.* Nayan Tara Dossea, 10 Suth. W. R., 369; Ramdhone Doss *v.* Ramrutton Dutt, 10 *ib.*, 389.

(*h*) Baboo Poolin Behary Sein *v.* Luteefoonissa Beebee, Marsh., 107; S. C., Suth. W. R., F. B., 31; *nom.* Luteefoonissa Beebee *v.* Baboo Polin Beharee Sein; Naimudda Jowardar *v.* Moncrieff, 3 B. L. R., 283.

such an objection has been, however, allowed (*a*). The decision of Peacock, C J., was approved and acted upon in a recent case (*b*).

On the other hand it has been held, that where an objection goes to the root of the case, and affects the jurisdiction of the Courts to entertain the suit at all, it can be taken and ought to be decided by the Court, even if not put forward, until the case reaches the Court of second appeal, as where the plaintiff, on the face of the proceedings, had no cause of action, and the objection was taken first in the Court of second appeal, it was allowed (*c*); and even although it is not mentioned in the petition of appeal (*d*). Other objections have been allowed to be taken for the first time in a second appeal, as for instance, an objection of the insufficiency of evidence to fulfil the requirements of a special law relating to the enhancement of rent (*e*).

Where the plaintiff had sued for a kabuliat at a certain rate of rent, and the Court of original jurisdiction found that he had not made out his case for a kabuliat at the rates he claimed, but gave him a decree for one at the old rates, which were less than the rate he claimed,—it was stated by Mr Justice Phear that, "in a "case lately determined by the Full Bench of this Court, it was "expressly held that where a plaintiff claims of the defendant a "kabuliat at a specified rent, his suit fails and ought to be dis-"missed, if he does not succeed in establishing his right to a kabuliat "at that specified rate" This objection was not, however, taken in the Court of first instance, but on appeal to the Judge it was made a ground of appeal, and was overruled The defendant then appealed specially to the High Court, and he renewed this objection It was contended, that as the objection had not been taken in the Court of first instance, it ought not to be allowed by the Courts of Appeal. On this point Mr. Justice Phear made the following observations :—

(*a*) Kalli Mohun Chatterjee *v.* Kali Krishna Roy, 2 B L R, Apx., 39; see also Bidhobuddun Mookerjee *v* Doorga Monee Debia, 2 Suth W R, 157; Bhai Trimbakji *v.* Tomuvalad Kutur, 2 Bom. H. C Rep, 200, where the plaintiff took the objection; but see Ramanund Roy Chowdhry *v.* Umokalee Debee, 2 Suth W. R., 257.

(*b*) Court of Wards *v* Musst Roop Moonjuree Kooer, 25 Suth W R., 260, Garth, C J, and Glover, J.

(*c*) Sheik Jan Ali *v* Khonkar Abdur Kuhma, 6 B L R, 154, Bayley and Paul, JJ; Chowdhry Wahid Ali *v.* Mullick Inayet Ali, *ib*, 52, Bayley and Kemp, JJ

(*d*) Motilal Ramdas *v.* Jamnadas Javerdas, 2 Bom H C. Rep., A. C., 40, Couch, C J

(*e*) Bhuban Chandra Shome *v* Ramdayal Shamanta, 5 B L R, Apx, 62, L. S. Jackson and Glover, JJ.

"After a little consideration, we are of opinion that an objection of "this kind, which is founded upon law only, may be made by a party "to the suit in the Court of Appeal, although it has not been made "in the Court below. Perhaps it might be said, generally, that "points which have not been taken in the Court below ought not to "be taken in a Court of Appeal; and, at any rate, whenever so taken, "if they are founded in any material degree upon matters of fact, "the Court of Appeal would probably do right, as a general rule, "to refuse to entertain them, because it can never be known with "certainty whether, if the point had been taken in the Court of "first instance, and the opposite party had been allowed to bring "forward evidence which might have seemed to him necessary in "consequence, the facts before the Court would not have assumed "a different aspect. As regards a pure point of law, no doubt, this "argument does not apply; but still it is inconvenient, to say the "least of it, both to the Court and to the parties, that a point of "law should be sprung in a Court of Appeal which had not been "received and discussed before the Court, &c.; and we do not think "that an Appeal Court would act improperly if it declined to listen "to an objection of this suit so made before it. However, in "the present case, the Judge has, as we have already mention-"ed, entertained the objection of the special appellant, and given a "judicial decision upon it; and we think that there is certainly "nothing necessarily wrong on the part of a Court of Appeal in "entertaining a point of law, for the first time, which has not been "raised in the Court below. This being so, we cannot see how we "can avoid giving liberty to the special appellant to object in law "before us to the decision which the Judge has pronounced." And the decision of the lower Court of Appeal was reversed (*a*).

In another case (*b*) a similar plea was not allowed, but it had not been taken either in the Court of original jurisdiction or in the lower Court of Appeal. The appellant contended, on the authority of *Shama Churn Chowdhry* v. *Bindabun Chunder Roy* (*c*), that the Court of special appeal was bound to follow the new exposition of the law with regard to suits of this description, as laid down in a case (apparently unreported) (*d*); and

(*a*) Deen Dyal Puramanick *v.* Surendurnath Roy, 10 Suth. W. R., 77; S. C., 3 B. L. R., A. C., 78 note, Phear and Robhouse, JJ.

(*b*) Nizamat Ali *v.* Ramesh Chandra Roy, 3 B. L. R., A. C., 78.

(*c*) 5 Wym., 141.

(*d*) Golam Mahomed *v.* Asmut Alee Khan, March 19, 1868.

with regard to this case, which is apparently the same as was referred to by Mr. Justice Phear in the judgment in the case already referred to, Mr. Justice Mitter observed, that it did not decide "that in every suit for a kabuliat, in which the plaintiff has "failed to prove the specific rate claimed by him, the Court is "bound, as a matter of course, to dismiss the suit at once. All "that has been laid down by that decision is, that a suit for a kabu-"liat being in the nature of a declaratory suit, the Court would be "justified in dismissing it, if it finds that a plaintiff has failed to "prove his right to obtain a kabuliat upon the precise terms which "he sought to impose upon the defendant."

The award of costs or interest is a matter in the discretion of the Judge, and a second appeal is not allowed where the Judge has exercised his discretion in a proper manner. In such a case, indeed, no appeal is allowable at all (*a*). But where the Court exercises its discretion in a manner contrary to law, even a second appeal will lie; thus, if the Court allowed the costs of more pleaders or on a higher scale than the law allows, a second appeal will lie (*b*). The fact that documentary evidence has been admitted although the document was improperly stamped, is no ground for an appeal from an appellate decree (*c*), nor is the refusal of the lower Appellate Court to take additional evidence (*d*).

The admission of an appeal after time, without proper legal reasons, is a matter for what is now an appeal from an appellate decree (*e*).

(*a*) Futeek Parooee *v.* Mohender Nath Mozoomdar, I. L. R., 1 Cal., 385, Markby and Mitter, JJ.; Amirsaheb Hafizulla *v.* Jamshedji Rustamjee, 4 Bom. H. C., A. C., 41, Couch, C. J., and Newton, J.; Desaji Lakhmaji *v.* Bhavanidas Narotamdas, 8 *ib.*, 100, Melvill and Kemball, JJ., Jan. 24, 1871; Sri Dantuluri Naryana Gajapati Razu Garu *v.* Surappa Razu, 3 Mad. H. C., 113, Innes and Collett, JJ., June 23, 1866; Musst. Bibee Mooseehun *v.* Musst. Bibee Munoorun, 24 Suth. W. R., 69, Phear and Morris, JJ., May 15, 1875; Ooma Churn *v.* Grish Chunder Banerjee, 25 *ib.*, 22, L. S. Jackson and McDonell, JJ.

(*b*) Gridhari Lal Roy *v.* Sundar Bibi, B. L. R., F. B., 496; Achumbit Singh *v.* Kunhya Lal Mohajun, 7 Suth. W. R., 208; Amirsaheb Hafizulla *v.* Jamshedji Rustamji, 4 Bom. H. C. Rep., A. C., 41, Couch, C. J., and Newton, J.; Ramchandra Goswami *v.* Matilal Bagchi, 2 B. L R., A. C, 168, Peacock, C. J., and Mitter, J.

(*c*) Goluck Chunder Sein *v.* Sheikh Khan Mahomed Khansamah, 3 Suth. W. R., Act X Cases, 158.

(*d*) Kulpo Singh *v.* Thakoor Singh, 15 Suth. W. R, 429.

(*e*) Mouri Bewa *v.* Surendra Nath Roy, 2 B. L. R., A. C., 104 *note*, Phear and Hobhouse, JJ.; and Dhurm Dos *v.* Mahomed Aman, S. D. A., N. W. P., 1864, p. 134, F. B.

Where the Court below has avowedly abstained from examining the plaintiff's claim of title to land (the subject of the suit), on the ground that the plaintiff was a party to the deed under which the defendant claimed, when the deed in fact showed on the face of it that he was no party to it, this was held to be such a "defect in law in the procedure or investigation of the case" as to warrant a further appeal (*a*). The misconstruction of a document, which is the foundation of the suit, being in the nature of a contract or a document of title, is allowed to be a ground for special appeal although not named in this section. But a special appeal does not lie because of a mistake as to the meaning of some portion of the evidence which is in writing, if it is connected with other evidence affecting its construction (*b*). If the decree of the Court below, as explained by the judgment, is erroneous, there can be a further appeal (*c*). But s. 206, *ante*, and s. 582, give another remedy, namely, an application to the Court which passed the decree to amend it and make it conform to the judgment.

The grounds of second appeal should be clear and distinct, showing to the respondent what points he has to meet (*d*). A respondent may file a cross-appeal when the appellant has appealed on a point of law specially (*e*).

The Court may convert an appeal on points of law into a general appeal on law and fact, as for instance, where it has remanded the case and fresh evidence has been taken. To justify a remand in such a case, it must be shown that the Court has committed some error in law, or that the case comes in some way under this section (*f*). The words "may have produced," etc., in the last clause of this section, do not imply by some possibility, but mean may not improbably have produced, etc. (*g*). A misjoinder of parties, not producing substantial injury, is no ground for

(*a*) Abdooz Salam *v.* Musst. Imrul-oonissa Bebee, Marsh., 6; Lullomull *v.* Gunga Ram, S. D. A., N. W. P., 1861, p. 4.

(*b*) Nowbut Singh *v.* Chutter Dharee Singh, 19 Suth. W. R., 223, Couch, C. J., and Glover, J.

(*c*) Maharanee Inderjeet Koonwar *v.* Chokew Sahoo, Marsh., 301.

(*d*) Nand Kishore Dass Mohant *v.* Ram Kalp Roy, 6 B. L. R., Apx., 49.

(*e*) Ishore Ghose *v.* Hills, Hay, 350; S. C., Suth W. R., 1864, F. B., 48; Narayan Ayyar *v.* Lakshmi Ammal, 3 Mad. H. C. Rep., 216, Innes and Collett, JJ, overruling Makudu Ravullan *v.* Mastan Sahib, 1 *ib.*, 102, Strange and Phillips, JJ.

(*f*) Hurish Chunder Shaha *v.* Hurish Chunder Paul, 25 Suth. W. R., 325.

(*g*) Ram Chunder Chowdhry *v.* Kassee Mohun, 21 Suth. W. R., 57, Kemp and Ainslie, JJ.

an appeal of this nature (*a*). As a general rule, all the witnesses brought forward by a party ought to be examined; but when an objection is made on an appeal of this nature that the Judge below has omitted to examine witnesses, it ought to be shown that the evidence of those witnesses would have been material to the case (*b*). The omission on the part of the first Court to frame issues, may be a material error which may be rectified on special appeal (*c*). The objection of non-joinder of parties cannot be made a ground of special appeal, unless the want of parties has caused a wrong decision to be given (*d*).

Second appeal only on grounds mentioned in section 584.

585. No second appeal shall lie except on the grounds mentioned in section 584.

This corresponds with the last clause of s. 372 of Act VIII of 1859, excluding special appeals on grounds other than those specified.

No second appeal in certain suits.

586. No second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

This corresponds with Act XXIII of 1861, s. 27, omitting the words "from any decision, &c., passed, &c., after the passing of the Act."

It has been held that the words of this section are absolute as to the nature of the suit in respect of which a special appeal is forbidden, and do not refer to the Court in which the suit may have been actually tried; consequently, where a suit was brought for the value of the materials of a house, with a claim for detention of them, and for a declaration of the plaintiff's title to the house, and the whole claim did not exceed Rs. 500, but the suit was tried by the ordinary Civil Court, and not the Small Cause Court, the High Court, considering that the claim in respect of title was mere sur-

(*a*) Syad Mirza Gulam Nabi *v.* Kharanbibi, 6 Bom. H. C. A. C. Rep., 177, Couch, C. J., and Gibbs, J.

(*b*) Nilkanth Surmah *v.* Soosela Debia, 6 Suth. W. R., 324, Peacock, C. J., and L. S. Jackson, J.

(*c*) Sheo Sahoy Singh *v.* Bechun Singh, 22 Suth. W. R., 31, Phear and Morris, JJ.

(*d*) Heera Lall Chowdhry *v.* Bistoo Lall Chowdhry, 22 Suth. W. R., 288, Couch, C. J., and Ainslie, J.

plusage and unmeaning, and that the suit was therefore cognizable by a Small Cause Court, held, that a special appeal was barred (*a*). These cases appear to be at variance with a more recent decision, where a suit was brought in a Civil Court, which should have been brought in a Small Cause Court, and it was held that a special appeal would lie (*b*). In this last case the Court held that this clause applies only where a suit, valued under Rs. 500, has been brought in an ordinary Civil Court in a district where no Small Cause Court is established, and that where a Small Cause Court has been established, that Court alone has jurisdiction, and, if the suit is instituted wrongly in the ordinary Civil Court, a special appeal lies. In another case it was held that where a suit which was cognizable by the Small Cause Court was instituted in the Court of the Moonsiff who gave a decree, there was an appeal to the Judge, who reversed the decree. As the Small Cause Court has, under Act XI of 1865, s. 12, exclusive jurisdiction in such a case, and as Act XXIII of 1861, s. 27, forbid a special appeal, it was held that the High Court will set aside the proceedings of the lower Courts on an application under 24 and 25 Vict., c. 104, s. 15 (*c*). The Court will not, however, treat the special appeal as such an application (*d*). A suit for money due on a contract is cognizable by a Small Cause Court, although it may be necessary to go into accounts (*e*). A second appeal will not lie in a suit which was instituted to recover damages for the value of crops, the amount being within the jurisdiction of the Small Cause Court, notwithstanding that the case involved incidentally, and for the purpose of ascertaining the right to the crops only, a question of title (*f*). Where, however, a

(*a*) Kishub Chunder Shaha *v.* Brommo Moyee Dabea, 1 Suth. W. R., 35, Bayley and Phear, JJ.; Ramdyal Gangooly *v.* Hurrosoonduree Dossia, 10 Suth. W. R., 272, L. S. Jackson and Dwarkanath Mitter, JJ.

(*b*) Debukee Nundun Sen *v.* Mudhoo Muttee Gooptee, I. L. R., 1 Cal., 126; S. C., 24 Suth. W. R., 478, Macpherson and Morris, JJ.

(*c*) Tarini Charan Mookerjee *v.* Raja Purna Chandra Roy, 6 B. L. R., 717, E. Jackson and Mitter, JJ.

(*d*) Soonut Dass *v.* Bhoban Lall, 20 Suth. W. R., 478, Phear and Morris, JJ.

(*e*) Jogul Kishore Roy *v.* Rughoo Nath Seal, 20 Suth. W. R, 4, L. S. Jackson and Dwarkanath Mitter, JJ., and Prosuno Chunder Roy *v.* Sreenath Sreemanee, 7 *ib.*, 422, L. S. Jackson and Markby, JJ.; but see Krishna Kinkur Roy *v.* Madhub Chunder Chuckerbutty, 21 *ib.*, 283, Kemp and Glover, JJ.

(*f*) Hedaetoollah *v.* Shaikh Karloo, 7 Suth. W. R, 73, Bayley and Shumboonath Pundit, JJ.; Ramdyal Gangooly *v* Hurrosoonduree Dossia, 10 *ib.*, 272, L. S. Jackson and Dwarkanath Mitter, JJ.

suit appears from the plaint to be one of the nature cognizable in the Small Cause Court, but a *bonâ fide* question of title has been gone into and decided by the District Court, a special appeal will lie (*a*). So in a case where the claim is under Rs. 500, if the issues raised affect the question of title, a special appeal is not barred *quoad* those issues (*b*). Nor would a special appeal be allowed in execution proceedings arising out of a suit of the kind abovementioned (*c*); and now, under s. 588, there is no second appeal in execution proceedings. Where the suit was on a bond for under 500 rupees, and the decree passed in pursuance of a compromise was, that the defendant should make over to the plaintiff a piece of land; and in execution of the decree disputes arose, and the defendant filed a special appeal, contending that the nature of the suit was changed, and that it was no longer a suit cognizable by the Small Cause Court,—it was held, that the nature of the suit was unchanged, and that there was no special appeal (*d*).

A sum of money was stolen from the Judge's Court at Tipperah while A. was the nazir. He paid the amount to the Government, and died, leaving B. his heir. B. sued the Government for a refund of the money, alleging that no negligence of A. had been shown, and that the money was in the custody of the guards appointed by the Government. It was held that, as this suit was cognizable by the Small Cause Court, no special appeal lay to the High Court (*e*). Where the subject of an award is, as to its nature and value, cognizable by the Court of Small Causes, no special appeal will lie to the High Court against the decree of an ordinary Civil Court in respect of such an award (*f*). A suit to recover a share of malikana, which the defendant had realized from the Collector, is cognizable by the Small Cause Court, and no special appeal lies against the decree in such a suit (*g*).

(*a*) Dikshit *v.* Dikshit, 2 Bom. H. C. Rep., 4, Arnould, C. J., Forbes and Newton, JJ.; Kisandram *v.* Jethiram, 5 *ib.*, App., 57, Newton and Gibbs, JJ.

(*b*) Bhoop Narain Sahoo *v.* Meer Mahomed Hossein, 1 Wym. Rep., 6; S. C., 4 Suth. W. R., 60; but see Grant *v.* Modhoo Soodhun Singh, 10 Suth. W. R., 79.

(*c*) Indro Chunder Roy *v.* Siddhee Gopal Misser, 4 Wym. Rep., 73; reported in 8 Suth. W. R., 113, as Anundchunder, &c., L. S. Jackson and Hobhouse, JJ.

(*d*) Srimati Talan Bibi *v.* S. M. Tenu Bibi, 6 B. L. R., Apx., 82, Kemp and Glover, JJ.

(*e*) Collector of Tipperah *v.* Musst. Mafizunnissa Bibi, 4 B. L. R., Apx., 46.

(*f*) Musst. Banu *v.* Narayan Sahu, 4 B. L. R, Apx., 82.

(*g*) Lasmani Debia *v.* Mahommed Hafezulla, 3 B. L. R., Apx., 96.

A suit brought to enforce a debt or demand not exceeding Rs. 500, which is secured upon, and must in law be primarily satisfied out of, immoveable property, is not a suit of the nature cognizable in the Court of Small Causes under this section, so as to exclude a special appeal, though the plaint on the face of it seeks recovery in the alternative, either from the mortgagor personally, or from the mortgaged property (*a*). But it has been held that a second appeal does not lie in a suit for damages under the Small Cause Court limit, whether the damages are on account of moveable or immoveable property (*b*). Suits on bonds for which lands are hypothecated as security are not of the description of cases cognizable by Courts of Small Causes, and therefore special appeals from decisions of the lower Courts are not barred by this section (*c*). A case in which a zemindar sues a putneedar for dâk expenses, according to his putnee jumma, is a case of a nature cognizable by a Court of Small Causes, and no special appeal will lie (*d*). It has been held that a suit for maintenance brought by a Hindu widow, if under the value, lies in a Small Cause Court (*e*); but this opinion has not been adopted by the Calcutta High Court (*f*). A suit for an annual allowance for the maintenance of a religious endowment is not cognizable by the Small Cause Court (*g*). If the lower Court has wrongly decided that the suit will not lie in any Civil Court, a special appeal is not barred by this section (*h*). Where the damages claimed in a suit exceeded Rs. 500, but the Court gave the plaintiff less than Rs. 500, it was held, that the right of appeal was not taken away by this

(*a*) Atmaram Ballal Kagje *v.* Sadashiv Hari Mahajani, 2 Bom. H. C. Rep., 1.

(*b*) Bheenuck Lall Mahton *v.* Rung Lall Mahtoon, 11 Suth. W. R., 369, Kemp and Glover, JJ.

(*c*) Mirza Roohoollah Beg *v.* Sahai Shaoo, S. D. A., N. W. P., 1863, p. 349

(*d*) Maharajah Dheeraj Mahtab Chund Bahadoor *v.* Radha Binode Chowdhry, 5 Wym. Rep., 33, Seton-Karr and Macpherson, JJ.; S. C., 8 Suth. W. R., 517.

(*e*) Ramchandra Dikshit *v.* Savitribai, 4 Bom. H. C. Rep., App., 73, Couch, C. J., and Newton, J.; Judal Kom Ranchod Mulji *v.* Hira Malji, same Judges, *ib.*, 75.

(*f*) Nobin Kali Debea *v.* Bindoobashiny Debea, 1 Wym. S. C. C. Ref., 13, Peacock, C. J., and L. S. Jackson, J.; Bhugwan Chunder Bose *v.* Bindoo Bashinee Dossee, 6 Suth. W. R., 286; Kaminee Dossee *v.* Bishenath Shaha, 9 *ib.*, 214; Musst. Heema Kooeree *v.* Ajoodhya Pershad, 24 *ib.*, 474.

(*g*) Keshavbhat bin Ganeshbhat *v.* Bhagirathibai Kom Narayanbhat, 3 Bom. H. C. Rep., A. C., 75, Turner and Gibbs, JJ.

(*h*) Shaik Gurceboollah *v.* Shaik Syefoollah, 7 Suth. W. R, 41, Bayley and Sumbhoonath Pundit, JJ.

section (*a*). A joint sharer in a revenue-paying estate, who has paid to Government the revenue due upon the whole estate, cannot sue his co-sharer in a Small Cause Court for contribution, where there is no contract for repayment (*b*). A suit to establish a surety's liability on account of arrears of rent due from a putneedar, where the non-payment of rent by the putneedar would have to be established, is not a suit cognizable by a Small Cause Court, and a special appeal is not barred (*c*). A suit to recover collections under a contract is a suit in which an appeal may be barred under this section (*d*). The provisions of this section are not affected by cl. 16 of the Charter of the High Court at Fort William, 1865 (*e*).

Provisions as to second appeals.

587. The provisions contained in Chapter XLI shall apply as far as may be to appeals under this chapter, and to the execution of decrees passed in such appeals.

This follows the last clause of s. 25 of Act XXIII of 1861, which was substituted for s. 375 of Act VIII of 1859. The meaning of the application of the provisions of chap. xli to these appeals is, that the procedure is to apply to them when they are admitted and registered, not that the rules as to the admission and registration of first appeals are to apply to appeals from appellate decrees; in that respect such appeals must be governed by the rules laid down in this chapter (*f*).

It was held by Peacock, C. J., Bayley and Kemp, JJ., in one case (*g*), that in a second appeal it was competent for the respondent to make a cross-objection. This was not the practice in

(*a*) Rajah Neelmonee Singh Deo *v.* Gordon, Stuart, & Co., 1 In. Jur., N. S., 356.

(*b*) Ram Buksh Chattangoe *v.* Modhoo Soodun Paul Chowdhry, 3 Wym. Rep., S. C. C. Ref., 23, Peacock, C. J., Trevor, Loch, Kemp, and Macpherson, JJ.; Tamizuddin Mirdha *v.* Gaffur Khan, 7 B. L. R., Apx., 40 (a suit for contribution); Ram Pearee Debia *v.* Dinonath Mookerjee, 10 Suth. W. R. 375, Bayley and Macpherson, JJ. (a suit for mesne profits).

(*c*) Maharajah Mahtab Chund Bahadoor *v.* Brojonath Mitter, 8 Suth. W. R., 111, L. S. Jackson and Hobhouse, JJ.

(*d*) Shah Ali Ahmed *v.* Oodhraj Ram, 10 Suth. W. R, 79, L. S. Jackson and Glover, JJ.

(*e*) Syam Yha *v.* Sheikh Borain, 3 Wym. Rep., 16.

(*f*) Chinnappa Chetti *v.* Nadaraja Pillay, 6 Mad. H. C. Rep., 1 Scotland, C. J., and Innes, J.

(*g*) Hills *v.* Isshore Ghose, Marsh., 151, Peacock, C. J., Bayley and Kemp, JJ.; S. C., Suth. F. B. Rep., 1864, p. 48.

Madras (*a*); and Phear, J., seemed to doubt if it could be done (*b*). The Madras practice is, however, now altered (*c*). It seems clear that such cross-objections could be taken under this Act.

The Court of second appeal has to deal with points of law and defects of procedure which have produced error or defect in the decision of the case upon the merits; and although it has all the powers of a Court of first appeal, and can take further evidence or send the case down for further evidence to be taken or direct an issue (*d*), a Court of second appeal will certainly feel less willing to do so than a Court of first appeal.

CHAPTER XLIII.

OF APPEALS FROM ORDERS.

Orders appealable.

588. An appeal shall lie from the following orders under this Code and from no other such orders:—

(*a*) orders under section 20, staying proceedings in a suit,

(*b*) orders under section 32, striking out or adding the name of any person as plaintiff or defendant,

(*c*) orders under section 44, adding a cause of action,

(*d*) orders under section 47, excluding a cause of action,

(*e*) orders rejecting or returning plaints under section 53, clause (*d*), or section 54, clauses (*b*) and (*d*), or section 57, clauses (*b*) and (*c*),

(*f*) orders rejecting applications under section 102 (in cases open to appeal) for an order to set aside the dismissal of a suit,

(*a*) Makudu Ravullan *v.* Mastan Sahib, 1 Mad., 102, Strange and Phillips, JJ.

(*b*) Auhin *v.* Ahmed Mahomed, 1 In. Jur., N. S., 243, Peacock, C. J., and Phear, J.

(*c*) Narayan Ayyar *v.* LakshmiAmmal, 3 Mad., 216, Innes and Collett, JJ.

(*d*) Nilatatohi *v.* Venkatachala Mudali, 1 Mad. H. C. Rep., 131, Scotland, C. J., and Frere, J.; Makudu Ravullan *v.* Mastan Sahib, *ib.*, 102; but see Kebul Kishen Muzoomdar *v.* Musst. Ambala, 7 Suth. W. R., 326, Seton-Karr and L. S. Jackson, JJ.

(*g*) orders under section 120, where a party fails to appear in person,

(*h*) orders under section 168 for attachment of property,

(*i*) orders under section 176, where a party refuses to give evidence or produce a document called for by the Court,

(*j*) orders under section 244 as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of a suit,

(*k*) orders under section 258 compelling decree-holders to certify,

(*l*) orders under section 261 as to objections to draft-conveyances or draft-endorsements,

(*m*) orders under section 312 for confirming or setting aside a sale,

(*n*) orders in insolvency matters under section 351, 352, 353 or 357,

(*o*) orders rejecting applications under section 370 for dismissal of the suit,

(*p*) orders disallowing objections under section 372,

(*q*) orders as to interpleader-suits under section 473, 475, or 476,

(*r*) orders under section 479, 480, 481, 485, 492, 493, 496, 503,

(*s*) orders under section 514 superseding an arbitration,

(*t*) orders under section 518 modifying an award,

(*u*) orders under any of the provisions of this Code imposing fines, or for the imprisonment of any person, except when such imprisonment is in execution of a decree,

(*v*) refusals under section 558 to re-admit, or under section 560 to re-hear, an appeal,

(*w*) orders under section 562 remanding a case.

The orders passed in appeals under this section shall be final.

This section, which is new, so far as it particularizes those orders

which are not to be appealable, is plain, and appears to be easy of application. There are still, however, many cases in which orders of the greatest moment are still left unappealable, thus it has been held, that s. 364 of Act VIII of 1859 prohibited an appeal from an order under s. 210 of the same Act, substituting the legal representative of a deceased judgment-debtor for the judgment-debtor. Section 234 of this Act corresponds with s. 210 of Act VIII, and there is still no appeal (*a*). Cl. (j), however, creates a difficulty which can only be removed by a series of decisions or by legislation. This section has already been the subject of discussion in some cases which have been referred to Full Benches in Calcutta and in the North-West Provinces, with reference to certain appeals from orders which would have been appealable under the old Code, but which were not appealed from until after it was repealed on the 1st of October, 1877, when the new Code came into operation.

In the first of these cases (*b*), an application was made under s. 208 of Act VIII of 1859 by the purchaser of a decree to be allowed to execute it. The application was rejected by the District Judge on the 17th of August, 1877. The purchaser appealed to the High Court on the 12th of November, 1877. There was no appeal under s. 208 of Act VIII of 1859.

The second case (*c*) was an application to execute a decree for possession of land and costs. The Subordinate Judge, on the 17th March, 1877, held, that the execution was barred by limitation, and rejected the application. The District Judge, on the 23rd August, 1877, held, that the execution was not barred, and ordered execution to issue. On the 19th November, 1877, the judgment-debtor presented an appeal to the High Court.

The third case (*d*) was an application to execute a decree, by which it was ordered that the judgment-debtor should execute a lease. The judgment-debtor objected that she ought not to be made to execute the lease, and that execution of the decree was barred by limitation. The Subordinate Judge, on the 15th September, 1877, overruled these objections, and ordered the lease to be executed. An appeal to the High Court was presented on the 2nd January, 1878.

(*a*) Pogose *v.* Beebee Dishkoon Waris Calchuck, 2 Cal., 278, Markby and Prinsep, JJ.

(*b*) Surendro Nath Pal Chowdhry *v.* Chunder Cumar Roy, No. 323 of 1877.

(*c*) No. 360 of 1877.

(*d*) Raj Cumari Dabi Chowdhrain *v.* Missuram Mondul, No. 2 of 1878.

In the fourth case (*a*) the decree-holder had obtained a decree for rent: the decree-holder desired to attach the moveable property of the judgment-debtor. The judgment-debtor insisted that the decree-holder was bound first to execute the decree against the tenure. The Munsiff thought the decree-holder was bound to take that course, and, on 17th March, 1877, refused to execute the decree against the moveable property of the judgment-debtor. The decree-holder, on the 6th of April, 1877, appealed to the District Judge, who, on the 5th October, 1877, set aside the Munsiff's order and ordered execution against the moveable property to issue. On the 4th January, 1878, the judgment-debtor presented a petition of appeal to the High Court.

In the fifth case (*b*) certain persons presented a petition to a Munsiff under s. 119 of Act VIII of 1859, alleging that there had been an *ex parte* decree against them, and praying that this decree should be set aside and the suit heard. The Munsiff, on the 19th June, 1877, rejected the application. The petitioners appealed, and the Officiating District Judge, on the 27th September, 1877, rejected the appeal. The petitioners then, on the 31st January, 1878, presented a second appeal to the High Court. An appeal against the order of the lower Appellate Court lay to the High Court under ss. 119 and 372 of the former Code of Procedure.

In the sixth case (*c*) a decree-holder applied for execution of a decree obtained *ex parte*. The judgment-debtor then put in an application under s. 119, praying that the judgment should be set aside and the case heard. On this he was summoned by the Subordinate Judge to appear personally. He did not attend, and having given no evidence in support of his application, it was dismissed on the 15th March, 1876. The judgment-debtor, on the 26th April, 1876, appealed, and on the 3rd October, 1877, the Officiating District Judge dismissed the appeal. On the 31st January, 1878, the judgment-debtor presented a second appeal to the High Court. This appeal would lie under the provisions of ss. 119 and 372 of Act VIII of 1859.

In the seventh case (*d*) the decree-holder had obtained a decree for possession, mesne profits, and costs. He applied for execution,

(*a*) Haran Chunder Chuckerbuti *v.* Rakhal Chunder Roy Chowdhry and others, No. 26 of 1878.

(*b*) Omur Ali Khan *v* Mahomed Sabair, No. 27 of 1878.

(*c*) Khundkar Mahomed Towsical Islam *v.* Amirunnissa Bibi, No 30 of 1878.

(*d*) Saharam Roy *v.* Sirmonto Chuckerbutti, No. 33 of 1878.

and the Subordinate Judge, on the 5th August, 1876, ordered that he should recover mesne profits from Srabun, 1269, to the end of 1280, and certain costs, which were specified. The judgment-debtor, on the 10th August, 1877, appealed to the District Judge, complaining against the order of the Subordinate Judge both as to mesne profits and costs. The District Judge, on the 30th November, 1877, dismissed the appeal. On the 31st January, 1878, the judgment-debtor appealed to the High Court. This appeal would lie under the provisions of s. 11 of Act XXIII of 1861.

In the eighth case (*a*) the decree-holder had obtained a rent-decree for money on the 16th September, 1871. On the 18th July, 1876, he applied for execution. The Subordinate Judge, on the 14th December, 1876, held that execution was barred by s. 58 of Act VIII of 1869 (B. C.) On the 13th January, 1877, the execution creditor appealed to the District Judge, who, on the 15th December, 1877, reversed the order of the Subordinate Judge and ordered execution to issue. The judgment-debtor, on the 25th of February, 1878, presented an appeal to the High Court.

All the Judges of the Full Bench in Calcutta came to the conclusion that there was no appeal in the first case, but that in all the rest there was an appeal; but, as they differed as to the grounds upon which they came to this conclusion, it will be convenient to take first the judgments of the three learned Judges—Markby, Ainslie, and Romesh Chunder Mitter, JJ.—who agreed in giving the same reason, namely, that cl. 16 of the Letters Patent of the High Court of 1865, which provides that this Court "shall be a Court of "Appeal from the Civil Courts of the Bengal Division of the Presi-"dency of Fort William, and from all other Courts subject to its "superintendence, and shall exercise appellate jurisdiction in "such cases as are subject to appeal to the said High Court by "virtue of any laws or regulations now in force," enabled the High Court to entertain appeals in all the cases except the first, because Act XXIII of 1861, s. 11, which was in force when this Charter was passed, gave an appeal. Their Lordships observed that "no doubt the Supreme Legislature has power, under s. 9 of "the 24 and 25 Vict., c. 104, to take away from this Court the "powers conferred by cl. 16 of the Letters Patent; and by s. 588 "of the new Code it has taken away a large portion of those "powers, but, in our opinion, not in this instance. It is said that

(*a*) Srinath Banerji *v.* Troilokho Nath Biswas, No. 48 of 1878.

"cl. 16 of the Letters Patent only gives the power to hear appeals, "whereas Act XXIII of 1861, which gives the right of appeal, is "repealed, and that, therefore, the appeal no longer lies. With "great deference it seems to us that so long as the power to hear "the appeal remains, that is sufficient, and that the power of a "Court to hear an appeal carries with it, as a necessary conse-"quence, the right to an appellant to present to that Court a "petition of appeal. If, as very often happens, the power to hear "the appeal and the right of appeal is given by one and the same "provision, then the repeal of that provision would destroy the "appeal altogether; but here there are two wholly independent "provisions, one of which is untouched, and which is alone sufficient "to enable us to hear this appeal." Markby, J., subsequently, for the sake of uniformity of practice, adopted the view taken by L. S. Jackson, J., in this case (*a*).

L. S. Jackson, J., adverted to the fact that the difficulty in these cases arose from the repeal of the Act under which they would have been cognizable without the simultaneous enactment of any provision, saving the right of appeal, and that it had been proposed to avoid this difficulty by treating the word "decree" (see the definition in s. 2) as including orders of this nature, and stated that he was of opinion that the word could not be so extended; and that the words "other judicial proceedings," used in s. 2, were those provided for by s. 647, and were outside regular suits.

With regard to s. 3, the word "procedure" was ambiguous, being employed in different senses in this Code; but that in this section it was intended to mean "the rules of practice whereby rights are effectuated through the successful application of proper remedies," and that the last clause of s. 3 taken by itself had no effect upon the question, but relates only to the application of the rules of practice contained in the Code.

His Lordship dissented from the view taken by Markby, Ainslie, and Romesh Chunder Mitter, JJ., that the power of hearing appeals given to the High Court was restricted to those cases in which an appeal is allowed by any law in force; that the words "now in force" had not the effect of maintaining an appeal when the law in force relating to appeals had been rescinded; and that the power of the High Court to hear appeals from the Civil Courts in the interior

(*a*) Nadir Hossein *v.* Bissen Chand, No. 97 of 1878, Markby and Prinsep, JJ, 28th June, 1878.

(inseparable from the rights of parties to prefer the appeals) is now regulated by Act VI of 1871 (*a*).

His Lordship then went on to say: "In my opinion, however, "we may safely adopt, and for the sake of obviating hardship and "injustice we ought to adopt, the construction which the High "Court of Bombay has put on s. 6 of Act I of 1868 (*b*), and "we ought also to hold that it will cover specific proceedings "taken in execution of a decree which have been commenced "before the Code came into force,—that is, before the repeal "of Act VIII of 1859 became operative. By making this use "of the 6th section of the General Clauses Act, and by taking "the view which I have taken of the effect of s. 3, it seems "to me that all difficulty is avoided. The provisions of the "Code will then have no retrospective effect so as to injure any "right of action or right of appeal existing at the time when the "Code came into effect, at the same time that the procedure as "intended by the Legislature will come into force with all its inci-"dents in every case at the time indicated—that is to say: (1) the "procedure in suits instituted after the Code came into force will be "wholly subject to its provisions; (2) the procedure in suits com-"menced before it came into force and pending at that time will "be regulated by the previous law up to decree, and by the Code "after decree; and (3) the procedure after decree in suits deter-"mined before the Code came into force would thereafter be govern-"ed entirely by the Code as to new proceedings, but not as to "proceedings already commenced, which, according to the view "now suggested, are specially protected by Act I of 1868."

Garth, C. J., held, that the appeal was preserved by the operation of s. 6 of the General Clauses Act, I of 1868, observing that it had been held (*c*), and he agreed in so holding, that a suit is a judicial proceeding, so that the words "any proceedings" used in the 6th section of Act I of 1868, which prescribes that "the repeal of "any Statute, Act or Regulation shall not affect anything done or "any offence committed or any fine or penalty incurred or *any* "*proceedings* commenced before the repealing Act shall have "come into operation," include all proceedings in any suit from

(*a*) See the note to s. 540, *ante*, where the earlier part of this judgment is more fully set out.

(*b*) Ratanchand Shrichand *v.* Hanmantra Sheobakas, 6 Bom. H. C. Rep., 166.

(*c*) In Ratanchand Shrichand *v.* Hanmantra Sheobakas, 6 Bom. H. C. Rep., 166, F. B.

the institution of the suit until its final disposal, and therefore included proceedings in appeal. Section 3 of this Code does not affect this construction, the word "procedure" in this section not meaning the same thing as the word "proceedings" in the other. The proceedings are to go on as before, but the procedure is to be that which is provided by the new Code; if the new Code does not provide any machinery for carrying on those proceedings, they must be carried on by the old. Although the word "procedure" had been used in a wider sense (*a*), the decision in the case in which it was so used did not depend upon that interpretation, and it was a case decided before Act I of 1868 was passed. Section 591 of this Code is prospective. With regard to the first case, Ainslie, J., was of opinion that, although orders under s. 208 of Act VIII of 1859 were not appealable, orders under s. 232 of this Code would, if in favor of the assignee of the decree, be appealable as orders under cl. (j) coupled with cl. (p) of this section.

A similar question arose in the North-Western Provinces, and was decided by a Full Bench of the High Court at Allahabad (*b*). The case was this: A decree-holder applied for execution of his decree by attachment of money deposited in Court to the credit of his judgment-debtor. On June 4th, 1877, the Court of first instance refused attachment, on the ground that the decree directed the sale of certain immoveable property for the satisfaction of the sum decreed, and awarded no other relief. The order of the Court of first instance was affirmed by the lower Appellate Court on the 4th of August, 1877. The new Code of Civil Procedure came into operation on 1st October, 1877. On the 13th November, 1877, the decree-holder applied for the admission of a special appeal from the order of the lower Appellate Court, on the ground that the decree had been misconstrued. The Judge to whom this application was made referred it to the Full Bench. Two questions were raised on this reference: 1*stly*, whether the application was governed by the provisions of the repealed Code of Civil Procedure, or by those of the existing Code; and 2*ndly*, if by those of the existing Code, whether a second appeal lies from the order of the lower Appellate Court. It was held that "the application was governed by the pro-"visions of the repealed Code, but that if it were governed by "the new Code, an appeal would lie from the order." Their

(*a*) Framji Bomanji *v.* Hormasji Barjorji, 3 Bom. H. C. Rep, 49.

(*b*) Thakakur Pershed, appellant.

Lordships held that cl. (j) gave an appeal from all orders which are analogous to a decree in the suit; or, using the words of the definition of the term "decree" in s. 2, from all orders of the Court in which the result of the suit *or other judicial proceeding* is embodied.

Court which shall hear appeals.

589. An appeal from any order specified in section 588, clause (*n*), shall lie to the High Court.

When an appeal from any other order is allowed by this chapter, it shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made, or when such order is passed by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

Procedure in appeals from orders.

590. The procedure prescribed in Chapter XLI shall, so far as may be, apply to appeals from orders under this Code, or under any special or local law in which a different procedure is not provided.

This corresponds with s. 366 of Act VIII of 1859, and, in addition, applies the procedure in appeals laid down in the Code to appeals under any special or local law in which a different procedure is not provided.

No appeal, before decree, from order passed in course of suit; but if decree appealed against, error or defect therein may be set forth.

591. Except as provided in this chapter, no appeal shall lie from any order passed by any Court on the exercise of its original or appellate jurisdiction; but if any decree be appealed against any error, defect or irregularity in any such order affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

There were somewhat similar provisions in the old Code, see Act XVIII of 1859, ss. 363-364, and Act XXIII of 1861, s. 26.

CHAPTER XLIV.

OF PAUPER APPEALS

Who may appeal as pauper.

592. Any person entitled under this Code or any other law to prefer an appeal, who is unable to pay the fee required for the petition of appeal, may, on presenting an application accompanied by a memorandum of appeal, be allowed to appeal as a pauper, subject to the rules contained in Chapters XXVI, XLI, XLII, and XLIII, in so far as those rules are applicable:

Procedure on application for admission of appeal.

Provided that the Court shall reject the application, unless, upon a perusal thereof and of the judgment and decree against which the appeal is made, it sees reason to think that the decree appealed against is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

The first part of this section corresponds with Act VIII of 1859, s. 367; and the second, with s. 370. See chap. xxvi, *ante*, as to pauper suits.

It has been already observed (*a*) that the Code does not provide for a defence in *formâ pauperis*, nor does this section provide for a pauper respondent. But where a pauper respondent files cross-objections under s. 561, he is in fact an appellant, and in that case, it seems that he ought to be allowed to file his cross-appeal as a pauper. The application to appeal as a pauper must be made on a stamp paper of the value of one rupee if it be made to a District Court, and of two rupees if it be made to a Commissioner or a High Court (*b*); and this, apparently, includes an application to a High Court for leave to appeal to England, although such an application was formerly received on unstamped paper (*c*); and in that case the usual security for costs must be given, and the costs of translations must be deposited (*d*). Where both parties appealed, and the plaintiff applied to do so as a pauper,

(*a*) See s. 401, *ante*, and *note*.

(*b*) Act VII of 1870, sched. ii, No. 3.

(*c*) *In re* Jowad Ali, 8 Suth. W. R. 48, L. S. Jackson, J.

(*d*) *Ibid*

and, his petition being rejected, he filed a cross-appeal and urged his objections as a cross-appellant, and the Judge declined to notice them,—it was held that the Judge was wrong in doing so (*a*).

Enquiry into pauperism.

593. The inquiry into the pauperism of the applicant may be made either by the Appellate Court or by the Court against whose decision the appeal is made under the orders of the Appellate Court:

Proviso.

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court against whose decree the appeal is made, no further enquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees special cause to direct such enquiry.

This corresponds with the second part of s. 370 of Act VIII of 1859.

CHAPTER XLV.

OF APPEALS TO THE QUEEN IN COUNCIL.

'Decree' defined.

594. In this chapter, unless there be something repugnant in the subject or context, the expression 'decree' includes also judgment and order.

This section corresponds with Act VI of 1874, s. 3. That Act is repealed by this Code (see sched. i), and this chapter is substituted for it. It gives a definition to the word 'decree' different to the general definition given in s. 2.

When appeals lie to Queen in Council.

595. Subject to such rules as may, from time to time, be made by Her Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained—

an appeal shall lie to Her Majesty in Council

(*a*) from any final decree passed on appeal by a High Court or other Court or final appellate jurisdiction,

(*a*) Bhugwandeen Pattuck *v.* Ramnoo Pattuck, S. D. A., N. W. P., 1864, p. 64.

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(*b*) from any final decree passed by a High Court in the exercise of original civil jurisdiction, and

(*c*) from any decree, when the case, as hereinafter provided, is certified to be a fit one for appeal to Her Majesty in Council.

This corresponds with Act VI of 1874, s. 4. As a decree means an order determining any suit or other judicial proceeding, it follows, that where any such order is made final by this Code and not included in s 597, there is an appeal to the Queen in Council, subject to the rules contained in this chapter, although there is no further appeal in British India. This would, apparently, give an appeal to the Queen in Council from an order passed by an Appellate Court upon an appeal from an appealable order under s. 588, although no further appeal is allowed to the High Court, for, applying the definition in the last section, and treating orders as decrees where they terminate finally any suit or judicial proceeding (see also the definition in s. 2, and the note to s. 588, *ante*), it would include them in the same way as they are included by cl. 39 of the Charter. Section 601 also shows that an appeal may lie to the Privy Council from the decree of a District Court in appeal, when there is no further appeal in India.

An order of a High Court, affirming an order of a lower Court that a decree be executed, is final, so far as the Courts in India are concerned; and, therefore, under this section, is appealable to Her Majesty in Council, although subsequent proceedings may be necessary to carry it out (*a*).

Value of subject-matter.

596. In each of the cases mentioned in clauses (*a*) and (*b*) of section 595,

the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum or upwards,

or the decree must involve, directly or indirectly, some claim or question to, or respecting, property of like amount or value,

(*a*) Sreenarain Mitter, petitioner, Markby, J., 18th Aug., 1874.

and where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law.

This corresponds with Act VI of 1874, s. 5. It has been decided upon the 39th clause of the Charter of the High Court,—which provides that the appeal to the Privy Council is to be only when "the sum or matter in issue is of the amount or value of "not less than 10,000 rupees, or that such judgment, decree, or order "shall involve, directly or indirectly, some claim, demand or ques-"tion to or respecting property amounting to or of the value of "not less than 10,000 rupees,"—that the High Court may take into consideration the fact that the property has increased in value since the commencement of the suit (*a*); and it appears that the High Court is not bound by the value which has been fixed for the purposes of the stamp on the plaint, but may enquire into the actual value (*b*); at any rate the Judicial Committee would give leave to appeal (*c*); and this of course could be done whether the case come up from a Chartered High Court, or from a Court whose decree was final under this Code. The application for leave to appeal ought to be made to the Court in India, and not to the Judicial Committee; and the Court is bound to grant the leave wherever the specified amount of 10,000 rupees is reached, although only, as it appeared in that case, by the addition of interest subsequent to the decree (*d*). It will be observed that the words used in this section are different, and that the value is to be "the amount or value of the subject-matter of the suit;" the construction put upon similar words has been the amount or value of the original suit, not of the suit on appeal (*e*), nor the amount decreed (*f*); but the appellant would still be able to resort to the second paragraph of this section and show that the

(*a*) Lopes *v.* Mudun Thakoor, 2 Wym., 96, L. S. Jackson, J.; see also Onooroop Chunder Mookerjee *v.* Purtab Chunder Pal, 2 Wym., 37, L. S. Jackson, J.

(*b*) Mohun Lall Sookul *v.* Bebee Doss, 7 Moo. I. A., 428. Lekraj Roy *v.* Kanheya Sing, L. R. 1 I. A. 317.

(*c*) *Ibid*, 8 Moo. I. A, 193; and Gourmoney Debia *v.* Khaja Abdool Gunny, *ib.*, 268.

(*d*) Mutusawmy Jagavera Yettapa Naiker *v.* Vencataswara Yetti, 10 Moo. I A., 313; S. C., 1 In. Jur., N. S., 205.

(*e*) Muthusami Pillai *v.* Muthu Chidambara Chetti, 7 Mad. H. C. Rep., 356, Morgan, C. J., Innes and Kindersley, JJ.

(*f*) Dooly Chund *v.* Nirban Singh, 9 B. L. R., F. B., 190; S. C., 18 Suth. W. R., 263.

decree involved a claim to or question respecting property of the required amount. In one case (*a*), the Court of original jurisdiction found that the value of the property in suit, making allowance for the expenses of collection, was under Rs. 5,000. There was an appeal to the District Judge, and the question of value as affecting his jurisdiction was raised. It was also raised in a subsequent appeal to the High Court; but the objection was not pressed in either Court, and neither dealt with it. The appellant petitioned for leave to appeal, basing his petition on affidavits, which, however, did not set out the cost of the collection, but stated that the rent was 1,600 a year or thereabouts. Markby, J., refused to allow the appeal, holding that the matter had been sufficiently considered and decided by the lowest Court. The appellant came again after the expiration of the six months, and asked for a reconsideration of his case. Markby, J., considered that the application was too late; but even if it were not so, the grounds were insufficient, and he confirmed his former decision. The Court in India has no power to consolidate appeals, or admit them after the time prescribed by the rules of the Privy Council: those are matters which must be dealt with by the Privy Council itself (*b*). But where the application has been made in time, and dismissed for default, the Court in India can, on good grounds of explanation, restore it after the expiration of the time (*c*), the Court having power to remove the application from its file, if there is unreasonable delay (*d*).

The substantial question of law, which the appeal must involve, is not restricted to appeals on the facts found concurrently by the Courts below, but may include a question arising on the evidence independently of the finding of the Courts upon such evidence (*e*). It was contended that Act VI of 1874, s. 5, was *ultra vires* of the power of the Indian Legislature, as being a curtailment of the jurisdiction given to the High Court by the Letters Patent, 1865 cl. 39 (Calcutta); but it was held not to be so. This clause is

(*a*) Radhica Mohan Roy, petitioner, Markby, J., 5th Aug., 1874, and 26th Nov., 1874.

(*b*) Pran Nath Roy Chowdree *v.* Kasheenath Chowdree, 2 Suth. W. R., Mis., 26, Loch and Seton-Karr, JJ.; Tamvaco *v.* Skinner, 1 B. L. R., O. J., 39, Macpherson, J.

(*c*) Radha Binode Misser, petitioner, 4 Wym., 20, F. B.

(*d*) Gobardhan Barmono *v.* S. M. Mani Bibi, 5 B. L. R., 76, Peacock, C.J., and Macpherson, J.

(*e*) Moran *v.* Mittu Bibee, I. L. R. 2 Cal., 228, Pontifex, J.

independent of the Charter Act, 24 and 25 Vict., c. 104, and it is subject to legislation by the Governor General in Council (*a*). The petition for admission of the appeal in that case set out that the value of the property involved in the suit exceeded 10,000 rupees, and that although the Act provided, as is provided in the last clause of this section, still, inasmuch as such provision was wholly unauthorized, the petitioner was entitled to appeal against the decree of the High Court affirming a decision of the District Court. There was no case for special leave to appeal. An attempt was made to show that a substantial question of law was involved, but it was afterwards admitted, and held that this alternative course could not be pursued. The question of the power of the Legislature was very fully argued, and the matter was gone into at considerable length by the learned Judge who decided the case.

In dealing with an application for leave to appeal, it is not enough that it appears on the face of the grounds of appeal that a question of law is involved. The Judge must exercise a discretion and see that there really is a substantial question of law raised. When the point is merely that the Courts below have decided against the weight of evidence, it is merely a question of fact. Where the Court reserves the question of value, the parties should take prompt steps to have that question discussed. Then where the question of law being disposed of as above the Judge reserved the question of value on the 14th of August, he refused to re-open the case on the 16th of the following July (*b*).

Judgment-creditors having sued out execution of their decrees amounting to about three lakhs of rupees, the judgment-debtors applied for the appointment of a manager under s. 243 of Act VIII of 1859; but the Judge, after hearing them, refused their application, and the High Court after hearing their appeal confirmed his decision. It was held that no substantial question of law was involved, and that the judgment-debtors could not appeal to the Privy Council (*c*).

Bar of certain appeals.

597. Notwithstanding anything contained in section 595,

(*a*) Feda Hossein, petitioner, I. L. R., 1 Cal., 431, Markby, J.

(*b*) Raj Mohun Mookerjee, petitioner, Markby, J., 14th Aug., 1874, and 16th July, 1875.

(*c*) Kartick Nath Pandey and others petitioners, Markby, J., 2nd of May, 1874.

no appeal shall lie to Her Majesty in Council from the judgment of one Judge of a High Court established under the twenty-fourth and twenty-fifth of Victoria, chapter 104, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court at the time being;

and no appeal shall lie to Her Majesty in Council from any decree which, under section 586, is final.

This corresponds with Act VI of 1874, s. 6. The section (586) quoted in the last clause corresponds with Act XXIII of 1861, s. 27, now repealed.

Application to Court whose decree is complained of.

598. Whoever desires to appeal under this chapter to Her Majesty in Council must apply by petition to the Court whose decree is complained of.

This corresponds with Act VI of 1874, s. 7. In a suit brought by A. against B., a Hindu, and after B.'s death continued against B.'s widows and his executors, it was held that one executor could not obtain leave alone to appeal on notice only to A. If the other executors and the widows do not desire to appeal, they should be served with notice, and they would be made respondents (*a*).

Time within which application must be made.

599. *Such application must ordinarily be made within six months from the date of such decree.*

But if that period expires when the Court is closed, the application may be made on the day that the Court re-opens.

This section, corresponding with Act VI of 1874, s. 8, is repealed by Act XV of 1877; see sched. i. The same period of limitation is, however, prescribed by sched. ii, div. 3, No. 177, of the same Act.

Certificate as to value or fitness.

600. Every petition under section 598 must state the grounds of appeal, and pray for a certificate, either that, as regards amount or

(*a*) Sreenarain Mitter, petitioner, Markby J., 11th August, 1874.

value and nature, the case fulfils the requirements of section 596, or that it is otherwise a fit one for appeal to Her Majesty in Council.

Upon receipt of such petition, the Court may direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

This corresponds with Act VI of 1874, s. 9. The application should state clearly the substantial question of law proposed to be submitted, and should be signed by counsel, if the case comes from the Original Side; or by counsel or pleader, if from the Appellate Side of the Court (*a*).

Effect of refusal of certificate.

601. If such certificate be refused, the petition shall be dismissed:

Provided that, if the decree complained of be a final decree passed by a Court other than a High Court, the order refusing the certificate shall be appealable, *within thirty days from the date of the order*, to the High Court to which the former Court is subordinate.

This corresponds with Act VI of 1874, s. 10. The words in italics are repealed by Act XV of 1877, sched. i (see sched. i), but the same period, thirty days, is given by sched. ii, div. 2, No. 153.

Security and deposit required on grant of certificate.

602. If the certificate be granted, the applicant shall, within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date,

(*a*) give security for the costs of the respondent, and

(*b*) deposit the amount required to defray the expense of translating, transcribing, indexing, and transmitting to Her Majesty in Council a correct copy of the whole record of the suit, except

(1) formal documents directed to be excluded by any order of Her Majesty in Council in force for the time being;

(2) papers which the parties agree to exclude;

(3) accounts, or portions of accounts, which the officer

(*a*) Mirza Ali Akbar *v.* Abdul Latiff Shustri, 12 Bom. H. C. Rep., 8.

empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included; and

(4) such other documents as the High Court may direct to be excluded:

and when the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also, within the time mentioned in the first clause of this section, deposit the amount required to defray the expense of printing such copy.

This corresponds with Act VI of 1874, s. 11. The Court may modify the requirements of this section: it may, for instance, enlarge the time for making the deposit (*a*) on sufficient grounds being shown (*b*). Where *no* deposit of security has been made, the appeal may be struck off under this clause (s. 11, cl. 6 of Act VI of 1874) (*c*). When the offices of the High Court were open, but the Court was not sitting on the proper day for depositing the money, it was held that the plaintiff was too late in tendering it afterwards when the Court resumed its sittings (*d*). In this case the petitioner sought to take advantage of s. 8, corresponding with s. 599 of this Act, and of Act IX of 1871, s. 5, corresponding with s. 5 of the present Limitation Act, X of 1877; but the learned Judge considered that those sections applied only to suits, appeals, and applications, not to petitions of this nature. All that has to be done here is to bring the deposit to the officer of the Court within the prescribed time; he then receives the money and makes the necessary entry in his books, &c. No application to the Court is required. Where the offices of the Court were closed the Court enlarged the time (*e*). It was at one time considered that there could be an appeal under the Charter of 1865, cl. 15, and see N. W. Charter, 1866, s. 10, against the order of a single Judge of the High Court granting a certificate; and it was held that such an appeal did not

(*a*) Soorjimukhi Koer, petitioner, I. L. R., 2 Cal., 272, Garth, C. J., Macpherson and Markby, JJ.

(*b*) *In re* Gour Surn Dass, 19 Suth. W. R., 305, Markby, J.

(*c*) Thakoor Kapilnath *v.* The Government, I. L. R., 1 Cal., 142, Phear, J., 24th Jany., 1876; see also Gobardhan Barmono *v.* S. M. Munuu Bibi, 3 B. L. R., O. C., 126, Phear, J.; confirmed on appeal, 5 B. L. R., 76, Peacock, C. J., and Macpherson, J.

(*d*) Lalla Gopee Chand, I. L. R., 2 Cal., 128, 15th Dec., 1876, Markby, J.

(*e*) Soorjimukhi Koer, petitioner, *supra*.

operate as a stay of proceedings so as to extend the time for depositing the security (*a*). It has, however, since been determined in Bengal, that an order of a single Judge giving leave to appeal to the Queen in Council is not appealable (*b*). An application put in on the last day of the six months, and then not in proper form and not supported by any one appearing for the applicant, was refused (*c*). It was certified on the 23rd of July, 1875, that an appeal involved a substantial question of law, and the appeal was admitted. The respondent appealed against this order, on the ground that no substantial question of law was involved. The appellant had been ordered to find the usual sureties for the costs of the appeal, and one of them agreed to deposit the money in Court; but hearing of the respondent's objection afterwards, refused to do so. The appellant applied for an extension of time until after the decision of this question, to furnish security. This application, not being based on any affidavit, was refused (*d*).

Where an application for permission to appeal to the Privy Council was presented on the last day of the six months allowed for such appeals, and with it was deposited not the sum which had been estimated as the cost of translating, printing, and transmitting the record, but the estimate less the charges for printing, nothing being deposited as the cost of transcription, and the petition was accordingly refused,—it was held that the petitioner had no right to amend the estimate made by the Clerk of the Privy Council Department, still less to amend it in the way he did, and that the plea of oversight was not sufficient to excuse him for non-compliance with the rules of Court or to admit his application beyond the prescribed time (*e*).

Admission of appeal and procedure thereon.

603. When such security has been completed and deposit made to the satisfaction of the Court, the Court may

(*a*) Funindro Deb Roy Kut, petitioner, Markby, J., 8th January, 1875.

(*b*) Musst. Amirunnissa *v.* Baboo Behary Lall, 25 Suth. W. R., 529, Garth, C. J., and Ainslie, J.; Mowla Buksh *v.* Hodgkinson, 24 *ib.*, 150, Macpherson, Offg. C. J., and L. S. Jackson, J.; S. C., I. L. R., 1 Cal., 102; see also Tara Chand Biswas *v.* Rada Jeebun Mustofee, 24 Suth. W. R., 148, Macpherson, Offg. C. J., and L. S. Jackson, J.

(*c*) Koer Sookhraj Bahadoor, petitioner, Markby, J., 16th March, 1876.

(*d*) Jugdish Beerbur, petitioner, Markby, J., 7th April, 1876.

(*e*) *In re* Gour Surn Dass, 19 Suth. W. R., 305, Markby, J.

(*a*) declare the appeal admitted, and

(*b*) give notice thereof to the respondent, and shall then

(*c*) transmit to Her Majesty in Council, under the seal of the Court, a correct copy of the said record, except as aforesaid, and

(*d*) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

This corresponds with Act VI of 1874, s. 12.

Revocation of acceptance of security.

604. At any time before the admission of the appeal, the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon.

This corresponds with Act VI of 1874, s. 13.

Power to order further security or payment.

605. If at any time after the admission of the appeal, but before the transmission of the copy of the record, except as aforesaid, to Her Majesty in Council, such security appears inadequate,

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment.

This corresponds with Act VI of 1874, s. 14.

Effect of failure to comply with order.

606. If the appellant fail to comply with such order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of Her Majesty in Council,

and in the meantime execution of the decree appealed against shall not be stayed.

This corresponds with Act VI of 1874, s. 15.

Refund of balance of deposit.

607. When the copy of the record, except as aforesaid, has been transmitted to Her Majesty in Council, the appellant may obtain a refund of the balance, if any, of the amount which he has deposited under section 602.

This corresponds with Act VI of 1874, s. 16.

Powers of Court pending appeal.

608. Notwithstanding the admission of any appeal under this chapter, the decree appealed against shall be unconditionally enforced, unless the Court admitting the appeal otherwise directs.

But the Court may, if it think fit, on any special cause shown by any party interested in the suit, or otherwise appearing to the Court—

(*a*) impound any moveable property in dispute or any part thereof, or

(*b*) allow the decree appealed against to be enforced, taking such security from the respondent as the Court thinks fit for the due performance of any order which Her Majesty in Council may make on the appeal, or

(*c*) stay the execution of the decree appealed against, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed against, or of any order which Her Majesty in Council may make on the appeal, or

(*d*) place any party seeking the assistance of the Court under such conditions, or give such other direction respecting the subject-matter of the appeal, as it thinks fit.

This corresponds with Act VI of 1874, s. 17. The application for the interference of the Court to stay proceedings must be made before execution of the decree has been issued. If made afterwards, it is too late (*a*).

Increase of security found inadequate.

609. If at any time during the pendency of the appeal, the security so furnished by either party appears inadequate, the Court

(*a*) Joynarain Pattur *v.* Russeck Mohun Bannerjee, 4 Wym., 104, F. B.

may, on the application of the other party, require further security.

In default of such further security being furnished as required by the Court, if the original security was furnished by the appellant, the Court may, on the application of the respondent, issue execution of the decree appealed against as if the appellant had furnished no such security.

And if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay all further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

This corresponds with Act VI of 1874, s. 18.

Procedure to enforce orders of Queen in Council.

610. Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council, shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred.

Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same ; and the Court to which the said order is so transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees.

When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of

exchange for the time being fixed by the Secretary of State for India in Council, with the concurrence of the Lords Commissioners of Her Majesty's Treasury, for the adjustment of financial transactions between the Imperial and the Indian Governments.

The first two paragraphs of this section correspond with Act VI of 1874, s. 19; the last is taken from Act XIII of 1876, s. 10, which fixes the rate of exchange for payment of the wages of seamen. Where application for execution of an order of Her Majesty in Council has been made elsewhere than in the Court from which the appeal was preferred, the proceedings are invalid. Where a decree is simply affirmed by the Appellate Court in India, it is the decree of the Appellate Court, and not that of the lower Court, which is to be executed (*a*). A Court, in executing a decree in a case which has been appealed to the Privy Council, is not warranted in receiving a mere copy of the printed judgment of the Privy Council as if it were a decree (*b*). Where a decree of the Privy Council gives interest, but does not clearly specify the rate, the Court should ascertain, if possible, from the other parts of the decree itself, or from other documents which may be read in conjunction with the decree, what rate was intended to be given (*c*).

Appeal against order relating to execution.

611. The orders made by the Court which enforces or executes the order of Her Majesty in Council relating to such enforcement or execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the enforcement or execution of its own decrees.

This corresponds with Act VI of 1874, s. 20.

Power to make rules.

612. The High Court may, from time to time, make rules consistent with this Act to regulate—

(*a*) the service of notices under section 600,

(*a*) Joy Narain Giree *v.* Goluck Chunder Mytee, 22 Suth. W. R., 102, Markby, J., on the authority of Kristo Kinker Ghose Roy *v.* Burrodakant Singh Roy, 17 *ib.*, 292, P. C.

(*b*) Joy Narain Giree *v.* Goluck Chunder Mytee, 20 Suth. W. R., 444, Markby and Birch, JJ.

(*c*) Ameeroonissa Khatoon *v.* Meer Mohamed Mozuffur Hossein Chowdhry 18 Suth. W. R., 103, Markby and Ainslie, JJ.

(*b*) the grant or refusal of certificates under sections 601 and 602 by Courts of final appellate jurisdiction subordinate to the High Court,

(*c*) the amount and nature of the security required under sections 602, 605, and 609,

(*d*) the testing of such security,

(*e*) the estimate of the cost of transcribing the record,

(*f*) the preparation, examination, and certifying of such transcript,

(*g*) the revision and authentication of translations,

(*h*) the preparation of indices to transcripts of records, and of lists of the papers not included therein,

(*i*) the recovery of costs incurred in British India in connection with appeals to Her Majesty in Council,

and all other matters connected with the enforcement of this chapter.

Publication of rules.

All such rules shall be published in the local official Gazette, and shall thereupon have the force of law in the High Court and the Courts of final appellate jurisdiction subordinate thereto.

This corresponds with Act VI of 1874, s. 22, except the last paragraph, paragraph (i) being added.

Legalization of existing rules.

613. All rules heretofore made and published by any High Court relating to appeal to Her Majesty in Council and in force immediately before the passing of this Act, shall, so far as they are consistent with this Act, be deemed to have been made and published hereunder.

This corresponds with the last paragraph of s. 22 of Act VI of 1874.

Recorder of Rangoon.

614. In sections 595 and 612, the expression 'High Court' shall be deemed to include also the Recorder of Rangoon, but not so as to empower him to make rules binding on Courts other than his own Court.

This corresponds with Act VI of 1874, s. 23.

Construction of Bengal Regulation III of 1828, section 4, clause 5.

615. The rules and restrictions referred to in Bengal Regulation III of 1828, section IV, clause *fifth*, shall be deemed to be the rules and restrictions applicable to appeals under this Code from the decisions of the High Court of Judicature at Fort William in Bengal.

This corresponds with Act VI of 1874, s. 24.

Reg. III of 1828 provides for the appointment of Special Commissioners for the more speedy hearing and determination of appeals from the decision of the Revenue authorities in regard to land or rents occupied or collected by individuals without payment of the revenue demandable by Government under the general law of the country, and for otherwise more effectually securing the realization of the public dues.

The fifth clause of the 4th section enacts that, in all cases decided by a Special Commissioner or Commissioners, whether on appeal by individuals from the decision of the Collector, or on reference from the Board of Revenue under the above rule, or in cases transferred from any of the ordinary Courts of Judicature, the decisions passed by the Special Commissioner or Commissioners, who, by warrant from the Governor-General in Council and the provisions of this Regulation, may be competent to pass the same, shall be final, save and except in cases which, if decided by the Sudder Dewanny Adawlut, would be appealable to His Majesty the King in Council. In such cases similar appeals will lie from the decision of the Special Commissioner or Commissioners under the same rules and regulations as are applicable to appeals from the decisions of the aforesaid Court; provided, however, that such decisions shall be immediately executed and enforced, notwithstanding the institution of the appeal; provided also, that it shall be competent to any Commissioner to review any judgment passed by him, on sufficient cause being shown why a new trial should be granted; the rules in the existing Regulations regarding a review of judgment being held applicable to such cases.

Saving of Her Majesty's pleasure,

616. Nothing herein contained shall be understood—

(*a*) to bar the full and unqualified exercise of Her Majesty's pleasure in receiving or rejecting appeals to Her Majesty in Council, or otherwise howsoever, or

(*b*) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to Her Majesty in Council, or their conduct before the said Judicial Committee.

and of rules for conduct of business before Judicial Committee.

And nothing in this chapter applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, nor to appeals from orders and decrees of Prize Courts.

The first three paragraphs of this section correspond with Act VI of 1874, s. 25 ; the last paragraph corresponds with s. 1 of the same Act.

PART VII.

CHAPTER XLVI.

OF REFERENCE TO AND REVISION BY THE HIGH COURT.

Reference of question to High Court.

617. (S.) If before or on the hearing of a suit or appeal in which the decree is final, or if, in the execution of any such decree, any question of law or usage having the force of law, or the construction of a document which construction may affect the merits, arises, on which the Court trying the suit or appeal or executing the decree entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

This corresponds with Act XXIII of 1861, s. 28; but it gives a somewhat larger power of reference, the words "if before or at the hearing of a suit or appeal in which the decree is final, or if in the execution of any such decree," being substituted for "if in any suit in which an order or decision is made final under the last preceding section." The preceding section (s. 27 of Act XXIII of 1871) precluded a special appeal from decisions passed in regular appeal in suits cognizable by Small Cause Courts, whenever the debt, damage, or demand for which the original suit was instituted did not exceed Rs. 500. References could not be made in execution proceedings under the old code.

Court may pass decree contingent upon opinion of High Court.

618. (S.) The Court may either stay the proceedings or proceed in the case, notwithstanding such reference, and may pass a decree or order contingent upon the opinion of the High Court on the point referred;

but no execution shall be issued, property sold, or person imprisoned in any case in which such reference is

made until the receipt of a copy of the judgment of the High Court upon such reference.

This corresponds with Act XXIII of 1861, s. 29; but gives the Court power to stay proceedings; the words "a copy of the judgment of the High Court upon such reference" are substituted for "the order of that Court."

Judgment of High Court to be transmitted, and case disposed of accordingly.

619. (S.) The High Court shall hear the parties to the case in which the reference is made, in person or by their respective pleaders, and shall decide the point so referred, and shall transmit a copy of its judgment under the signature of the Registrar, to the Court by which the reference was made, and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

This corresponds with Act XXIII of 1861, ss. 32 and 33.

Costs of reference to High Court.

620. (S.) Costs, if any, consequent on a reference for the opinion of the High Court, shall be costs in the case.

This corresponds with Act XXIII of 1861, s. 34.

Power to alter, &c., decrees of Court making reference.

621. (S.) When a case is referred to the High Court under this chapter, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed in the case out of which the reference arose, and make such order as it thinks fit.

This is similar to the provision in Act XI of 1865, s. 28, which deals with reference by Small Cause Courts; but it also enables the High Court to return the case for amendment.

Power to call for record of cases decided by Small Cause Courts, or, on appeal, by subordinate Courts.

622. (S.) The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law,

or to have failed to exercise a jurisdiction so vested, and may pass such order in the case as the High Court thinks fit.

This corresponds with s. 35 of Act XXIII of 1861. The words "High Court," having no special definition in this Code, must be understood to mean "the highest Civil Court of Appeal" in any part of British India in which this Act operates as defined by Act I of 1868 (General Clauses), s. 2, No. 11. The words "no appeal" are substituted for "no further appeal."

The Chartered High Courts have extensive powers of supervision under cl. 15 of the Charter Act, 24 and 25 Vict., c. 104. The High Court exercises these powers of supervision only where the Court subordinate to it has exceeded its jurisdiction or abstained from exercising it (*a*). So also where there has been a capital error of judgment, and the applicant has entitled himself to relief (*b*). A party applying to the High Court for relief under this section must show that he has not contributed by his own conduct to his being placed in the position he finds himself in. Therefore, where a person stands by and allows irregular proceedings to be carried on in a suit against him, and his property in consequence is attached and sold, he must seek his remedy in an ordinary suit; he cannot come to the High Court, and ask it to exercise its power under this section to quash the proceedings (*c*). Thus it restrained a Collector from exercising powers which were only vested in a Zilla Judge (*d*). Where a claim to certain property attached in execution was disallowed, and the property was sold, and an order was made for the distribution of the proceeds according to the then existing law,—namely, by payment in the first place of the debt of the first attaching creditor in full, and by a rateable distribution of the surplus among the other attaching creditors,—and, on an application by the unsuccessful claimant, the lower Court altered this mode of distribution, the

(*a*) Janokee Bullub Sein *v.* Dulkima Mokhun Chowdhry, 7 Suth. W. R., 519, F. B.: *In re* Issur Chunder Poddar, 18 Suth. W. R., 289, Glover and Mitter, JJ.

(*b*) S. M. Shovankurry Dabee *v.* Dwarka Nath Mookerjee, 25 Suth. W. R., 345, L. S. Jackson and McDonell, JJ.

(*c*) Cochrane, petitioner, 14 B. L. R., 330, L. S. Jackson and McDonell, JJ.

(*d*) Bhyrub Chunder Chunder *v.* Shama Soonderee Debea, 6 Suth. W. R., Act X Rul., 68, Norman and L. S. Jackson, JJ. See also Sheikh Elahee Buksh *v.* Sheikh Hajoo, 14 *ib.*, 33, Bayley and Markby, JJ.

High Court set aside its order as made without jurisdiction (*a*). If the Court below enters into an inquiry which it is required by law to make, and comes to a conclusion, the High Court cannot interfere; but where it does not make the necessary enquiry, it can be ordered to do so (*b*). In the last case jurisdiction under the Registration Act of 1866 was declined by the Judge and enforced by the High Court; see now, however, Act III of 1867 as to the procedure to be adopted on the refusal of the Registrar to register a document. Although there was no appeal against an order made under s. 210 of Act VIII of 1859, corresponding with s. 234 of this Act, substituting a legal representative for a deceased judgment-debtor, yet, where the Court had done so, and had substituted a person whom it did not, and could not decide was the proper legal representative, without making any enquiry, and merely for the convenience of all parties, it was held to have acted without jurisdiction, and its order might be set aside (*c*). Where the lower Courts passed decrees clearly contrary to law, and there was no special appeal, because the suit was one cognizable by a Small Cause Court, the High Court set aside the decrees of the lower Courts in exercise of its extraordinary powers (*d*).

A. sued B., a ryot, for arrears of rent. C. was added as a party under Act X of 1859, s. 77. The Collector in appeal refused to try C.'s claim under s. 77, because she had not produced her title-deed. Held, that the refusal to try C.'s claim was a refusal of jurisdiction, and the High Court sent the case back under 24 and 25 Vict., c. 104, s. 15 (*e*).

Where the law applicable to the case expressly makes the decision of the Court below final, the Court would not interfere as a Court of Revision under s. 35 of Act XXIII of 1861. Thus, where a lower Court set aside a sale of moveable property on the ground of inadequacy of price, and at the instance of the judg-

(*a*) Maharaja Dhiraj Mahtab Chand Bahadur, petitioner, 2 B. L. R., A. C., 217, Bayley and Hobhouse, JJ.

(*b*) Greesh Chunder Lahooree *v.* Kahsessuree Debia, 8 Suth. W.R., 26, L. S. Jackson and Hobhouse, JJ. See also Showdaminee Dossee *v.* Manick Ram Chowdhry, 9 Suth. W. R., 386, L. S. Jackson and Hobhouse, JJ.; Sankar Dobay, petitioner, 4 B. L. R., A. C., 65; Hardayal Mandal *v.* Tirtanand Thakur, *ib.*, Apx., 28, E. Jackson and Hobhouse, JJ.; Collector of Bogra *v.* Krishna Indra Roy, 2 B. L. R., A. C., 301, Norman and E. Jackson, JJ.

(*c*) Pogose *v.* Beebee Dishkoon Waris Catchuck, 3 Cal., 278, Markby and Prinsep, JJ.

(*d*) Maharaja Dhiraj, &c. *v.* Shagor Kundu, 5 B. L. R., Apx., 91.

(*e*) *In re* Srimati Nassir Jan, 7 B. L. R., 144, Jackson and Mookerjee, JJ.

ment-debtor (a thing it had no jurisdiction to do, see s. 252 of Act VIII of 1859, corresponding with s. 298 of this Code), and the purchaser appealed to the Judge, who rightly decided that he had jurisdiction,—it was held, that the High Court could not, under this section, interfere with the decision of the Judge (*a*). In this case it will be observed that the application was made with the object of setting aside the decision of the Judge, who was clearly right in declining jurisdiction, not of the lower Court, which had acted without jurisdiction in setting aside the sale on the ground of inadequacy of price. Had the application been made with reference to the order of the lower Court setting aside the sale, the result might have been different; but the High Court might, in the exercise of the discretion which this section gives it, still refuse to set aside the proceeding of the lower Court if the effect of so doing would be to give the property to a purchaser at a very inadequate price; and there may be other circumstances which would induce the High Court to abstain from interfering, as where the applicant had taken his chance in an appeal, and had appeared and contested the decision of the lower Court upon the merits without taking any objection as to jurisdiction (*b*). The High Court has in some cases reversed an order of a Moonsiff setting aside a sale in execution which the Moonsiff had no jurisdiction to make (*c*). Where a Deputy Collector refused to entertain an application made by a defendant for realization of costs awarded by a Court of Appeal, and for a refund of the amount which the plaintiff had realized from the defendant in the execution of the decree of the lower Court, but which had been disallowed by the Court of Appeal, and where, on appeal, the Judge held that he had no jurisdiction, the High Court, acting under the 15th clause of the Charter Act, ordered the Deputy Collector (over whom it had under that clause superintendence) to enforce restitution and execute that part of the decree which related to costs (*d*). Before the High Court will

(*a*) Dacosta *v.* Hall, 1 Wym., 165, F. B.; S. C., *nom.*, Dacosta, petitioner, B. L. R., F. B., 432, and 5 Suth. W. R., 25.

(*b*) Drobo Moyee Dabee *v.* Bipin Mundul, 10 Suth. W. R., 6, Bayley and Markby, JJ.

(*c*) Joy Ram *v.* Bulwunt Sing, 5 Suth. W. R., Mis., 3, Kemp and L. S. Jackson, JJ.

(*d*) Gobind Koomar Chowdry, petitioner, B. L. R., F. B., 714; S. C., 7 Suth. W. R., 520; Greesh Chunder Lahooree *v.* Kashessuree Debia, 8 *ib.*, 26; Collector of Bogra *v.* Krishna Indra Roy, 2 B. L. R., A. C., 301, see p. 305, Norman and E. Jackson, JJ.

issue a rule calling upon a Judge to show cause why he should not act upon their order, they must have such materials before them as will warrant their making the order if no cause is shown (*a*); it would probably decline to interfere, and if the applicant had another remedy, it appears it is well settled that it would not do so (*b*). The Court, however, has refused to interfere under this section to set aside an order rejecting a document made by a Court under Act VIII of 1859, s. 129, an appeal from such an order being barred by s. 363 (*c*); but there the Court had exercised its jurisdiction.

Where a Court exceeds its jurisdiction, the High Court may set aside that part of the order which is in excess of jurisdiction; and where the Court has no jurisdiction, the proper order is to set it aside altogether. When an appeal is heard by a Court which has no jurisdiction, and another Court has, the High Court may set aside the decision of the Court without jurisdiction, and may, if it think right, refer the case to that which has (*d*), even if it be too late to prefer a fresh appeal to that Court (*e*). Where an Appellate Court, after reversing a decree for the plaintiff, stayed execution of its own decree, and kept the defendant's property still under attachment,—it was held that the Appellate Judge acted without jurisdiction, and consequently his order was set aside (*f*).

Where a lower Court had made an order setting aside an attachment of certain land pending a suit for the land, declaring that A. had no right to sell the land, and directing that possession be transferred to the petitioner, and the Civil Judge had reversed this order, so far as it related to putting the petitioner into possession, the High Court entertained a petition, and modified the original order of the lower Court, allowing the order to stand only so far as it set aside the attachment, the rest being *ultra vires* (*g*).

(*a*) Comptoir d'Escompte de Paris *v.* Currie and Co., 3 B L. R, Apx., 153.

(*b*) Bishno Chunder Bhuttacharjee *v.* Shoshee Mohun Pal Chowdhry, 22 Suth. W R, 277, L S Jackson and McDonell, JJ.; Bell *v.* Thakoordoss Gossain, 9 Suth. W. R., Mis., 26, Campbell and Macpherson, JJ.; Sudder Golab Singh *v* Rambuddun Singh, 1 In Jur., N. S, 1, Loch and Glover, JJ.

(*c*) *In re* Erskine, 18 Suth. W R, 511, L. S Jackson and Ainslie, JJ.

(*d*) Rajrani of Burdwan *v.* Parikhti Rawtra, 7 B. L. R., Apx., 15, Kemp and Glover, JJ.; following Kristo Inder Roy *v.* Roopinee Bebee, 6 Suth. W. R, Act X Rul, 56, Peacock, C. J, and Sumbhoonath Pundit, J.

(*e*) Subjaun Ostagar *v* Promothonauth Ghose, 6 Suth W. R, Mis, 77.

(*f*) Kavasji Bhimji *v* Dhondinaj Vinayak, 10 Bom. H. C. Rep, 411, Melvill, J.

(*g*) *Ex parte* Chellapperumal Pillai, 1 Mad. H. C. Rep, 135.

In this case the land had been attached, in the year 1830, pending a suit respecting it in the lower Court (that of a Mufti Sadr Amin); the suit was dismissed for want of prosecution, but the defendant, the owner of the land, omitted to get the attachment removed, and died, leaving a son and heir, the petitioner. Thereupon the widow, usurping a power-of-sale, sold the property to a purchaser, who remained in possession for many years. Scotland, C. J., and Frere, J., held, that, although there was no statutory power to set aside the attachment, the lower Court could certainly do so where it was issued by mistake or on insufficient grounds, or where it was no longer in force. Otherwise an attachment might be the means of inflicting the greatest injustice, instead of being, as it was intended to be, a useful means of enforcing legal rights. In this respect the Court, therefore, had jurisdiction, but not in respect of the other part of the order. The High Court, N. W. P., directed a Judge to entertain an application for a review under the Charter Act. The Judge had refused to do so, on the ground that the decision sought to be reviewed was made by his predecessor (*a*).

But the High Court cannot interfere where a subordinate Court has not exceeded its jurisdiction (*b*); or where a Court, having jurisdiction, exercises it, the High Court cannot, under this section, set aside the order of the Court below on the ground that it is mistaken in fact or law (*c*). The High Court refused to interfere with an order of Court granting a review of its judgment, although the application for review was not made until three years after the date of the decree, the party who preferred the application for the review having satisfied the lower Court of the existence of good cause for not having preferred his application for review within the prescribed time. Section 377 of Act VIII of 1859 allowed the applicant to proceed, on showing good cause, after ninety days. The matter is now, however, regulated

(*a*) Mathra Parshad, petitioner, I. L. R., 1 All., 296, Stuart, C. J, and Turner, J.

(*b*) Abdool Kureem *v.* Oooghun Lal, 6 Suth. W. R., Mis., 119.

(*c*) See Dacosta *v.* Hall, supra; Gobind Nath Sandyal *v.* Ramcoomar Ghose, 9 Suth. W. R., 115; Drobo Moyee Dabee *v.* Bipin Mundul, 10 *ib*, 6; Huro Mohun Mookerjee *v.* Kedernath Doss, 5 *ib.*, Act X Rul., 25; Doorga Churn Sircar *v.* Doorga Churn Ghossal, 11 *ib.*, 23; S. C., 2 B. L. R., App., 165; Karim Sheikh *v.* Mukhoda Soondery Dassee, 15 B. L. R., 111; see also Tej Ram *v.* Harsukh, I. L. R., 1 All, 101, F. B., and the note at p. 104, where several cases are collected; see also *In re* Lukhykant Bose I. L. R., 1 Cal., 180.

by the Indian Limitation Act, XV of 1877, s. 5, which makes a like provision (*a*). The High Court refused to interfere where the Judge below had sent a person to the Magistrate for refusing to attend as a witness, on the ground that the Judge could make such an order and was not exceeding his jurisdiction in so doing (*b*). Where a Judge refused to confirm the sale in execution of a decree, although applied to by the certified purchaser, it was held that the Judge had acted within his jurisdiction, and the High Court refused to interfere (*c*). The Court seems to have carried this principle to its extreme limits in refusing to interfere where, under a summary decree for rent under Reg. VII of 1791 against the father of A., A. himself had been arrested and sent to prison (*d*). Norman, J., however, dissented from this decision. The Court refused to extend assistance by the exercise of its extraordinary powers under s. 15 of this Act to parties who were chargeable with great and unexplained delay (*e*); again, the Court declined to interfere under this section in order to set aside an order lawfully made by a Judge under s. 269, Act VIII of 1859, upon a complaint made to him of resistance or obstruction to the delivery of possession under s. 264, and stated that it would not have interfered even if the order had been made without jurisdiction, after the delay that had taken place the petitioners' remedy being to bring a regular suit to establish their right (*f*).

(*a*) Ajonnissa Bibi *v.* Surja Kant Acharji, 2 B. L R., A. C., 181, Bayley and Hobhouse, JJ.; S. C., 11 Suth. W. R., 56.

(*b*) Jankee Bullub Sen, petitioner, B. L. R., F. B., 716; S. C., *nom.* Janoke Bullub Sein *v.* Dukhina Mohun Chowdhry, 7 Suth. W. R., F. B., 519.

(*c*) Durga Charan Sirkar, petitioner, 2 B. L. R., A. C., 165, Bayley and Markby, JJ.; S. C., 11 Suth. W. R., 23.

(*d*) Gopal Singh *v.* Court of Wards, 7 Suth. W. R., 430, Seton-Karr and L. S. Jackson, JJ.

(*e*) Radha Mohun Roy *v.* Raj Chunder Shah, 22 Suth. W. R., 522, L. S. Jackson and McDonald, JJ.

(*f*) Musst. Zuhoorun Begum *v.* Syud Mahomed Wafed, 18 Suth. W. R., 87, Couch, C. J., and Ainslie, J.

PART VIII.

CHAPTER XLVII.

OF REVIEW OF JUDGMENT.

Application for review of judgment.

623. (S.) Any person considering himself aggrieved—

(*a*) by a decree or order from which an appeal is hereby allowed, but from which no appeal has been preferred;

(*b*) by a decree or order from which no appeal is hereby allowed; or

(*c*) by a judgment on a reference from a Court of Small Causes;

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him,

may apply for a review of judgment to the Court which passed the decree or made the order, or to the Court, if any, to which the business of the former Court has been transferred.

A party who is not appealing from a decree may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except when the ground of such appeal is common to the applicant and the appellant, or when being a respondent, he can present to the Appellate Court the case on which he applies for the review.

This section follows s 376 of Act VIII of 1859, but is wider, and includes decrees and orders as described in cls (a) and (b) of all

Courts. The new matter must be "important," and must have been unknown to the applicant, notwithstanding the exercise of due diligence by him. Both these additions are enactments of what had been decided on the construction of the Act of 1859. Cl. (c) is new. A review may also be had if an error is apparent on the record. Every Court has so far the power to revise its own decision as may be necessary for the purpose of making that decision in terms accord with the intention of the Court entertained at the time it was passed, for instance, to correct verbal errors, or otherwise to make the formal decree an accurate expression of the judgment which the Court intended to pass. But an inferior Court does not possess a general power of revising its own decision (*a*). So a decree, if found to be at variance with the judgment, may be amended under s. 206, *ante*. The last paragraph but one differs from s. 376 of Act VIII of 1859, which directed the application to be made to the Court which passed the decree. This would expressly include a review of a judgment passed by the predecessor in office of the Judge applied to; but such a proceeding is only allowable *ex necessitate* (*b*), and on the grounds set forth in the next section. The last paragraph of this section is new. But a review of judgment can only be granted as regards those parties who appear to have applied for it (*c*). A decree that has been passed *ex parte* can be reviewed in the same manner as a decree in a case which has been decided after hearing the parties (*d*).

Although a decree or order of any Court may be reviewed, there cannot be a review of a decree in appeal from an appellate decree where the ground of the review is the discovery of fresh evidence, for the second Appellate Court does not deal with the facts, but with the law only (*e*), unless perhaps where the new evidence goes to show that the Court had not jurisdiction (*f*). But

(*a*) Hajee Abdoolah *v.* Reassut Hossein, 19 Suth. W. R., 303, Phear and Ainslie, JJ.

(*b*) Maharajah Moheshur Singh *v.* The Bengal Government, 7 Moo. I. A., 304.

(*c*) Doorga Pershad Ghose *v* Greesh Chunder Bose, 1 Suth. W. R., 222, Trevor and Campbell, JJ.

(*d*) Poresh Nath Mundul *v.* Khettro Monee Debia, 20 Suth. W. R., 284, Glover and Birch, JJ.

(*e*) Panchanan Mookerjee *v.* Radha-Nath Mookerjee, 4 B. L. R., A. C., 213; Jackamull *v.* Palneappa Chetty, 5 Mad. H. C. Rep., 464.

(*f*) Nanabhai Vallabhdas *v.* Nathabhai Haribhai, 9 Bom. H C Rep., 89, Westropp, C. J., Melvill and Kemball, JJ.

this is perhaps a doubtful point, having regard to the decision in the case noted below (*a*), which was, that a special appeal will not be entertained upon a question of jurisdiction depending on a matter of fact not found by the lower Courts, and not admitted by the parties (*b*).

In the case of the discovery of fresh evidence after a special appeal has been admitted, it has been held that the Court of Appeal may allow the appeal to be withdrawn for the purpose of allowing the appellant to apply for a review; and the Court intimated, in the course of the argument, that if the application for a review were rejected, the applicant might prefer another special appeal (*c*). But it is doubtful whether such a course can be followed, having regard to the terms of the section, which allow of a review only when no appeal has been preferred, not when an appeal has been preferred and disposed of. The Madras High Court seems to have left that point open (*d*), and it seems that an application under the same circumstances was rejected in an earlier instance by Arnould, Forbes, and Warden, JJ, in Bombay (*e*). The question appears to be simply whether an appeal has been preferred, and this is the view that has been taken in the Calcutta High Court in a case (*f*) which decided, on an application under s. 15 of the Charter Act, that the lower Appellate Court had no jurisdiction to admit the review after the dismissal of the special appeal, which had been dismissed on the ground that the Court could not admit fresh evidence; but that the fresh evidence might be a good ground for the admission of the review, without however any suggestion that the appellant could apply for the review after his special appeal was dismissed (*g*). And the same view was adopted in earlier cases. It was decided that a review cannot be granted when an appeal has been preferred,

(*a*) Luteefoonissa Bibee *v.* Poolin Behary Sein, Suth. W. R., 1864, F. B, 31.

(*b*) See also Court of Wards *v.* Musst. Roop Moonjuree Kooer, 25 Suth. W. R., 260, Garth, C. J., and Glover, J.

(*c*) Dullabh Shivlal *v.* Hope, 8 Bom. H C. Rep., A. C., 213, see p 219, Westropp, C. J., and West, J., Pandurang Sadashiv *v.* Moro Vasudev, 6 Bom. H. C. Rep, A. C., 68, Couch, C. J, and Gibbs, J., citing *Ex parte* Bashiyagarulu Nayudu, 1 Mad. H. C. Rep., 254, Strange and Holloway, JJ.

(*d*) *Ibid.*

(*e*) 6 Bom. H. C. Rep, A. C, 69 note.

(*f*) Jadunath Mookerjee, petitioner, 6 B. L R, 333, Norman and Loch, JJ.; the case arose out of the case of Punchanun Mookerjee, *supra*.

(*g*) Panchanan Mookerjee *v.* Radha Natn Mookerjee, 4 B. L. R, A. C, 213; see also Lucas *v.* Stephen, 9 Suth. W. R., 301, Bayley and Phear, JJ.

even although the Appellate Court has refused to go into the merits of the appeal (*a*); but if a review be applied for in proper time, and admitted before appeal preferred, the subsequent filing of an appeal does not prevent the application for review being heard (*b*). It appears, therefore, that the Court can, on the first appeal, call for fresh evidence under s. 567, although the plaintiff cannot produce it as of right; or a review can be granted only when no appeal has been preferred, and it appears that fresh evidence is forthcoming, or for some reason as described in this section (*c*).

It has been held, notwithstanding this prohibition against the admission of a review after an appeal has been preferred, that a review can be had to correct a clerical error, after there has been an appeal heard and determined; but such a review cannot be had to make a substantial alteration in the judgment already appealed from (*d*). Thus, where a decree in a suit of A. *v.* B. gave A. costs, but did not say who was to pay them, and the judgment was confirmed in appeal, a review might still be had to correct the omission (*e*). So, where there appeared to be a substantial error in the decree occasioned by the officer who drew it up, it was held, that the proper remedy was a review (*f*). These cases, however, seem to proceed upon grounds stated by Norman, J. (*g*), *viz.*, "the inherent power in every Court, for the purpose of correct-"ing errors in its own proceedings, to amend or vary their orders, "&c.;" but this view was not unanimously adopted in that case (*h*). An order refusing to admit an appeal, whether regular or special, can be reviewed (*i*).

There can be no review as a matter of right; the applicant must show some cause why the review should be admitted, other-

(*a*) Musst. Khoorshed Begum *v.* Syed Hadee Ali, S. D. A., N. W. P., 1865, p. 40.

(*b*) Bhurrut Chunder Mojoomdar *v.* Ram Gunga Sein, 5 Suth. W. R., 59; Syud Asudoodden Hyder *v.* Khajah Abdool Kureem, 6 Suth. W. R., 110.

(*c*) See Clarke *v.* Bindabun Chunder Sircar, Marsh., 75.

(*d*) Oomanund Roy *v.* Suttish Chunder Roy, 9 Suth. W. R., 471, Phear and Hobhouse, JJ.

(*e*) Chowdhry Goluck Chunder *v.* Chowdhry Gunga Narain, 11 B. L. R., 363, Markby and Birch, JJ.

(*f*) Sumar Ahmed *v.* Haji Ismail, I. L. R., 1 Bom., 158—162, Westropp, C. J., March 4, 1876.

(*g*) Haradhun Mookerjee *v.* Chunder Mohun Roy, Marsh., 205, see p. 207.

(*h*) See also Zuhoor Hossein *v.* Musst. Syedun, 11 Suth. W. R., 142, *per* Norman and E. Jackson, JJ.

(*i*) Joy Koomar Dutta Jha *v.* Esharee Nund Dutta, 10 B. L R., 155, Kemp and Pontifex, JJ.

wise the provisions of these sections would be unnecessary (*a*). Every case must depend on its own merits; but the Courts have agreed that, under these rules, they should not allow a rehearing upon the possibility of an alteration of opinion upon new points put, and new arguments urged, after the decision, by another advocate not present at the first hearing, on the ground that the Court is asked to say it is in error in its adjudication when it never had before it in the first instance the new points on which it is asked subsequently to adjudicate (*b*). On the other hand, in another case (*c*), Couch, C. J., stated: "I have ruled for years that a point previously argued cannot be argued in review" (*d*). See another case (*e*) decided by Bayley, J., whose opinion was concurred in by Markby, J., who held that "the proper rule as to reviews is, that, on the one "hand, a review is to be sought, not upon the same arguments, upon "the same matter and facts already before the Court, and upon "which judgment has already been given; and that, on the other "hand, a review should not be allowed upon altogether a new "point which had not been taken at all at the time of the first "hearing of the case, though full opportunity existed for doing "so." It was contended in one case (*f*) that, in consequence of these opinions, a review of judgment was practically denied. On reference to a Full Bench, it was held, "that it cannot be "treated as a universal rule that no point can be raised on "application for a review which has already been discussed and "decided on the original hearing of the appeal, or that no new point "which has not been raised on the hearing of the appeal can be "argued on the application for review. In each case the Court to "which application is made must consider and decide whether a "review is necessary to correct any evident error or omission, or is "otherwise requisite for the ends of justice." The purpose of a review is to correct errors, not to retry a case upon the same

(*a*) See the case of Bhawabal Sing *v.* Maharaja Rajendra Pratap Sahoy Bahadoor, 5 B. L R., 321, and cases cited.

(*b*) See Bhawabal Sing *v.* Maharaja Rajendra Pratap Sahoy Bahadoor, 5 B. L. R., 321; see also Garib Hossein Chowdhry *v.* Wise, *ib.*, 342 note.

(*c*) Gungapersad *v.* The Agra and Masterman's Bank, 5 B. L. R, 340 note.

(*d*) See also Collector of Tippera *v.* Musst. Mafizustnissa Bibi, 5 B. L. R, 341 note.

(*e*) Janab Ali *v.* Chandi Charan Dey, *ib.*, 334 note.

(*f*) *In re* Chintamani Pal, 6 B L. R., 126, and Saleh Shabi Sabi-ud-din Abu Saleh, *ib*

evidence (*a*). The fact that a Judge has decided against the weight of evidence is ground for an appeal and not for a review (*b*).

Where a Judge had decided against the validity of a document after hearing evidence in support of its validity, and none to impeach it, it was held by the Judicial Committee that a review was properly granted; they were not prepared to say that there was an absolute defect of jurisdiction to admit a review whenever the parties had failed to show that there was either positive error in law or new evidence to be brought forward, which could not be brought forward on the first hearing (*c*). They did not think that the cases cited (*d*) limit the discretion of the Court in saying what reason is good and sufficient, or what may be so far requisite to the ends of justice to support an application for review.

An application for a review of judgment was made to a Court of Appeal on the ground that certain very material documents on which the Court of first instance had relied had been summarily discredited without being inspected by the Court of Appeal; and that the Court of Appeal had erred in declaring the report of a commissioner appointed by the Court of first instance for the purpose of making a local enquiry to be unworthy of reliance, because he was a muharrir of the Court of first instance. It was held that there were good grounds for granting the review (*e*). And it has been held that although a former judgment of a Court of competent jurisdiction is conclusive between the same parties in a subsequent suit brought in another Court, notwithstanding an appeal be pending against it, the Judge passing the decree in the subsequent suit may, on application made to him and security being given, stay the execution of it until the appeal in the former suit is decided, and

(*a*) Hadjee Abdoollah, petitioner, I. L. R, 2 Cal., 131, see p. 134; S. C., L. R., 3 I. A, 221; Bhyrub Chunder Surmah Chowdhry *v.* Madhub Ram Surmah, 20 Suth. W. R., 84, F. B.; Roy Meghraj Bahadoor *v.* Beejoy Gobind Burral, 23 *ib.*, 438, Macpherson and Birch, JJ.; Chunder Churn Auggrodany *v.* Loodun Ram Deb, 25 *ib.*, 324, Birch and Morris, JJ.

(*b*) Nasiruddin Khan *v.* Indronarayan Chowdhry, B. L. R., F. B., 367, see p. 371; S. C, 1 In. Jur., N. S., 147; and 1 Wym., 127.

(*c*) Hadjee Abdoollah, petitioner, I. L. R., 2 Cal., 131, P C., see p. 140; S. C., L. R., 3 I. A., 221.

(*d*) Nasiruddin Khan *v.* Indronarayan Chowdhry, B. L. R., Sup Vol., 367, and other cases.

(*e*) Abdul Rahim *v.* Racha Rai, I. L. R., 1 All., 363, Stuart, C. J., and Pearson, J.

may, if the former decree be reversed, entertain an application for a review of his own decision in the subsequent suit (*a*).

A Court of original jurisdiction has power to entertain an application for a review of an order rejecting a petition to sue *in formâ pauperis*. If it refuses to do so on the ground of want of jurisdiction, the High Court can set aside its order of refusal under 24 and 25 Vict., c. 104, s. 15 or under s. 622 (*b*). Where the decree is *ultra vires* the remedy is by review, or it can be set aside in the same way (*c*). Upon an appeal, where an appeal lies, it may be open to the Court of Appeal to say that the Judge ought not to have admitted a review; but that is a very different thing from ruling that he has acted wholly without jurisdiction. In the first case, the Appellate Court reverses the order, because the Judge has erred in the mode in which he has exercised a judicial discretion; in the latter case, it quashes the order, because there was no discretion at all to be exercised (*d*).

It has been held that an error on a point of law may be a ground for review of judgment (*e*), but it is a ground for appeal also; and, therefore, as the parties should come prepared with their cases in the first instance, it was considered that the production of an authority, which was not brought to the notice of the Court at the first hearing, and which lays down a view of the law contrary to that taken by the Judge, is not a sufficient ground for a review. If the Judge has decided wrongly on the matter of law by reason of the case not having been brought to his notice, it is a matter for appeal, not for review (*f*). So, in one instance (*g*), Bayley and Markby, JJ., refused to admit a review on a point of jurisdiction which might have been taken before, and declined to hear a

(*a*) Bulkiram Natharam *v.* The Guzerat Mercantile Association, 4 Bom. H. C. Rep., 81.

(*b*) *In re* Rani Umasundari Debi, 5 B L. R., Apx., 29, Bayley and Markby, JJ.; *In re* Mathra Parshad, I. L. R., 1 All., 296, Stuart, C. J., and Turner, J.

(c) Doorga Doss Sandyal *v* Panchoo Ram Mundul, 23 Suth. W. R., 271, Phear and Morris, JJ.

(*d*) Hadjee Abdoollah, petitioner, I. L. R, 2 Cal., 131, see p. 140; see also Chintamani Pal *v.* Saleh Shabi Sabi-ud-din Abu Saleh, 6 B. L. R., 126; and Kalu-bin-Bhiwaji *v.* Vishram Mawji, I. L. R., 1 Bom., 543.

(*e*) Koh Poh *v.* Moung Tay, 10 Suth. W. R., 143, Peacock, C. J., and Mitter, J.

(*f*) Ellem *v.* Basheer, I. L. R., 1 Cal. 184, Garth, C. J., and Birch, S. C., 24 Suth. W. R., 382, Nobeen Kishen, Mookerjee *v.* Shib Pershad Pattuck 9 Suth. W. R., 161.

(*g*) Jonab Ali *v.* Chundee Churn Dey, 11 Suth. W. R., 202.

re-argument on the same facts as have been before the Court originally. The fact that the law has been differently expounded since the decision of the case may be a ground for review (*a*); and when the review is once admitted, the suit becomes a new one, and if the law has been differently expounded by the superior Court, after the case was originally decided, the Court hearing the review must be guided by this new exposition of the law (*b*). The omission of the Court to take into consideration a material issue is a sufficient ground to admit an application for a review of judgment. And when a review has been admitted on grounds other than the discovery of fresh evidence, fresh evidence not produced at the trial may be received, although no reason, as required by this section, has been assigned for its non-production at the trial (*c*). The Court may, on the oral application of the parties, enlarge the grounds of review beyond those taken in the written application (*d*). When the review is admitted, the whole case is reopened, and not the points only on which review was admitted (*e*). It was decided in the High Court at Madras that the provisions of the Civil Procedure Code of 1859 were not applicable to proceedings under Act XXVII of 1860, which enables a Court to grant a certificate to collect debts (*f*). It was thought that although Act XXIII of 1861, s. 38, which corresponds with s. 647 of this Act, provided, as s. 647 provides, that the procedure of the Code shall be followed in all miscellaneous cases and proceedings, it must be held to apply only when a mode of procedure is left unprovided for; and that Act XXVII of 1860, s. 6, did provide a special procedure for getting rid of a certificate when granted. In a case (*g*) decided in Calcutta, it was, however, held that such proceedings could be reviewed, but that there was no appeal against them. Glover, J., and Mitter, J., who decided the case, felt

(*a*) Unoop Chunder Paul *v.* Ekkurree Singh, 2 Wym., 180; S. C., 6 Suth. W. R., 180, Norman and Seton-Karr, JJ.; but see Attorney-Genl. of Hongkong *v.* Kwok-a-Sing, L. R., 5 P. C., 190, *per* Mellish, L. J.

(*b*) Allad Monee Dossia *v.* Joy Sunkur Roy, 7 Suth. W. R., 408.

(*c*) Bihari Lal Nandi *v.* S. M. Trailakhomayi Barmani, 3 B. L. R., 346, L. S. Jackson and Markby, JJ.

(*d*) Bhugwandeen Doobey *v.* Myna Baee, 11 Moo. I. A., 487.

(*e*) Sainal Ranchod *v.* Dullabh Dvarka, 10 Bom. H. C. Rep., 360, Melvill and Nanabhai Haridas, JJ.

(*f*) Sivu *v.* Chenamma, 5 Mad. H. C. Rep., 417, Scotland, C. J., and Holloway, J.

(*g*) Poona Kooer, petitioner, I. L. R. 1 Cal., 101.

bound to follow a former decision of the Calcutta High Court (*a*) and to disregard the decision of the High Court in Madras. There may be a review of an order rejecting an application for registration of a document under the Registration Act (*b*). If a review is admitted without sufficient legal reason, the judgment passed on review is passed without jurisdiction, and will be reversed on appeal (*c*). There may be various good grounds for admitting a review besides error of law or the discovery of new evidence, for instance, a minor, who on coming of age finds that his guardian has misconducted a suit on his behalf, can apply for review (*d*).

To whom applications for review may be made.

624. (S.) Except upon the ground of the discovery of such new and important matter or evidence as aforesaid, or of some clerical error apparent on the face of the decree, no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it.

The words of this section exclude applications for reviews, expect in the cases specified, from the consideration of any Judge other than he who delivered it, unless the judgment be that of a High Court. This would in such cases prevent an application to the successor of a Judge who had left the Court, otherwise there may be circumstances under which a Judge may admit a review of his predecessor's judgment (*e*). On this point the following observations will be found in the judgment delivered by the Privy Council in February, 1859. "It must be borne in mind that a review "is perfectly distinct from an appeal; it is quite clear from the "Regulations (and the same remark applies to this Act, VIII of "1859) that the primary intention of granting a review was a

(*a*) Hameeda Bibee *v.* Noor Bibee, 9 Suth. W. R, 394

(*b*) Hadjee Abdoollah, petitioner, I. L. R., 2 Cal., 131, P. C., see p. 139.

(*c*) Syud Fuzzul Hossein *v.* Enayet Ali Khan, 22 Suth. W. R., 268, Phear and Morris, JJ.

(*d*) Dabee Dutt Shahoo *v.* Subodra Bibee, 25 Suth. W. R., 449, Garth, C. J., and Ainslie, J.

(*e*) Aman Ali Chowdhree *v* Budeeur Ruhman, 3 Wym Rep, 30; S. C., 6 Suth. W. R., 316; Sheikh Gholam Hossein *v.* Okhoy Coomar Ghose, 3 Suth. W. R., Act X Rul., 169; Roy Meghraj *v.* Beejoy Gobind Burral, I. L. R, 1 Cal., 197, Macpherson, Offg. C. J. and Birch, J; Mathra Pershad, petitioner, *ib.*, 1 All., 296, Stuart, C. J., and Turner, J; Shama Churn Chowdhry *v.* Bindabun Chunder Roy, 5 Wym, 141; S. C., 9 Suth W. R, 181, F. B.

"reconsideration of the same subject by the same Judge, as contra-"distinguished to an appeal, which is a hearing before another "tribunal. We do not say that there might not be cases in "which a review might take place before another and a different "Judge, because death or some other unexpected and unavoidable "cause might prevent the Judge who made the decision from "reviewing it; but we do say that such exceptions are allowable "only *ex necessitate*" (*a*).

Form of applications for review.

625. (S.) The rules hereinbefore contained as to the form of making appeals shall apply, *mutatis mutandis*, to applications for review.

This also is new. The rules as to the form of making appeals will be found in chap. xli, s. 541.

The time for applying for a review of judgment is ninety days from the date of the decree or order (*b*), except in the case of a judgment of a High Court of Judicature at Calcutta, Madras or Bombay, in the exercise of its original jurisdiction, in which case it is twenty days. By s. 5 of Act XV of 1877, an application may be admitted after the period of limitation, when the applicant satisfies the Court that he had sufficient cause for not making the application within such period.

A review should not be admitted after time without the express leave of the Court (*c*). It was held in a Privy Council case (*d*) that where a review was admitted after time, and without good cause shown for the delay, all proceedings following the admission of the review are nugatory. The Judicial Committee said, "that the causes accounting for the delay, and intended to justify "the grant of a review, ought to be of grave importance. "Indeed, it is quite manifest, that this must be so, or the litiga-"tion might be indefinitely suspended, and all the evil incidental "to the uncertainty of the rights of property incurred. . . . . And "if the review was granted without due regard to the regulations "governing such proceedings, it, and all that has been done under

(*a*) Maharajah Moheshur Singh *v.* The Bengal Government, 7 Moo. I. A., 304.

(*b*) Act XV of 1877, sched. ii, div. 3, No. 173.

(*c*) Omrao Singh *v.* Mongula Bebee, 3 Suth. W. R., 113; Mahomed Gazi Chowdhry *v.* S. M. Dullab Bibee, 5 B. L. R., 318 note.

(*d*) Maharajah Moheshur Singh *v.* The Bengal Government, 7 Moo. P. C., 283.

"it, must fall to the ground." This was a case decided on Reg. XXVI of 1814 (Bengal), but the principle was adopted in the case of *Luchmun Singh* v. *Tirbani Buksh* (*a*) and on a construction of s. 377 of Act VIII of 1859, it had been applied by the Full Bench of the High Court at Calcutta (*b*).

The order should also state the reasons for its admission, otherwise it will be set aside together with all subsequent proceedings (*c*).

Where a defendant, who was one out of twenty-seven defendants, had no reason to believe that a decree for wasilat against "the defendant" would have been executed against *him*, when he was not the person against whom the plaintiff sought for wasilat in the original plaint, and came to the Court for a review after the limited time,—it was held that he had good cause (*d*).

Where L., a plaintiff, lost her suit in the first Court and succeeded in appeal and then died, and A., in execution of the decree, having obtained possession of the land, sued for and realized the costs; afterwards S., claiming as the adopted son of L., applied for a review after time which was allowed, on the ground that the appeal was decreed when the petitioner was a minor, and proceedings had then taken place which ended in the Court of Wards taking charge of the property on his behalf, but the Court of Wards did not apply for a review, but he did himself when he came of age, without loss of time,—it was held, that the review was properly granted (*e*). It has been said that there is no limit to the time allowed, provided that sufficient cause be shown (*f*).

The fact that the law has been differently expounded since the case was decided in the first instance is not a good reason for

(*a*) 14 B. L. R., P. C., 373; S. C., L. R, 2 I. A., 58; *nom.* Luchmun Singh *v.* Shumshere Singh.

(*b*) Shama Churn Chowdhry *v.* Bindabun Chunder Roy, 5 Wym., 141; S. C., 9 Suth. W. R., 181; see also Dwarkanath Doss Biswas *v.* Manick Chunder Doss, 9 Suth. W. R., 102; Pran Kishan Bhuttacharjee *v.* Bukshee Cazee, 10 *ib.*, 26; Gour Pershad Surmah *v.* Aujub Ali, 24, *ib.*, 294, Macpherson and Morris, JJ.

(*c*) Luchmun Singh *v.* Shumshere *supra*; see also Gunganarain Roy *v.* Goonomonee, 8 Suth. W. R., 184; see also Musst. Montoora *v.* Ablak Roy, 11 Suth. W. R., 197.

(*d*) Bunkoo Lall Singh *v.* Basoomunissa Bibee, 7 Suth. W. R., 166, Norman and Seton-Karr, JJ.

(*e*) Ajonnissa Bibi *v.* Surja Kant Acharji, 2 B. L. R., A. C., 181; S. C., 11 Suth. W. R., 56.

(*f*) Joogulkishore Singh *v.* Ooggroo Narain Singh, 5 Wym., 20, L. S. Jackson and Hobhouse, JJ.; S. C., 8 Suth. W. R., 483.

admitting a review after lapse of time (*a*). In the last case the review was not admitted on the ground that it had not been applied for within ninety days after the new exposition of the law. But in a case of this nature there may be other circumstances which, coupled with the new law, will justify the admission of a review. Thus where five analogous cases were decided by the High Court together and dismissed on appeal, and two of them, being in respect of property over Rs. 10,000 in value, were appealed to the Judicial Committee, which reversed the decision, and the other three were not of that value,—it was decided in that particular instance by Kemp and Glover, JJ., to admit the review after time in the three unappealed cases (*b*), although the Judicial Committee might have called up the other three cases and decided them with the two which were appealed (*c*). The case must be very exceptional in which a review should be admitted under such circumstances. The pendency of an appeal on a point of law is not a good reason for allowing a review after time (*d*); in fact, the pendency of the appeal bars the review (*e*). In the case of an application for a review being preferred after time, there are two orders to be made: the first, the order that the application shall be received; and the second, the order granting the review. If the decree on review be appealed against, an objection to the first of these orders may be urged on the appeal (*f*). But these two orders may be made together (*g*). An application for a review should be accompanied by a copy of the *decree;* a copy of the *judgment* is not enough (*h*).

(*a*) Maharajah Moheshur Singh *v.* The Bengal Government, 7 Moo. I. A., 309 (where it was many years); see also Shamachurn Chowdhry *v.* Bindabun Chunder Roy, 5 Wym., 141; 9 Suth. W. R., 181, F. B.; Ramkuvar Bhai *v.* Damodhar Narbheram, 6 Bom. H. C. Rep., A. C., 146; Mowri Bewa *v.* Surendra Nath Roy, 2 B. L. R., App., 184 note; Punchanun Bose *v.* Guru Doss Roy, 9, *ib.*, 187; Forbes *v.* Shaikh Dyanutoollah, 10 Suth. W. R., 415, Bayley and Kemp, JJ.

(*b*) Satto Saran Ghosal Bahadur *v.* Tarini Charan Ghose, 3 B. L. R., A. C., 287.

(*c*) See Baboo Gopal Lal Thakoor *v.* Teluck Chunder Rai, 10 Moo. I. A., 183. But see Asrafannissa Begum *v.* Syad Inaet Hossein, 5 B. L. R., 321, and Panchanan Bose *v.* Guru Doss Roy, 9 B. L. R., 187; and the strong opinion expressed in the Full Bench case, 5 Wym., 144, 145.

(*d*) Lucas *v.* Stephen, 9 Suth. W. R 301, Bayley and Phear, JJ.

(*e*) See s. 623, *ante*.

(*f*) Shamachurn Chowdhry *v.* Bindabun Chunder Roy, 5 Wym., 141; S. C., 9 Suth. W. R., 181.

(*g*) Ajonnissa Bibi *v.* Surja Kant Acharji, 2 B. L. R., A. C., 181; S. C., 11 Suth. W. R., 56.

(*h*) Chundursurry Koondoo *v.* Mackintosh, S. D. A., 1860, p. 283.

626. (S.) If it appear to the Court that there is not sufficient ground for a review, it shall reject the application.

Application when rejected.

If the Court be of opinion that the application for the review should be granted, it shall grant the same, and the Judge shall record with his own hand his reasons for such opinion:

Application when granted.

Proviso.

Provided that—

(*a*) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree a review of which is applied for; and

(*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed, without strict proof of such allegation.

This section corresponds with the first and last part of s. 378 of Act VIII of 1859. The second proviso enacts what had been decided in numerous cases under that section.

On an application for a review being made, grounds should be clearly put forward by affidavit (*a*). Upon an application for review of judgment, the written grounds for review impugned the correctness of the decision of the Court below, on grounds that related solely to the immoveable estate and not to the moveable estate also in question in the suit. It was held that, notwithstanding the terms of s. 378 of Act VIII of 1859, it was competent to the Judges, by whom the order allowing the application for review was made, to enlarge those grounds on an oral application by including moveables, if satisfied that there was a proper case on the merits for so doing (*b*). Where an application for review is rejected, the papers relating to the review are not to be sent with the record to the Privy Council where an appeal is preferred against

(*a*) Dhunsook Doss *v.* Hurry Baboo, 1 Bourke, 115; Umrao Thakoor *v.* Gakul Mundal, 8 B. L. R, Apx., 34.

(*b*) Bhugwandeen Doobey *v.* Myna Baee, 11 Moo. I. A., 487.

the decree which it was sought to have reviewed, no appeal being filed against the order rejecting the review (*a*).

Application for review in Court consisting of two or more Judges.

627. (S.) If the Judge or Judges, or any one of the Judges, who passed the decree or order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause, for a period of six months next after the application, from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

This corresponds with Act VIII of 1859, s. 379. See *ante*, s. 624, as to the cases in which, when a Judge has left the Court, his successor may review a judgment of the Judge who has left.

Application when rejected.

628. (S.) If the application for a review be heard by more than one Judge, and the Court be equally divided, the application shall be rejected.

If there be a majority, the decisions shall be according to the opinion of the majority.

This is new.

Order of Court final.

629. (S.) An order of the Court for rejecting the application shall be final, but whenever such application is admitted, the admission may be objected to on the ground that it was—

(*a*) in contravention of the provisions of section 624,

(*b*) in contravention of the provisions of section 626, or

(*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

(*a*) Shaik Imdad Ali *v.* Musst. Kootby Begum, 3 Moo. I. A., 1; Raja Syud Enaet Hossein *v.* Rani Roushun Jehan, 1 B. L. R., F. B., 1; S. C., 10 Suth. W. R., F. B., 1; Fakiruddin Mohammed Asan Chowdhry *v.* Najumunnissa Chowdhrain, 2 B. L. R., App., 264, Loch, J.

Such objection may be made at once by an appeal against the order granting the application, or may be taken in any appeal against the final decree or order made in the suit.

Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and if it be proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court may order it to be restored to the file upon such terms as to costs or otherwise, as it thinks fit, and shall appoint a day for hearing the same.

No order shall be made under this section unless the applicant has served the opposite party with notice in writing of the latter application.

No application to review an order passed on review or on an application for a review shall be entertained.

This corresponds with a clause in s. 378 of Act VIII of 1859, but gives a direct appeal under the circumstances specified. Under the old law (1859) there was no direct appeal except against an order admitting the review after time. In such a case there were two decisions: one, that there was just cause for admitting the application after time; the other, for admitting the review. The first was directly appealable (*a*). The second order granting the review, although it had been held in some cases to be itself final, yet, in appeal against the decision passed in review, objection might be taken that the review was improperly granted; and this would be so still; but there is also now, in the cases specified, a direct appeal in accordance with a Full Bench ruling of the High Court at Calcutta (*b*). Where a lower Court, with material before it, comes to the conclusion that a review, which has been applied for, is necessary to correct evident error or omission, or for

(*a*) Shama Churn Chowdhry *v.* Brindabun Chunder Roy, 5 Wym., 141, F. B.; S C., 9 Suth. W. R, 181.

(*b*) See Bhyrub Chunder Shurmah Chowdhry *v.* Madhub Ram Shurmah, 20 Suth. W. R., 84, and cases there cited; Joy Kishen Mookerjee *v.* Parbutty Churn Ghossal, 22 Suth. W. R., 183, Ainslie and McDonell, JJ.

the ends of justice, and grants the application accordingly, the order admitting the review will not be questioned on special appeal (*a*).

The order rejecting an application for a review is final, and this provision is not affected by cl. 15 of the Letters Patent of 1865. Therefore, where two Judges of the High Court differed in opinion as to the propriety of admitting a review, and the opinion of the senior Judge prevailed, it was decided that the order could not be dealt with under that 15th clause (*b*), nor is there an appeal under the Charter (cl. 39) of the High Courts to the Judicial Committee (*c*). The decree on the case after the review has been granted is appealable like any other decree (*d*).

It was held that by "final" is meant that there is no appeal against the order, and not that there cannot be a second application for a review (*e*). A second application was held to be admissible, whether (1) the application for review is dismissed for default of the applicant, or (2) admitted, and the judgment is altered on rehearing, or (3) admitted, and the judgment is not altered on the rehearing, or (4) rejected (*f*). The last paragraph of this section does not seem to alter this law which relates to a second or subsequent application to review the original judgment. Such an application is not an application to review the first order passed on review, or on an application for a review. The reasons given by Peacock, C. J., in the case of *Nasiruddin Khan* seem to be unaffected by this new enactment. His Lordship observed: "I think that an order for "rejection is not absolutely final, and that it is in the judicial "discretion of the Court to say that, notwithstanding it has rejected "the application on one ground, it is not precluded from admitting

(*a*) Sahebjan Bibee *v.* Syud Sufdur Ali, 22 Suth W. R., 288, Couch, C. J., and Ainslie, J.

(*b*) Raku Bibi *v.* Khaja Mahomed Musa Khan, 4 B. L R., A. C., 10, Peacock, C. J., Kemp and Macpherson, JJ.

(*c*) Soudamonee Dossee *v.* Maharaj Dheraj Mahatab Chand Bahadoor, 6 Suth. W. R, Mis, 102, F. B.

(*d*) Apcar *v* Howah Bye, 1 In. Jur., N. S., 237, Peacock, C. J., and Morgan, J.; Ahmud Hossein Jan *v.* Sharbanud Tewaree, 6 Suth. W. R., 301, Loch and Macpherson, JJ.

(*e*) Nusiruddin Khan *v.* Indro Narayan Chowdhry, B. L. R., F. B., 367; S. C. 1 In. Jur., N. S, 147, and 5 Suth. W. R., F. B., 93; Fukheeroodeen *v.* Kalachand Sirdar, 1 Suth. W. R., 287; Doorganauth Shoor *v.* Sookhmoy Biswas, 2 Suth. W. R, 62; Kanto Lall Singh *v.* Brojo Lall Singh, 3 Suth. W. R, Mis.. 3.

(*f*) Nasiruddin Khan *v.* Indronarain Chowdhry, B. L. R, F. B, 367; S. C., 1 In. Jur, N. S., 147; and 5 Suth. W. R, 93, F. B.

"it upon another ground. It may happen that, after a review has "been rejected on a point of law, new evidence may be discovered, "which was not within the knowledge of the applicant at the "original hearing, or at the time of the re-hearing on review; "surely there is no reason for refusing to admit a review upon the "ground of the new evidence, simply because it has been rejected "upon a point of law, if the Court thinks that a review is neces-"sary for the ends of justice. . . . . I do not think that "any inconvenience will arise from this construction, if applications "for review be confined to their legitimate object; whereas, injus-"tice might be done if a different construction were put upon the "words" (*a*). So now, an applicant might say, "I have nothing to "urge against the rejection of my first application for a review; it "was made upon a ground which has been decided to be untenable; "but I have another and a distinct ground to urge as a reason why "the original judgment should be reviewed," but he could not say "I wish to urge again the same objection which I urged before." It is submitted that this is the meaning of the last paragraph of this section.

Registry of application granted and order for re-hearing.

630. (S.) When an application for a review is granted, a note thereof shall be made in the register, and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

This corresponds with s. 380 of Act VIII of 1859, but enables the Judge to hear the case at once, which was not so before (*b*); and even now it should manifestly give notice to the other side.

(*a*) See pages 370 and 371 of B. L. R., F. B.

(*b*) Parbutty *v.* Khoobun, 3 Suth. W. R., 134, Bayley and E. Jackson, JJ.

PART IX.

CHAPTER XLVIII.

SPECIAL RULES RELATING TO THE CHARTERED HIGH COURTS.

This part to apply only to certain High Courts.

631. This chapter applies only to High Courts which are or may hereafter be established under the twenty-fourth and twenty-fifth of Victoria, chapter 104 (*an Act for establishing High Courts of Judicature in India*).

Application of Code to High Courts.

632. Except as provided in this chapter the provisions of this Code apply to such High Courts.

High Court to record judgments according to its own rules.

633. The High Court shall take evidence and record judgments and orders in such manner as it by rule from time to time directs.

The power to direct the manner of taking evidence is new. The power as to recording judgments and orders was conferred by Act XX of 1862, s. 5.

Power to order execution of decree before ascertainment of costs, and execution for costs subsequently.

634. Whenever a High Court considers it necessary that a decree made in the exercise of its ordinary original civil jurisdiction should be enforced before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs;

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

This is taken from Act XX of 1862, s. 8.

635. Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its ordinary original civil jurisdiction or to examine witnesses, except when the Court shall have, in the exercise of the power conferred by its Charter, authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils, and attorneys.

Attorneys not to address Court, except when authorized.

636. Notices to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the ordinary or extraordinary original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants issued under section 65, writs of execution, and notices under section 553, may be served by the attorneys in the suit, or by persons employed by them, or by such other persons as the High Court by any rule or order from time to time directs.

Process of High Courts may be served by attorneys in suit.

This is taken from Act XVIII of 1862, s. 10.

637. Any non-judicial or quasi-judicial act which this Code requires to be done by a Judge, and any act which may be done by a commissioner appointed to examine and adjust accounts under section 394, may be done by the Registrar of the Court or by such other officer of the Court as the Court may direct to do such act.

Non-judicial acts may be done by Registrar.

The High Court may, from time to time, by rule declare what shall be deemed to be non-judicial and quasi-judicial acts within the meaning of this section.

638. The following portions of this Code shall not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely, sections 16

Sections not applying to High Court in original civil jurisdiction.

and 17, sections 54, clauses (*a*) and (*b*), 57, 119, 160, 182 to 185 (both inclusive), 187, 189, 190, 191, 192 (so far as relates to the manner of taking evidence), 198 to 206 (both inclusive), 261, and so much of section 409 as relates to the making of a memorandum,

and section 579 shall not apply to the High Court in the exercise of its appellate jurisdiction.

Code not to affect High Court in exercise of insolvent jurisdiction.

Nothing in this Code shall extend or apply to any High Court in the exercise of its jurisdiction as an Insolvent Court.

Power to frame forms.

639. The High Court may, from time to time, frame forms for any proceeding in such Court, and may make rules as to the books, entries and accounts to be kept by its officers.

PART X.

CHAPTER XLIX.

MISCELLANEOUS.

Exemption of certain women from personal appearance.

640. (S.) Women, who according to the customs and manners of the country ought not to be compelled to appear in public, shall be exempt from personal appearance in Court.

But nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process.

This clause, which corresponds with Act VIII of 1859, s. 21, refers, as a rule, only to native women (*a*),—*i. e.*, Mahomedans and others who have adopted their custom of secluding women, and to some Eurasians (*b*); and when they have appeared in Court as witnesses, they have been allowed to remain unseen in closed palanquins (*c*), or their evidence is more commonly taken by commission. This may be done under chap. xxv, *ante*. In one case (*d*), a commission was granted to take the evidence of a female witness, subject to having the deposition suppressed if it were shown that she might have appeared. When any act is alleged to have been done, as for instance where a document is alleged to have been executed, by a purdah woman, it must be clearly shown that she was a free agent and knew the nature and effect of the instrument she executed (*e*).

Local Government may exempt certain persons from personal appearance.

641. (S.) The Local Government may, by notification in the official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such

(*a*) Davis *v.* Middleton, 4 Wym. S. C. C. Ref., 7; S. C., 8 Suth. W. R., 282.

(*b*) *Per* Markby, J., in Hossainee Bibee *v.* Tirikhanum, 25th Feb. 1868; *In re* Mainath Sing, 24 Suth. W. R., 375.

(*c*) Kistomohun Mookerjee *v.* S. M. Adarmoney Dabee, 2 Hyde, 88.

(*d*) Gourbullub *v.* Juggernath Persaud Mitter, Morton, 277.

(*e*) Geresh Chunder Lahoree *v.* Musst. Bhuggobutty Debia, 13 Moo. I. A., 419; Tacoordeen Tewarry *v.* Nawab Syed Ali Khan, L. R., 1 I. A., 192.

Government, entitles him to the privilege of exemption, and may, by like notification, withdraw such privilege.

List of names of persons exempted to be kept in subordinate Court.

The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the Local Government, and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court, subordinate to the High Court, shall be kept in such subordinate Court.

Costs of commission rendered necessary by claiming privilege.

When any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pay such costs.

This corresponds with Act VIII of 1859, s. 22.

A rajah instituted a suit under Act X of 1859 through his agent. The Deputy Collector cited the rajah to appear as a witness. He claimed exemption under this section, and petitioned that the evidence of his general agent might be admitted. It was held by the High Court, on appeal, that the Deputy Collector was bound to receive the evidence of the general agent for what it was worth, and to decide the case upon the evidence which was tendered; and that the refusal of the rajah, who had the privilege which he claimed, and his appointment of a special agent or mookhtar for the purpose of the suit, instead of his general agent, was no ground for dismissing the suit (*a*).

The last clause enacts what has always been the practice in this case, and also in the case of other witnesses, purdah women, &c., who for their own convenience are examined by commission.

Persons exempt from arrest.

642. (S.) No Judge, Magistrate or other judicial officer shall be liable to arrest under this Code while going to, presiding in, or returning from his Court.

(*a*) Maharajah Juggut Inder Bunwaree, &c., &c., *v.* Soorjcoomar Chowdhree, Marsh, 267.

And except as hereinafter provided, the parties to a suit and their pleaders and recognized agents shall be exempt from arrest under this Code while going to or attending a Civil Court for the purpose of such suit and while returning from such Court. Witnesses acting in obedience to a summons shall be similarly exempt.

This is the declaration of a well-known rule of English law. The privilege does not attach where there has been an unnecessary deviation from the journey (*a*), or where the witness comes without *bonâ fide* belief that his evidence is required (*b*); but it does attach when the person arrested is in *bonâ fide* attendance for the purposes of the trial, as where it is adjourned and he goes to a lodging (*c*), or stops by the way for refreshment (*d*), and when the witness attends voluntarily he is privileged (*e*) ; but where a writ of attachment was issued against a party to a suit for contempt of Court in not obeying an order to give an account and pay money into Court, it was held, that he could not claim privilege from arrest when coming to Court for the purpose of attending the hearing of the suit, the privilege under which a witness is entitled to his discharge in such a case being the privilege of the Court, not of the witness (*f*). Where a person privileged from arrest was committed by a Court of inferior jurisdiction, it was held, that he could be discharged on application to a High Court on *habeas corpus*, and could show his privilege, although the warrant appeared to be regular, and the Small Cause Court in the Presidency Towns was a Court of inferior jurisdiction to a High Court (*g*). The writ of *habeas corpus* is now abolished in India, but an application can be made under the High Courts' Criminal Procedure Act (Act X of 1875), s. 148.

Procedure in case of certain offences.

643. (S.) When in a case pending before any Court, there appears to the Court sufficient ground for sending for investigation to the Magistrate a charge of any such offence as is described

(*a*) Ricketts *v.* Gurney, 1 Chit., 682.

(*b*) Wooma Churn Dhole *v.* Teil, 14 B. L. R., Apx., 13.

(*c*) Lightfoot *v.* Cameron, 2 W. Bl., 1113; *In re* Omritolall Dey, I. L. R., 1 Cal., 78, Phear, J.

(*d*) Pitt *v.* Coombs, 4 Nev. and M., 535; S. C., 5 B. and Adol., 1078.

(*e*) Rishton *v.* Nisbett, 1 N. and Rob., 347.

(*f*) John *v.* Carter, 4 B. L. R., O. C. J., 90, Macpherson, J.

(*g*) *In re* Omritolall Dey, I. L. R., 1 Cal., 78, Phear, J.

in section 193, 196, 199, 200, 205, 206, 207, 208, 209, 210, 463, 471, 474, 475, 476 or 477 of the Indian Penal Code, which may be made in the course of any other suit or proceeding or with respect to any document offered in evidence in the case, the Court may cause the person accused to be detained till the rising of the Court, and may then send him in custody to the Magistrate, or take sufficient bail for his appearance before the Magistrate.

The Court shall send to the Magistrate the evidence and documents relevant to the charge, and may bind over any person to appear and give evidence before such Magistrate.

The Magistrate shall receive such charge and proceed with it according to law.

This corresponds with Act XXIII of 1861, ss. 16 and 19. The Indian Penal Code (Act XLV of 1860), s. 193, relates to the giving of false evidence; s. 196, to using evidence known to be false; s. 199, to false statements in declarations which are by law receivable as evidence; s. 200, to using the same as true; s. 205, to false personation for the purpose of any suit; s. 206, to fraudulent removal or concealment of property to prevent its seizure in execution of a decree; s. 207, to fraudulent claim to property to prevent its seizure as a forfeiture or in execution of a decree; s. 208, to fraudulently suffering a decree for a sum not due; s. 209, to dishonestly making a false claim in a Court of Justice; s. 210, to fraudulently obtaining a decree for a sum not due; s. 463, to forgery; s. 471, to using as genuine a forged document; s. 474, to having possession of a valuable security or will known to be forged, with intent to use it as genuine; s. 475, counterfeiting a device or mark used for authenticating valuable securities or wills or authorities to adopt a son, or possessing counterfeit marked material; s. 476, the same with regard to other documents; s. 477, fraudulent cancellation of documents mentioned in s. 475.

Use of forms in fourth schedule.

644. (S.) Subject to the power conferred on the High Court by section 639 and by the twenty-fourth and twenty-fifth of Victoria, chapter 104, section 15, the forms set forth in the

fourth schedule hereto annexed, with such variation as the circumstances of each case require, shall be used for the respective purposes therein mentioned.

Language of subordinate Courts.

645. (S.) The language which, when this Code comes into force, is the language of any Court subordinate to a High Court, shall continue to be the language of such subordinate Court until the Local Government otherwise orders;

but it shall be lawful for the Local Government, from time to time, to declare what language shall be the language of every such Court.

Power of Registrars of Small Cause Courts to state cases.

646. (S.) Whenever the Registrar of a Court of Small Causes has any doubt upon any question of law or usage having the force of law, or as to the construction of a document which construction may affect the merits of the decision, he may state a case for the opinion of the Judge; and all the provisions herein contained relative to the stating of a case by the Judge shall apply, *mutatis mutandis*, to the stating of a case by the Registrar.

See Act XI of 1865, s. 42.

Miscellaneous proceedings.

647. (S.) The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals.

Admission of affidavits as evidence.

The High Court may, from time to time, make rules to provide for the admission, in such proceedings, of affidavits as evidence of the matters to which such affidavits respectively relate; and such rules, on being published in the local official Gazette, shall have the force of law.

The first part of this section is taken from Act XXIII of 1861, s. 38. The second part is new. In a recent case, decided by a Full Bench of the North-Western Provinces (*a*) it was said that by the

(*a*) *In re* Harshankar Parshad, I. L. R., 1 All., 178.

words "miscellaneous proceedings" would be understood, ordinarily, those "applications commenced by petition and not by plaint, of a "less formal character than suits, and generally, if not universally, "calling on the Court to exercise special powers conferred on it by "the legislature, such as applications for certificates to collect debts, "applications for probate or letters of administration, applications "for the appointment of guardians, &c.; and possibly also the term "may be also applied with propriety to those proceedings which "the Court is empowered to institute of its own motion, such as "proceedings for the institution of prosecutions in certain cases" and "all proceedings not being regular suits or appeals for which "no procedure is expressly provided and in that sense" the words embrace "proceedings in execution of decrees." In a note to this case several instances are given. The Judicial Committee also have given a very general interpretation to the like words in Act XXIII of 1861, s. 38, holding that it expressly made applicable to a proceeding to compel registration under the Registration Act of 1871, the whole of the procedure laid down in Act VIII of 1859, and that an order of a District Judge rejecting an application to register a document being in the nature of a final decree between the parties asking for the registration of the deed and the parties opposing registration, was capable of being reviewed by virtue of the application of the Code of Civil Procedure to such a miscellaneous proceeding (*a*). But where the proceeding is of a summary nature and not one which is subject to appeal, but may be questioned in a regular suit, it appears that this general application of the Code does not operate to give an appeal. Thus, it was considered that, as in the case of summary orders, made by the District Judge under Reg. I of 1798, no appeal is provided, but such order is open to question in a regular suit. This section gives no right of appeal in such cases, but merely provides that the mode of trial and the procedure incidental and ancillary thereto laid down in the Code shall be applied throughout in miscellaneous cases and proceedings (*b*).

Procedure when person to be arrested or property to be attached is outside the District.

648. (S.) If any person to be arrested or any property to be attached under this Code, resides or is situate outside the District within which the Court issuing the warrant of

(*a*) *In re* Hadjee Abdoollah, I. L. R., 2 Cal., P. C., 131.

(*b*) Hureenath Koondoo *v.* Modhoo Soodun Saha, 19 Suth. W. R., 122, L. S. Jackson and Mitter, JJ.

arrest or making the order of attachment is situate, such Court shall send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment,

and the Court making any arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued.

This section is new; it appears to be inconsistent with the rules for the execution of decrees laid down in the 19th chapter, *ante*, ss. 223 to 229 inclusive; it applies however only to arrest and to attachment, not to the sale of property in execution. An application made under this section for the arrest of a defendant in Calcutta, before judgment in a suit for less than Rs. 1,000, instituted in the Court of the Deputy Commissioner in Delhi, was refused by the High Court in Calcutta, on the ground that to send the man to Delhi in arrest for such a small sum, before judgment, would be oppression (*a*). It applies to Small Cause Courts so far as it relates to arrests.

Rules applicable to all civil process for arrest, sale or payment.

649. (S.) The rules contained in Chapter XIX shall apply to the execution of any judicial process for the arrest of a person or the sale of property or payment of money, which may be desired or ordered by a Civil Court in any civil proceeding.

This corresponds with Act VIII of 1859, s. 296.

Application of rules as to witnesses.

650. (S.) The provisions of Chapters XIV and XV relating to witnesses shall apply to all persons required to give evidence, or to produce documents in any proceeding under this Code.

See Act VIII of 1859, s. 220.

(*a*) Report, 1877.

Penalty for escaping from custody under Code.

651. (S.) Whoever offers any resistance or illegal obstruction to the lawful apprehension of himself under this Code, or under the warrant of any Court of Civil Judicature, or escapes or attempts to escape from any custody in which he is lawfully detained under this Code or under such warrant, shall, on conviction before a Magistrate, be punished with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

This is new in this place. S. 186 of the Indian Penal Code makes the voluntary obstruction of a public servant in the discharge of his duty an offence punishable with imprisonment for three months, or a fine which may extend to Rs. 500, or both. The Amending Act, XXVII of 1870, s. 225A, makes an escape from lawful custody punishable with imprisonment for one year, or with fine, or with both.

Power to make subsidiary rules of procedure.

652. (S.) The High Court may, from time to time, make rules consistent with this Code to regulate any matter connected with the procedure of the Courts of Civil Judicature subject to its superintendence. All such rules shall be published in the local official Gazette, and shall thereupon have the force of law.

See Act XXIII of 1861, s. 40.

THE FIRST SCHEDULE.

(*See section 3.*)

A.—Statute Repealed.

Year and chapter.	Title.	Extent of repeal.
29 Char. II, chap. 7	An Act for the better observance of the Lord's day, commonly called Sunday.	The whole.

B.—Acts Repealed.

Number and year	Subject or title.	Extent of repeal.
IX of 1840...	For amending the law administered in Her Majesty's Courts of Justice with reference to Arbitrations, Damages, and interested Witnesses.	So much as has not been repealed.
XXIII of 1840...	For executing within the local limits of the jurisdiction of Her Majesty's Courts legal Process issued by authorities in the Mufassal.	So far as it relates to the execution of the process of Civil Courts.
VIII of 1841...	Interpleader ...	The whole.
XXVI of 1841...	Extending 3 & 4 Wm. IV, c. 42.	So much as has not been repealed.
XIV of 1848...	Commissions for taking affidavits.	The whole.

THE FIRST SCHEDULE—*continued.*

Acts Repealed—continued.

Number and year.	Subject or title.	Extent of repeal.
XVII of 1852...	Special cases ...	The whole.
XXXIII of 1852...	Enforcement of judgments.	The whole Act, except so far as it relates to the decrees of Military Courts of Requests.
VI of 1855...	Writs of execution ...	The whole.
XXXIV of 1855...	Execution of judgments.	The whole.
VIII of 1859...	For simplifying the procedure of the Courts of Civil Judicature not established by Royal Charter.	So much as has not been repealed.
XXIII of 1861...	To amend Act VIII of 1859.	So much as has not been repealed.
XX of 1862...	To provide for the levy of Fees and Stamp-duties in the High Court, &c.	So much as has not been repealed.
XXIV of 1862...	To continue in force Act XX of 1862.	So much as has not been repealed.
IX of 1863...	To amend the Code of Civil Procedure.	The whole.
XVIII of 1863...	To make provision for the speedy and efficient disposal of the business, &c.	So much as has not been repealed.

THE FIRST SCHEDULE—*continued.*

Acts Repealed—continued.

Number and year	Subject or title.	Extent of repeal
XXXII of 1863...	To continue in force Act XX of 1862.	So much as has not been repealed.
XI of 1865...	Mufassal Small Cause Courts Act.	Sections 8, 9, 10, 11 (para. 2), 22, 23, 24, 25, 26, 27, 28, 42, and 47, and in section 32 the words "in the manner prescribed in the twenty-second section of this Act" and "contained in the twenty-second, twenty-third, twenty-fourth and twenty-fifth sections of this Act."
XIV of 1865...	Central Provinces Courts Act.	Sections 17 and 18.
XIX of 1865...	Panjáb Courts Act ...	Sections 13 and 17.
V of 1866...	To provide a summary procedure on Bills of Exchange, &c.	In the title, the words '*to provide a summary procedure on Bills of Exchange and*' The preamble down to and including the words 'Notes; and' In section 1, the definitions of 'High Court' and 'Local Government.' Sections two to eight (both inclusive). Section fourteen.

THE FIRST SCHEDULE—*continued.*

Acts Repealed—concluded.

Number and year.	Subject or title.	Extent of repeal.
XXIV of 1866...	High Court, North-Western Provinces.	So much as has not been repealed.
X of 1867...	References by Mufassal Small Cause Courts.	The whole.
XXVI of 1867...	To amend the law relating to Stamp-duties.	So much as has not been repealed.
XV of 1869...	Prisoners' Testimony Act.	So much of sections 15 and 16 as relates to process issued by a Civil Court.
IX of 1873...	Panjáb Appeals Act, 1873.	Sections 9 and 10.
VI of 1874...	The Privy Council Appeals Act, 1874.	The whole.

C.—Regulations Repealed.

Bengal Regulation XX of 1810.	Cantonments ...	So much of section XIX as relates to civil process.
Madras Regulation XIV of 1816.	Vakíls	Section 27.

THE SECOND SCHEDULE.

(See section 5.)

Chapters and Sections of this Code extending to Mufassal Courts of Small Causes.

PRELIMINARY: Sections 1, 2, 3, and 5.

CHAPTER.

I.—Of the Jurisdiction of the Courts and *Res Judicata*, except section 11.

II.—Of the Place of Suing, except section 20, paragraph 4, and sections 22 to 24 (both inclusive).

III.—Of Parties and their Appearances, Applications and Acts.

IV.—Of the Frame of the Suit, except section 42 and section 44, rule *a*.

V—Of the Institution of Suits.

VI.—Of the Issue and Service of Summons, except section 77.

VII—Of the Appearance of the Parties and consequence of Non-appearance.

VIII.—Section 111, Set-off.

IX.—Of the Examination of the Parties by the Court, except section 119.

X.—Of Discovery and the Admission, &c. of Documents.

XII.—Section 155, first paragraph, Judgment where either party fails to produce his evidence.

XIII.—Of Adjournments.

XIV.—Of the Summoning and Attendance of Witnesses.

XV.—Of the Hearing of the Suit and Examination of Witnesses, except sections 182 to 188 (both inclusive).

XVII.—Of Judgment and Decree, except sections 204, 207, 211, 212, 213, 214, and 215.

XVIII.—Sections 220, 221, and 222 of Costs.

XIX.—Of the Execution of Decrees, sections 230 to 236 (both inclusive), 239 to 258 (both inclusive), 259 (except so far as relates to the recovery of wives), 266 (except so far as relates to immoveable property), 267 to 272 (both inclusive), 273 (so far as relates to decrees for moveable property), 275 to 280 (both inclusive), 283, 284 (so far as relates to moveable property), 285, 286, 287, 288, 289, 290, 291, 292, 293 (so far as relates to re-sales under 297), 294 to 303 (both inclusive), 328 to 333 (both inclusive, so far as relates to moveable property), 336 to 343 (both inclusive).

CHAPTER.

XXI.—Of the Death, Marriage, and Insolvency of Parties.

XXII.—Of the Withdrawal and Adjustment of Suits.

XXIII.—Of Payment into Court.

XXIV.—Of requiring Security for Costs.

XXV.—Of Commissions.

XXVI.—Suits by Paupers.

XXVII.—Suits by and against Government or Government Servants.

XXVIII.—Suits by Aliens and by and against Foreign and Native Rulers, except the first paragraph of section 433.

XXIX.—Suits by and against Corporations and Companies.

XXX.—Suits by and against Trustees, Executors, and Administrators

XXXI.—Suits by and against Minors and Persons of unsound Mind.

XXXII.—Suits by and against Military Men.

XXXIII.—Interpleader.

XXXIV.—Of Arrest and Attachment before Judgment.

XXXVII.—Reference to Arbitration, sections 506 to 522 (both inclusive).

XXXVIII.—Of proceedings on Agreement of Parties.

XLVI.—Reference to and Revision by High Court.

XLVII.—Of Review of Judgment.

XLIX.—Miscellaneous, sections 640 to 647 (both inclusive) section 648 (so far as relates to arrest), sections 649 to 652 (both inclusive).

THE THIRD SCHEDULE.

(See section 7.)

Bombay Enactments.

Bombay Regulation XXIX, 1827.
" " VII, 1830.
" " I, 1831.
" " XVI, 1831.
Act XIX of 1835.
" XIII of 1842.

THE FOURTH SCHEDULE.

(See section 644)

FORMS OF PLEADINGS AND DECREES.

A—PART I. PLAINTS.

No 1

For Money Lent

IN THE COURT OF AT

CIVIL SUIT No.

A. B. of

against

C. D of

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at he lent the defendant rupees repayable on demand [*or* on the day of].

2. That the defendant has not paid the same, except rupees paid on the day of 18 .

[*If the plaintiff claims exemption from any law of limitation, say*:—

3. The plaintiff was a minor [*or* insane] from the day of till the day of .]

4. The plaintiff prays judgment for rupees, with interest at per cent., from the day of 18 .

[NOTE—The object of stating when the debt is to be repaid is merely to fix a date for interest. If, therefore, interest is not claimed, the statement may be omitted]

No 2

For Money received to Plaintiff's use

(*Title.*)

A. B and *G. H.*, the above-named plaintiffs, state as follows:—

1. That, on the day of 18 , at the defendant received rupees [*or* a cheque on the Bank for rupees] from one *E. F.* for the use of the plaintiffs,

2. That the defendant has not paid [*or* delivered] the same accordingly

3 The plaintiffs pray judgment for rupees, with interest at per cent., from the day of 18

No. 3.

For Price of Goods sold by a Factor.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at he and *E F.*, since deceased, delivered to the defendant [*one thousand barrels of flour, five hundred maunds of rice, or as the case may be*] for sale upon commission.

2 That, on the day of 18 , [*or*, on some day unknown to the plaintiff, before the day of 18], the defendant sold the said merchandise for rupees.

3. That the commission and expenses of the defendant thereon amount to rupees.

4. That, on the day of 18 , the plaintiff demanded from the defendant the proceeds of the said merchandise.

5. That he has not paid the same.

[*Demand of judgment.*]

No. 4.

For Money received by Defendant through the Plaintiff's Mistake of Fact.

(*Title.*)

A B., the above-named plaintiff, states as follows :—

That, on the day of 18 , at the plaintiff agreed to buy, and the defendant agreed to sell, bars of silver at annas per tola of fine silver.

2. That the plaintiff procured the said bars to be assayed by one *E. F*, who was paid by the defendant for such assay, and that the said *E F.* declared each of the said bars to contain 1,500 tolas of fine silver, and that the plaintiff accordingly paid the defendant rupees annas therefor.

3 That each of the said bars did contain only 1,200 tolas of fine silver.

4 That the defendant has not repaid the sum so overpaid.

[*Demand of judgment.*]

[NOTE.—A demand of repayment is not necessary, but it may affect the question of interest or the costs.]

No 5.

For Money paid to a third Party at the Defendant's Request.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at

at the request [*or* by the authority] of the defendant, the plaintiff paid to one *E F.* rupees.

2. That, in consideration thereof, the defendant promised [*or* became bound] to pay the same to the plaintiff on demand [*or as the case may be.*]

3. That [on the day of 18 , the plaintiff demanded payment of the same from the defendant, but] he has not paid the same.

[*Demand of judgment.*]

[NOTE.—If the request or authority is implied, the plaint should state facts raising the implication]

No. 6.

For Goods sold at a fixed Price and delivered.

(*Title.*)

A B., the above-named plaintiff, states as follows :—

1. That on the day of 18 , at *E F.*, of , deceased, sold and delivered to the defendant [one hundred barrels of flour, *or*, the goods mentioned in the schedule hereto annexed, *or*, sundry goods].

2. That the defendant promised to pay rupees for the said goods on delivery [*or* on the day of *some day before the plaint was filed*].

3. That he has not paid the same.

4. That the said *E. F.* in his lifetime made his will, whereby he appointed the plaintiff executor thereof.

5. That, on the day of 187 , the said *E. F.* died.

6. That, on the day of , probate of the said will was granted to the plaintiff by the Court of .

7. The plaintiff as executor as aforesaid [*Demand of judgment*].

[NOTE.—If a day was fixed for payment, it should be stated as furnishing a date for the commencement of interest.]

No. 7.

For Goods sold at a reasonable Price and delivered.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at plaintiff sold and delivered to the defendant [*sundry articles of house furniture*] but no express agreement was made as to the price.

2. That the same were reasonably worth rupees.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

[NOTE.—The law implies a promise to pay so much as the goods are reasonably worth.]

No. 8.

For Goods delivered to a third Party at Defendant's Request at a fixed Price.

(*Title*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at plaintiff sold to the defendant [*one hundred barrels of flour*] and at the request of the defendant, delivered the same to one *E F.*

2. That the defendant promised to pay to the plaintiff rupees therefor.

3. That he has not paid the same.

[*Demand of judgment.*]

No. 9.

For Necessaries furnished to the Family of Defendant's Testator without his express Request, at a reasonable Price.

(*Title*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at plaintiff furnished to [*Mary Jones*] the wife of *James Jones* deceased, at her request, sundry articles of [*food and clothing*], but no express agreement was made as to the price.

2. That the same were necessary for her.

3. That the same were reasonably worth rupees.

4. That the said *James Jones* refused to pay the same.

5. That the defendant is the executor of the last will of the said *James Jones.*

[*Demand of judgment*]

No. 10.

For Goods sold at a fixed Price.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at the plaintiff sold to *E. F.* of deceased [*all the crops then growing on his farm in*].

2. That the said *E. F.* promised to pay the plaintiff rupees for the same.

3. That he did not pay the same.

4. That the defendant is administrator of the estate of the said *E. F.*

[*Demand of judgment.*]

No. 11.

For Goods sold at a reasonable Price.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at *E. F.* of sold to the defendant [*all the fruit growing in his orchard in*], but no express agreement was made as to the price.

2. That the same was reasonably worth rupees.

3. That the defendant has not paid the same.

4. That, on the day of the High Court of Judicature at Fort William duly adjudged the said *E. F.* to be a lunatic and appointed the plaintiff committee of his estate with the usual powers for the management thereof.

5. The plaintiff as committee as aforesaid [*Demand of judgment.*]

[NOTE.—When the lunatic's estate is not subject to the ordinary original jurisdiction of a High Court, for paragraphs 4 and 5 substitute the following.]

4. That, on the day of the Civil Court of duly adjudged the said *E. F.* to be of unsound mind and incapable of managing his affairs, and appointed the plaintiff manager of his estate.

5. The plaintiff as manager as aforesaid [*Demand of judgment.*]

No. 12

For Goods made at Defendant's Request, and not accepted.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , *E. F.* of agreed with the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*], and that the said *E. F.* should pay for the same upon delivery thereof rupees.

2. That the plaintiff made the said goods, and on the day of 18 offered to deliver the same to the said *E. F.*, and has ever since been ready and willing so to do.

3. That the said *E. F.* has not accepted the said goods or paid for the same.

4. That, on the day of the High Court of

Judicature at Fort William duly adjudged the said *E F.* to be a lunatic and appointed the defendant committee of his estate.

5. The plaintiff prays judgment for rupees with interest from the day of , at the rate of per cent. per annum, to be paid out of the estate of the said *E. F.* in the hands of the defendant.

No. 13

For Deficiency upon a Re-sale [Goods sold at Auction].

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at plaintiff put up at auction sundry [*articles of merchandise*], subject to the condition that all goods not paid for and removed by the purchaser thereof, within [*ten days*] after the sale, should be re-sold by auction on his account, of which condition the defendant had notice.

2. That the defendant purchased [*one crate of crockery*] at the said auction at the price of rupees.

3. That the plaintiff was ready and willing to deliver the same to the defendant on the said day and for [*ten days*] thereafter, of which the defendant had notice.

4. That the defendant did not take away the said goods purchased by him, nor pay therefor, within [*ten days*] after the sale, nor afterwards.

5. That, on the day of 18 , at , the plaintiff re-sold the said [*crate of crockery*], on account of the defendant, by public auction, for rupees.

6. That the expenses attendant upon such re-sale amounted to rupees.

7. That the defendant has not paid the deficiency thus arising, amounting to rupees.

[*Demand of judgment.*]

[NOTE to § 4.—Unless the seller agreed to deliver, the purchaser must fetch the goods See Act IX of 1872, sec. 93.]

No. 14.

For the Purchase-money of Lands conveyed.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the plaintiff sold [and conveyed] to the defendant [the house and compound No. , in the city of *or*, a farm known as , in , *or*, a piece of land lying, *&c.*]

2. That the defendant promised to pay the plaintiff rupees for the said [house and compound, *or* farm, *or* land].

3. That he has not paid the same.

[*Demand of judgment.*]

[NOTE.—Where there has been no actual conveyance, say, in § 1, "sold to the defendant the house, &c.," and placed him in possession of the same.]

No. 15.

For the Purchase-money of Immoveable Property contracted to be sold, but not conveyed.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant, and that the defendant should purchase from the plaintiff [the house No. in the town of , *or* one hundred bighás of land in , bounded by the East Indian railroad, and by other lands of the plaintiff] for rupees.

2. That, on the day of 18 , at , the plaintiff tendered [*or*, was ready and willing, and offered to execute] a sufficient instrument of conveyance of the said property to the defendant, on payment of the said sum, and still is ready and willing to execute the same.

3. That the defendant has not paid the said sum.

[*Demand of judgment.*]

No. 16.

For Services at a fixed Price.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at the defendant [hired plaintiff as a clerk, at the salary of rupees per year].

2. That from the [said day] until the day of 18 , the plaintiff served the defendant as his clerk].

3. That the defendant has not paid the said salary.

[*Demand of judgment.*]

No. 17.

For Services at a reasonable Price.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, between the day of 18 , and the day of 18 , at , plaintiff [executed

sundry drawings, designs and diagrams] for the defendant, at his request; but no express agreement was made as to the sum to be paid for such services.

2. That the said services were reasonably worth rupees.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 18.

For Services and Materials at a fixed Price.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at plaintiff [furnished the paper for and printed one thousand copies of a book called] for the defendant, at his request [and delivered the same to him].

2. That the defendant promised to pay rupees therefor.

3. That he has not paid the same.

[*Demand of judgment.*]

No. 19.

For Services and Materials at a reasonable Price.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at , plaintiff built a house [known as No. , in], and furnished the materials therefor, for the defendant, at his request; but no express agreement was made as to the price to be paid for such work and materials.

2. That the said work and materials were reasonably worth rupees.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 20.

For Rent reserved in a Lease.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at , the defendant entered into a covenant with the plaintiff, under their hands, a copy of which is hereto annexed.

[*Or state the substance of the agreement.*]

2. That the defendant has not paid the rent of the [month] ending on the day of 18 , amounting to rupees.

[*Demand of judgment.*]

Another Form.

1. That the plaintiff let to the defendant a house, No. 27 Chowringhee, for seven years to hold from the day of 187 at rupees a year, payable quarterly.

2. That of such rent quarters are due and unpaid.

[*Demand of judgment.*]

No. 21.

For Use and Occupation at a fixed Rent.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at the defendant hired from the plaintiff [the house No. street], at the rent of rupees, payable on the first day of .

2. That the defendant occupied the said premises from the day of 18 to the day of 18

3. That the defendant has not paid rupees, being the part of said rent due on the first day of 18

[*Demand of judgment.*]

No. 22.

For Use and Occupation at a reasonable Rent.

(*Title.*)

A. B., the above-named plaintiff, executor of the will of *X. Y.*, deceased, states as follows :—

1. That the defendant occupied the [house No. street], by permission of the said *X. Y.*, from the day of 18 , until the day of 18 and no agreement was made as to payment for the use of the said premises.

2. That the use of the said premises for the said period was reasonably worth rupees.

3. That the defendant has not paid the same.

4. The plaintiff as such executor as aforesaid prays judgment for rupees.

No. 23.

For Board and Lodging.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, from the day of 18 , until the day of 18 , the defendant occupied certain rooms in the house [No. , street], by permission of the plaintiff, and was furnished by the plaintiff, at his request, with meat, drink, attendance and other necessaries.

2. That, in consideration thereof, the defendant promised to pay, [*or* that no agreement was made as to payment for such meat, drink, attendance or necessaries, but the same were reasonably worth] the sum of rupees.

3. That the defendant has not paid the same.

[*Demand of judgment*]

No. 24.

For Freight of Goods.

(*Title.*)

A B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , plaintiff transported in [his barge, *or otherwise*] [one thousand barrels of flour, *or* sundry goods], from to at the request of the defendant.

2. That the defendant promised to pay the plaintiff the sum of [one rupee per barrel] as freight thereon. [*Or*, that no agreement was made as to payment for such transportation, but that such transportation was reasonably worth rupees.]

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 25.

For Passage-money.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , plaintiff conveyed the defendant [in his ship, called the] from to at his request.

2. That the defendant promised to pay the plaintiff rupees therefor. [*Or* that no agreement was made as to the price of the said passage; but that the said passage was reasonably worth rupees.]

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 26.

On an Award.

(*Title*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the plaintiff and defendant, having a controversy between them concerning [a demand of the plaintiff for the price of ten barrels of oil, which the defendant refused to pay], agreed to submit the same to the award of *E. F.* and *G H*, as arbitrators [*or*, entered into an agreement, a copy of which is hereto annexed]

2. That, on the day of 18 , at , the said arbitrators awarded that the defendant should [pay the plaintiff rupees]

3. That the defendant has not paid the same.

[*Demand of judgment.*]

[NOTE.—This will apply where the agreement to refer is not filed in Court.]

No. 27.

On a Foreign Judgment.

(*Title*)

A. B, the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , in the State [*or* Kingdom] of , the Court of that State [*or* Kingdom], in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff rupees, with interest from the said date.

2. That the defendant has not paid the same.

[*Demand of judgment*]

PLAINTS UPON INSTRUMENTS FOR THE PAYMENT OF MONEY ONLY.

No. 28.

On an Annuity Bond.

(*Title*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at the defendant, by his bond became bound to the plaintiff in the sum of rupees to be paid by the defendant to the plaintiff, subject to a condition that if the defendant should pay to the plaintiff rupees half yearly on the day of and

the day of in every year during the life of the plaintiff, the said bond should be void.

2. That afterwards, on the day of 187 , the sum of rupees for of the said half-yearly payments of the said annuity, became due to the plaintiff and is still unpaid.

[*Demand of judgment.*]

No. 29.

Payee against Maker.

(*Title.*)

A. B, the above-named plaintiff, states as follows:—

1. That, on the day of , 18 , at , the defendant, by his promissory note now overdue, promised to pay to the plaintiff rupees [days] after date.

2. That he has not paid the same [except rupees, paid on the day of 18].

[*Demand of judgment.*]

[NOTE.—*Where the note is payable after notice, for paras.* 1 *and* 2 *substitute*—]

1. That, on the day of at the defendant, by his promissory note, promised to pay to the plaintiff rupees months after notice.

2. That notice was afterwards given by the plaintiff to the defendant to pay the same months after the said notice.

3. That the said time for payment has elapsed, but the defendant has not paid the same.

[*Where the note is payable at a particular place, say*—]

1. That, on the day of 187 , at , the defendant, by his promissory note now overdue, promised to pay to the plaintiff [at Messrs. *A. and Co.*, Madras] rupees months after date.

2. That the said note was duly presented for payment [at Messrs. *A. and Co.*] aforesaid, but has not been paid.

Written Statement of the Defendant.

IN THE COURT, &c.

C. D., the above-named defendant, states as follows:—

1. The defendant made the note sued upon under the following circumstances: The plaintiff and defendant had, for some years, been in partnership as indigo manufacturers; and it had been agreed between them that they should dissolve partnership, that the plaintiff should retire from the business, that the defendant should take over the whole of the partnership assets and liabilities, and should pay the plaintiff the value of his share in the assets after deducting the liabilities.

2. The plaintiff thereupon undertook to examine the partnership books and enquire into the state of the partnership assets and liabilities; and he did accordingly examine the said books and make the said enquiries, and he thereupon represented to the defendant that the assets of the firm exceeded Rs. 1,00,000 and that the liabilities of the firm were less than Rs. 30,000, whereas the fact was that the assets of the firm were less than Rs. 50,000 and the liabilities of the firm largely exceeded the assets.

3. The misrepresentations mentioned in the second para. of this statement induced the defendant to make the note now sued on, and there never was any other consideration for the making of such note.

No. 30.

First Indorsee against Maker.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the defendant, by his promissory note now overdue, promised to pay to the order of *E. F.* [*or* to *E. F.* or order] rupees [days after date].

2. That the said *E. F.* indorsed the same to the plaintiff.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 31.

Subsequent Indorsee against Maker.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. [*As in the preceding form.*]

2. That the same was, by the indorsement of the said *E. F.* and of *G. H.* and *I. J.* [*or* and others], transferred to the plaintiff.

[*Demand of judgment.*]

No. 32.

First Indorsee against first Indorser.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That *E. F.*, on the day of 18 , at , by his promissory note now overdue, promised to pay to the defendant or order rupees months after date.

2. That the defendant indorsed the same to the plaintiff.

3. That, on the day of 18 , the same was duly presented for payment, but was not paid.

[*Or state facts excusing want of presentment.*]

4. That the defendant had notice thereof.

5. That he has not paid the same.

[*Demand of judgment.*]

No. 33.

Subsequent Indorsee against first Indorser; the Indorsement being special.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That the defendant indorsed to one *E. F.* a promissory note, now overdue, made [*or* purporting to have been made] by one *G. H.*, on the day of 18 , at to the order of the defendant, for the sum of rupees [payable days after date].

2. That the same was, by the indorsement of the said *E. F.*, [and others] transferred to the plaintiff. [*Or*, that the said *E. F.* indorsed the same to the plaintiff.]

3, 4 *and* 5. [*Same as* 3, 4 *and* 5 *of the preceding form.*]

[*Demand of judgment.*]

No. 34.

Subsequent Indorsee against his immediate Indorser.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That the defendant indorsed to him a promissory note, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 , at , to the order of one *G. H.*, for the sum of rupees [payable days after date], and indorsed by the said *G. H.* to the defendant.

2, 3 *and* 4. [*As in No.* 33.]

[*Demand of judgment.*]

No. 35.

Subsequent Indorsee against intermediate Indorser.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That a promissory note, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of

18 , at , to the order of one *G. H.*, for the sum of rupees [payable days after date], and indorsed by the said *G. H* to the defendant, was, by the indorsement of the defendant [and others], transferred to the plaintiff.

2, 3 *and* 4. [*As in No.* 33.]

[*Demand of judgment.*]

No. 36.

Subsequent Indorsee against Maker, first and second Indorser.

IN THE COURT OF AT

CIVIL SUIT NO.

A. B. of

against

C D. of
E. F. of

and

G. H. of

A. B, the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at , the defendant, *C. D.*, by his promissory note, now overdue, promised to pay to the order of the defendant, *E. F.*, rupees [months after date]

2. That the said *E. F.* indorsed the same to the defendant, *G. H*, who indorsed it to the plaintiff.

3. That on the day of 18 , the same was presented [*or state facts excusing want of presentment*] to the said *C. D* for payment, but was not paid.

4. That the said *E. F.* and *G. H.* had notice thereof.

5. That they have not paid the same.

[*Demand of judgment.*]

No 37.

Drawer against Acceptor.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at , by his bill of exchange, now overdue, the plaintiff required the defendant to pay to him rupees [days after date, *or* sight thereof]

2. That the defendant accepted the said bill. [*If the bill is payable at a certain time after sight, the date of acceptance should be stated, otherwise it is not necessary.*]

3. That he has not paid the same.

4. That by reason thereof the plaintiff incurred expenses in and about the presenting and noting of the bill, and incidental to the dishonour thereof.

[*Demand of judgment.*]

[NOTE.—*Where the bill is payable to a third party, for paras.* 1, 2, 3, *say*—]

1. That, on, &c., at, &c., by his bill of exchange, now overdue, directed to the defendant, the plaintiff required the defendant to pay to *E. F.* or order rupees months after date.

2. That the plaintiff delivered the said bill to the said *E. F.* on .

3. That the defendant accepted the said bill, but did not pay the same, whereupon the same was returned to the plaintiff.

No. 38.

Payee against Acceptor.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , the defendant accepted a bill of exchange, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 , at , requiring the defendant to pay to the plaintiff rupees after sight thereof.

2. That he has not paid the same.

[*Demand of judgment.*]

No. 39.

First Indorsee against Acceptor.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , the defendant accepted a bill of exchange, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 at , requiring the defendant to pay to the order of one *G. H.* rupees after sight thereof.

2. That the said *G. H.* indorsed the same to the plaintiff.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 40.

Subsequent Indorsee against Acceptor.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. [*As in the preceding form, to the end of art.* 1.]

2. That, by the indorsement of the said *G. H.* [and, others], the same was transferred to the plaintiff.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No 41

Payee against Drawer for Non-acceptance.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at , the defendant, by his bill of exchange, directed to *E. F.*, required the said *E. F.* to pay to the plaintiff rupees [days after sight.]

2. That, on the day of 18 , the same was duly presented to the said *E. F.* for acceptance, and was dishonoured.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[*Demand of judgment.*]

[NOTE.—Notice of dishonour by non-acceptance must be given at once.]

No 42.

First Indorsee against first Indorser.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That the defendant indorsed to the plaintiff a bill of exchange, now overdue, made [*or* purporting to have been made] by one *E. F.*, on the day of 18 , at requiring one *G. H.* to pay to the order of the defendant rupees [days] after sight [*or* after date, *or* at sight] thereof [and accepted by the said *G. H.* on the day of 18 .]

2. That, on the day of 18 , the same was presented to the said *G. H.* for payment, and was dishonoured.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[*Demand of judgment.*]

No. 43.

Subsequent Indorsee against first Indorser; the Indorsement being special.

(*Title*)

A. B., the above-named plaintiff, states as follows:—

1. That the defendant indorsed to one *E. F.* a bill of exchange, now overdue, made [*or* purporting to have been made] by one *G.*

H., on the day of . 18 , at requiring one *I. J.* to pay to the order of the defendant rupees days after sight thereof [*or otherwise*], and accepted by the said *I J.* on the day of 18 . [*This clause may be omitted, if not according to the fact.*]

2 That the same was, by the indorsement of the said *E. F.* [and others], transferred to the plaintiff.

3. That, on the day of 18 , the same was presented to the said *I. J.* for payment, and was dishonoured.

4. That the defendant had due notice thereof.

5. That he has not paid the same.

[*Demand of judgment.*]

No. 44.

Subsequent Indorsee against his immediate Indorser.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the defendant indorsed to plaintiff a bill of exchange, now overdue, made [*or* purporting to have been made] by one *E F.*, on the day of 18 , at , requiring one *G. H.* to pay to the order of *I. J.* rupees days after sight thereof [*or otherwise*], [accepted by the said *G. H*] and indorsed by the said *I. J.* to the defendant.

2. That, on the day of 18 , the same was presented to the said *G. H.* for payment, and was dishonoured.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[*Demand of judgment*]

No 45.

Subsequent Indorsee against immediate Indorser.

(*Title*)

A. B., the above-named plaintiff, states as follows :—

1. That a bill of exchange, now overdue, made [*or* purporting to have been made] by *E. F*, on the day of 18 , at , requiring one *G. H.* to pay to the order of one *I. J.* rupees days after sight thereof [*or otherwise*], [accepted by the said *G. H*] and indorsed by the said *I J.* to the defendant, was, by the indorsement of the defendant [and others], transferred to the plaintiff.

2. That, on the day of 18 , the same was presented to the said *G. H.* for payment, and was dishonoured.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[*Demand of judgment*]

No. 46

Indorsee against Drawer, Acceptor and Indorser.

IN THE COURT OF AT

CIVIL REGULAR No.

A B. of

against

C. D. of

E. F. of

and

G. H. of

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the defendant, *C. D.*, by his bill of exchange, now overdue, directed to the defendant *E. F.*, required the said *E. F.* to pay to the order of the defendant, *G. H.*, rupees [days after sight thereof.]

2. That, on the day of 18 , the said *E F.* accepted the same.

3. That the said *G. H.* indorsed the same to the plaintiff.

4. That, on the day of 18 , the same was presented to the said *E. F.* for payment, and was dishonoured.

5. That the other defendants had due notice thereof.

6. That they have not paid the same.

[*Demand of judgment*]

No. 47.

Payee against Drawer for Non-acceptance of a Foreign Bill.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the defendant, by his bill of exchange drawn in Calcutta, required one *E. F.* to pay to the plaintiff in [London] pounds sterling [sixty days] after sight thereof.

2. That, on the day of 18 , the same was presented to the said *E. F.* for acceptance, and was dishonoured, and was thereupon duly protested.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[5. That the value of pounds sterling, at the time of the service of notice of protest on the defendant, was rupees annas]

Wherefore the plaintiff demands judgment against the defendant for rupees, with [ten per centum] compensation and interest from the day of 18

No. 48.

Payee against Acceptor.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at one *E. F.*, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the plaintiff rupees after date [*or* days after sight] thereof.

2. That, on the day of 18 , the defendant accepted the said bill.

3. That he has not paid the same.

[*Demand of judgment.*]

[NOTE.—This form omits to state the delivery of the bill to the plaintiff or his title to sue. See *Churchill* v. *Gardner*, 7 T. R., 596.]

No. 49.

On a Marine [open] Policy, on Vessel lost by Perils of the Sea.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That plaintiff was the owner of [*or*, had an interest in] the ship at the time of its loss, as hereafter mentioned.

2. That, on the day of 18 , at , the defendants, in consideration of rupees to them paid [*or* which the plaintiff then promised to pay], executed to him a policy of insurance upon the said ship, a copy of which is hereto annexed; [*or*, whereby they promised to pay to the plaintiff, within days after proof of loss and interest, all loss and damage accruing to him by reason of the destruction or injury of the said ship, during its next voyage from to , whether by perils of the sea or by fire, or by other causes therein mentioned, not exceeding rupees].

3. That the said vessel, while proceeding on the voyage mentioned in the said policy, was, on the day of 18 , totally lost by the perils of the sea [*or otherwise*].

4. That the plaintiff's loss thereby was rupees.

5. That, on the day of 18 , he furnished the defendants with proof of his loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

6. That the defendants have not paid the said loss.

[*Demand of judgment.*]

No. 50

On Cargo, lost by Fire :—valued Policy.

(*Title.*)

A. B, the above-named plaintiff, states as follows :—

1. That plaintiff was the owner of [*or*, had an interest in] [one hundred bales of cotton] on board the ship at the time of its loss as hereafter mentioned.

2. That, on the day of 18 , at , the defendant, in consideration of rupees which the plaintiff then paid [*or*, promised to pay], executed to him a policy of insurance upon the said goods, a copy of which is hereto annexed; [*or*, whereby it promised to pay to the plaintiff rupees in case of the total loss, by fire or other causes mentioned, of the said goods before their landing at ; *or*, in case of partial loss, such damage as the plaintiff might sustain thereby, provided the same should exceed per centum of the whole value of the goods.]

3. That, on the day of 18 , at while proceeding on the voyage mentioned in the said policy, the said goods were totally destroyed by fire.

4 *and* 5. [*As in paragraphs* 5 *and* 6 *of the last preceding Form*]

[*Demand of judgment.*]

No. 51

On Freight :—valued Policy.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff had an interest in the freight to be earned by the ship [ ] on her voyage from to , at the time of her loss as hereafter mentioned, and that a large quantity of goods was shipped upon freight in her at that time.

2. That, on the day of 18 , at , the defendant, in consideration of rupees to it paid, executed to the plaintiff a policy of insurance upon the said freight, a copy of which is hereto annexed [*or state its tenor, as before*]

3. That the said vessel, while proceeding upon the voyage mentioned in the said policy, was, on the day of 18 , totally lost by [the perils of the sea.]

4. That the plaintiff has not received any freight from the said vessel, nor did she earn any on the said voyage, by reason of her loss as aforesaid.

5 *and* 6. [*As in Form No.* 50.]

[*Demand of judgment*]

No 52.

For a Loss by General Average.

(*Title*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff was the owner of [*or*, had an interest in] [one hundred bales of cotton] shipped on board a vessel called the *Y. Z.*, from to , at the time of the loss hereafter mentioned.

2. That, on the day of 18 , at in consideration of rupees [which the plaintiff then promised to pay], the defendant executed to the plaintiff a policy of insurance upon his said goods, a copy of which is hereto annexed [*or state its tenor, as before*].

3. That, on the day of 18 , while proceeding on the voyage mentioned in the said policy, the said vessel was so endangered by perils of the sea, that the master and crew thereof were compelled to, and did, cast into the sea a large part of her rigging and furniture.

4. That the plaintiff was, by reason thereof, compelled to, and did, pay a general average lost of rupees.

5. That, on the day of 18 , he furnished the defendant with proof of his loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

6. That the defendant has not paid the said loss.

[*Demand of judgment.*]

No. 53.

For a Particular Average Loss.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1 *and* 2 [*As in the preceding Form.*]

3. That, on the day of 18 , while on the high seas, the sea-water broke into the said ship, and damaged the said [cotton] to the amount of rupees.

4 *and* 5. [*As in paragraphs* 5 *and* 6 *of the preceding Form*]

[*Demand of judgment*]

No. 54.

On a Fire Insurance Policy.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff [was the owner of, *or*] had an interest in a [dwelling-house, known as No. street, in the city

of ,] at the time of its destruction [*or*, injury] by fire as hereinafter mentioned.

2. That, on the day of 18 , at in consideration of rupees [to be paid], the defendant executed to the plaintiff a policy of insurance on the said [premises], a copy of which is hereto annexed [*or state its tenor*].

3. That, on the day of 18 , the said [dwelling-house] was totally destroyed [*or*, greatly damaged] by fire.

4. That the plaintiff's loss thereby was rupees.

5. That, on the day of 18 , he furnished the defendant with proof of his said loss and interest, and otherwise only performed all the conditions of the said policy on his part.

6. That the defendant has not paid the said loss.

[*Demand of judgment.*]

No. 55.

Against Sureties for Payment of Rent.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at one *E. F.* hired from the plaintiff, for the term of years, the [house No. , street] at the annual rent of rupees, payable [monthly].

2. That [at the same time and place] the defendant agreed, in consideration of the letting of the said premises to the said *E. F.*, to guarantee the punctual payment of the said rent.

3. That the rent aforesaid for the month of 18 amounting to rupees, has not been paid.

[*If, by the terms of the agreement, notice is required to be given to the surety, add:*—]

4. That, on the day of 18 , the plaintiff gave notice to the defendant of the non-payment of the said rent, and demanded payment thereof.

5. That he has not paid the same.

[*Demand of judgment.*]

B.—PLAINTS FOR COMPENSATION FOR BREACH OF CONTRACT.

No. 56

For Breach of Agreement to convey Land.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at , the plaintiff and defendant entered into an agreement, under their hands, of which a copy is hereto annexed.

[*Or* That, on, &c., the defendant agreed with the plaintiff that, in consideration of a deposit of rupees then paid, and of the further sum of ten thousand rupees payable as hereafter mentioned, he would, on the day of 18 , at execute to the plaintiff a sufficient conveyance of [house No. street, in the city of , free from all incumbrances; and the plaintiff agreed to pay ten thousand rupees for the same on delivery thereof.]

2. That, on the day of 18 , the plaintiff demanded the conveyance of the said property from the defendant and tendered rupees to the defendant [*or*, that all conditions were fulfilled, and all things happened and all times elapsed necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part.]

3. That the defendant has not executed any conveyance of the said property to the plaintiff [*or*, that there is a mortgage upon the said property, made by to , for rupees, registered in the office of , on the day of 18 , and still unsatisfied, *or any other defect of title.*]

4. That the plaintiff has thereby lost the use of the money paid by him as such deposit as aforesaid and of other moneys provided by him for the completion of the said purchase, and has lost the expenses incurred by him in investigating the title of the defendant and in preparing to perform the agreement on his part, and has incurred expense in endeavouring to procure the performance thereof by the defendant.

The plaintiff prays judgment for rupees compensation.

No 57.

For Breach of Agreement to purchase Land.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the plaintiff and defendant entered into an agreement, under their hands, of which a copy is hereto annexed.

[*Or* That, on the day of 18 , at , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant, and that the defendant should purchase from the plaintiff, forty bighas of land in the village of for rupees.]

2. That, on the day of 18 , at , the plaintiff being then the absolute owner of the said property [and the same being free from all incumbrances, as was made to appear to the defendant], tendered to the defendant a sufficient instrument of conveyance of the same [*or*, was ready and willing, and offered to convey the same to the defendant by a sufficient

instrument,] on the payment by the defendant of the said sum.

3. That the defendant has not paid the same.

[*Demand of judgment.*]

No. 58.

Another Form.

For not completing a Purchase of Immoveable Property.

(*Title.*)

A. B, the above-named plaintiff, states as follows:—

1. That, by an agreement, dated the day of 187 , it was agreed by and between the plaintiff and the defendant that the plaintiff should sell to the defendant and the defendant should purchase from the plaintiff a house and land at the price of rupees, upon the terms and conditions following (that is to say)—

(*a*) That the defendant should pay the plaintiff a deposit of rupees in part of the said purchase-money on the signing of the said agreement, and the remainder on the day of 187 , on which day the said purchase should be completed.

(*b*) That the plaintiff should deduce and make a good title to the said premises on or before the day of 187 , and on payment of the said remainder of the said purchase-money as aforesaid should execute to the defendant a proper conveyance of the said premises, to be prepared at the defendant's expense.

2. That all conditions were fulfilled, and all things happened and all times elapsed necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part, yet the defendant did not pay the plaintiff the remainder of the said purchase-money as aforesaid on his part.

3. That the plaintiff has thereby lost the expense which he incurred in preparing to perform the said agreement on his part, and has been put to expense in endeavouring to procure the performance thereof by the defendant.

[*Demand of judgment*]

No 59.

For not delivering Goods sold.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff [on the day of 18 ,] and that the plaintiff should pay therefor rupees on delivery.

2. That, on the [said] day, the plaintiff was ready and willing, and offered to pay the defendant the said sum upon delivery of the said goods.

3. That the defendant has not delivered the same, whereby the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[*Demand of judgment.*]

No. 60.

For Breach of Contract to employ.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, *or* in the capacity of foreman, *or as the case may be*], and that the defendant should employ the plaintiff as such, for the term of [one year], and pay him for his services rupees [monthly].

2. That, on the day of 18 , the plaintiff entered upon the service of the defendant as aforesaid, and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year, whereof the defendant always had notice.

3. That, on the day of 18 , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[*Demand of judgment.*]

No. 61.

For Breach of Contract to employ, where the Employment never took Effect.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. [*As in last preceding Form.*]

2. That, on the day of 18 , at , the plaintiff offered to enter upon the service of the defendant, and has ever since been ready and willing so to do.

3. That the defendant refused to permit the plaintiff to enter upon such service, or to pay him for his services.

[*Demand of judgment.*]

No 62

For Breach of Contract to serve.

(*Title.*)

A. B, the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at [an annual] compensation of rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year]

2. That the plaintiff has always been ready and willing to perform his part of the said agreement [and, on the day of 18 , offered so to do]

3. That the defendant [entered upon the service of the plaintiff on the above-mentioned day, but afterwards, on the day of 18 , he] refused to serve the plaintiff as aforesaid.

[*Demand of judgment.*]

No 63.

Against a Builder for defective Workmanship.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at the plaintiff and defendant entered into an agreement, of which a copy is hereto annexed :

[*Or state the tenor of the contract.*]

[2. That the plaintiff duly performed all the conditions of the said agreement on his part]

3. That the defendant [built the house referred to in the said agreement in a bad and unworkmanlike manner]

[*Demand of judgment.*]

No 64.

By the Master against the Father or Guardian of an Apprentice.

(*Title.*)

A. B, the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the defendant entered into an agreement, under his hand and seal,* a copy of which is hereto annexed :

[*Or state the tenor of these covenants*]

2. That, after the making of the said agreement, the plaintiff received the said [*apprentice*] into his service as such apprentice

* The form given in Act XIX of 1850 requires the seal of the father or guardian.

for the term aforesaid, and has always performed and been ready and willing to perform all things in the said agreement on his part to be performed.

3. That, on the day of 18 , the said [*apprentice*] wilfully absented himself from the service of the plaintiff, and continues so to do.

[*Demand of judgment.*]

No. 65.

By the Apprentice against the Master.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at the defendant entered into an agreement with the plaintiff and his father, *E. F.*, under their hands and seals, a copy of which is hereto annexed.

2. That, after the making of the said agreement, the plaintiff entered into the service of the defendant with him after the manner of an apprentice to serve for the term mentioned in the said agreement, and has always performed all things in the said agreement contained on his part to be performed.

3. That the defendant has not [instructed the plaintiff in the business of , *or state any other breach, such as cruelty, failure to provide sufficient food, or other ill-treatment.*]

[*Demand of judgment.*]

No. 66.

On a Bond for the Fidelity of a Clerk.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at plaintiff employed one *E. F.* as a clerk.

2. That, on the day of 18 , at , the defendant agreed with the plaintiff, that if the said *E. F.* should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all moneys, evidences of debt, or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees.

[*Or*, 2. That, at the same time and place, the defendant bound himself to the plaintiff, by a writing under his hand, in the penal sum of rupees, conditioned that if the said *E. F.* should faithfully perform his duties as clerk and cashier to the plaintiff, and should justly account to the plaintiff for all moneys, evidences

of debt, or other property which should be at any time held by him in trust for the plaintiff, the same should be void, but not otherwise.]

[*Or*, 2. That, at the same time and place, the defendant executed to the plaintiff a bond, a copy of which is annexed.]

3. That, between the day of 18 , and the day of 18 , the said *E. F.* received money and other property, amounting to the value of rupees, for the use of the plaintiff, for which he has not accounted to him, and the same still remains due and unpaid.

[*Demand of judgment.*]

No. 67.

By Tenant against Landlord, with special Damage.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at the defendant, by an instrument in writing, let to the plaintiff [the house No. street] for the term of years, covenanting with the plaintiff that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2. That all conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. That, on the day of during the said term, one *E. F.*, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. That the plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving, and lost the custom of *G. H.* and *I. J.* by such removal.]

[*Demand of judgment.*]

No. 68.

For Breach of Warranty of Moveables.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the defendant warranted a steam-engine to be in good working order, and thereby induced the plaintiff to purchase the same of him, and to pay him rupees therefor.

2. That the said engine was not then in good working order, whereby the plaintiff incurred expense in having the said engine repaired, and lost the profits which would otherwise have accrued to him while the engine was under repair.

[*Demand of judgment.*]

No. 69.

On an Agreement of Indemnity.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the plaintiff and defendant, being partners in trade under the firm of *A. B.* and *C. D.*, dissolved the said partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm, and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the said firm.

2. That the plaintiff duly performed all the conditions of the said agreement on his part.

3. That, on the day of 18 , [a judgment was recovered against the plaintiff and defendant by one *E. F.*, in the High Court of Judicature at , upon a debt due from the said firm to the said *E. F.*, and on the day of 18] the plaintiff paid rupees [in satisfaction of the same.]

4. That the defendant has not paid the same to the plaintiff.

[*Demand of judgment.*]

No. 70.

By Ship-Owner against Freightor for not Loading.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the plaintiff and defendant entered into an agreement, a copy of which is hereto annexed.

[*Or*, 1. That, on , at , the plaintiff and defendant agreed by charter-party that the defendant should deliver to the plaintiff's ship at , on the day of 18 , five hundred tons of merchandise, which she should carry to , and there deliver, on payment of freight; and that the defendant should have days for loading, days for discharge, and days for demurrage, if required, at rupees per day.]

2. That, at the time fixed by the said agreement, the plaintiff was ready and willing and offered to receive [the said merchandise, *or*, the merchandise mentioned in the said agreement] from the defendant.

3. That the period allowed for loading and demurrage has elapsed, but the defendant has not delivered the said merchandise to the said vessel.

Wherefore the plaintiff demands judgment for rupees for demurrage and rupees additional for compensation.

C.—PLAINTS FOR COMPENSATION UPON WRONGS.

No. 71.

For Trespass on Land.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

That, on the day of 18 , at , the defendant entered upon certain land of the plaintiff, known as [and depastured the same with cattle, trod down the grass, cut the timber, and otherwise injured the same.]

[*Demand of judgment.*]

No. 72.

For Trespass in entering a Dwelling-house.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That the defendant entered a dwelling-house of the plaintiff called , and made a noise and disturbance therein for a long time, and broke open the doors of the said dwelling-house, and removed, took and carried away the fixtures and goods of the plaintiff therein, and disposed of the same to the defendant's own use, and expelled the plaintiff and his family from the possession of the said dwelling-house, and kept them so expelled for a long time.

2. That the plaintiff was thereby prevented from carrying on his business, and incurred expense in procuring another dwelling-house for himself and family.

[*Demand of judgment.*]

No. 73.

For Trespass on Moveables.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at the defendant broke open ten barrels of rum belonging to the plaintiff, and emptied their contents into the street [*or* seized and took the plaintiff's goods, that is to say, iron, rice, and household furniture, *or as the case may be*], and carried away the same and disposed of them to his own use:

[*or*, seized and took the plaintiff's cows and bullocks, and impounded them and kept them impounded for a long time.]

2. That the plaintiff was thereby deprived of the use of the cows and bullocks during that time, and incurred expense in feeding them and in getting them restored to him; and was also prevented from selling them at fair, as he otherwise would have done,

and the said cows and bullocks are diminished in value to the plaintiff [*otherwise state the injury according to the facts*].

[*Demand of judgment.*]

No. 74.

For the Conversion of Moveable Property.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , plaintiff was in possession of certain goods described in the schedule hereto annexed [*or* of one thousand barrels of flour].

2. That, on that day, at , the defendant converted the same to his own use, and wrongfully deprived the plaintiff of the use and possession of the same.

[*Demand of judgment.*]

The Schedule.

No. 75.

Against a Warehouseman for Refusal to deliver Goods.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at the defendant, in consideration of the payment to him of rupees [*or*, rupees per barrel, per month, &c.], agreed to keep in his godown [one hundred barrels of flour], and to deliver the same to the plaintiff on payment of the said sum.

2. That thereupon the plaintiff deposited with the defendant the said [hundred barrels of flour].

3. That, on the day of 18 , the plaintiff requested the defendant to deliver the said goods, and tendered him rupees [*or*, the full amount of storage due thereon], but the defendant refused to deliver the same.

4. That the plaintiff was thereby prevented from selling the said goods to *E. F.*, and the same are lost to the plaintiff.

[*Demand of judgment.*]

No. 76.

For procuring Property by Fraud.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the defendant, for the purpose of inducing the plaintiff to sell

him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth rupees over all his liabilities].

2. That the plaintiff was thereby induced to sell [and deliver] to the defendant [dry goods] of the value of rupees.

3. That the said representations were false [*or, state the particular falsehoods*], and were then known by the defendant to be so.

4. That the defendant has not paid for the said goods. [*Or, if the goods were not delivered*] That the plaintiff, in preparing and shipping the said goods and procuring their restoration, expended rupees.

[*Demand of judgment.*]

No. 77.

For Fraudulently procuring Credit to be given to another person.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , at , the defendant represented to the plaintiff, that one *E. F.* was solvent and in good credit, and worth rupees over all his liabilities [*or*, that *E. F.* then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit].

2. That the plaintiff was thereby induced to sell to the said *E. F.*, [rice] of the value of rupees [on month's credit].

3. That the said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [*or*, to deceive and injure the plaintiff].

4. That the said *E. F.* [did not pay for the said goods at the expiration of the credit aforesaid, *or*,] has not paid for the said rice, and the plaintiff has wholly lost the same by reason of the premises.

[*Demand of judgment.*]

No. 78

For polluting the Water under the Plaintiff's Land.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That he is, and at all the times hereinafter mentioned was, possessed of certain land called and situate in , and of a well therein, and of water in the said well, and was entitled to the use and benefit of the said well and of the said water therein, and to have certain springs and streams of water

which flowed and ran into the said well to supply the same to flow or run without being fouled or polluted.

2. That, on the day of 18 , the defendant wrongfully fouled and polluted the said well and the said water therein and the said springs and streams of water which flowed into the said well.

3. That, by reason of the premises, the said water in the said well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the said well and water.

[*Demand of judgment.*]

No. 79.

For carrying on a Noxious Manufacture.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called situate in

2. That ever since the day of 18 , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter which spread themselves over and upon the said lands, and corrupted the air, and settled on the surface of the said lands.

3. That thereby the trees, hedges, herbage and crops of the plaintiff growing on the said lands were damaged and deteriorated in value, and the cattle and livestock of the plaintiff on the said lands became unhealthy, and divers of them were poisoned and died.

4. That, by reason of the premises, the plaintiff was unable to depasture the said lands with cattle and sheep, as he otherwise might have done, and was obliged to remove his cattle, sheep and farming stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the said lands as he otherwise would have had.

[*Demand of judgment.*]

No. 80.

For Obstructing a Way.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff is, and at the time hereafter mentioned was, possessed of [a house in the town of].

2. That he was accustomed to pass [with vehicles, *or*, on foot] along a certain way leading from his said house to [the highway].

3. That, on the day of 18 , the defendant obstructed the said way, so that the plaintiff could not pass [with vehicles, *or*, on foot, *or*, in any manner] along the said way [and has ever since obstructed the same].

4. [*State special damage, if any.*]

[*Demand of judgment.*]

Another Form.

1. That the defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from to so as to obstruct it.

2. That thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones (*or*, into the said trench) and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

(*Demand of judgment.*)

No 81

For Diverting a Watercourse.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That the plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a (stream), known as the , in the village of , district of .

2. That, by reason of such possession, the plaintiff was entitled to the flow of the said stream for working the said mill.

3. That, on the day of 18 , the defendant, by cutting the bank of the said stream, diverted the water thereof, so that less water ran into the plaintiff's mill

4 That, by reason thereof, the plaintiff has been unable to grind more than sacks per day, whereas, before the said diversion of water, he was able to grind sacks per day.

(*Demand of judgment.*)

No 82

For Obstructing a Right to use Water for Irrigation.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That the plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, &c., and entitled to

take and use a portion of the water of a certain stream for irrigating the said lands.

2. That, on the day of , the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by obstructing and diverting the said stream.

[*Demand of judgment.*]

No. 83.

For Waste by a Lessee.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , the defendant hired from him the [house No. street] for the term of .

2. That the defendant occupied the same under such hiring.

3. That, during the period of such occupation, the defendant greatly injured the premises [defaced the walls, tore up the floors, and broke down the doors; *or otherwise specify the injuries as far as possible*].

The plaintiff prays judgment for rupees compensation.

No. 84.

For Assault and Battery.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

That, on the day of 18 , at the defendant assaulted and beat him.

The plaintiff prays judgment for rupees compensation.

No. 85.

For Assault and Battery, with special Damage.

(*Title.*)

A. B, the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at the defendant assaulted and beat the plaintiff, until he became insensible.

2. That the plaintiff was thereby disabled from attending to his business for [six weeks thereafter], and was compelled to pay rupees for medical attendance, and has been ever since disabled [from using his right arm]. [*Or otherwise state the damage, as the case may be.*]

[*Demand of judgment.*]

No. 86.

For Assault and False Imprisonment.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at the defendant assaulted the plaintiff and imprisoned him for days [*or* hours]; *state special damage, if any, thus:*—]

2. That, by reason thereof, the plaintiff suffered great pain of body and mind, and was exposed and injured in his credit and circumstances, and was prevented from carrying on his business and from providing for his family by his personal care and attention, and incurred expense in obtaining his liberation from the said imprisonment [*or otherwise as the case may be*].

[*Demand of judgment.*]

No. 87.

For Injuries caused by Negligence on a Railroad.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , the defendants were common carriers of passengers by railway between and

2. That, on that day, the plaintiff was a passenger in one of the carriages of the defendants on the said road.

3. That, while he was such passenger, at [*or*, near the station of ; *or*, between the stations of and], a collision occurred on the said railway, caused by the negligence and unskilfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, &c., *and state the special damage, if any, as*], and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as a salesman.

[*Demand of judgment.*]

[*Or thus:*—2. That, on that day, the defendants, by their servants, so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, *&c., as in* § 3.]

No. 88.

For Injuries caused by Negligent Driving.

(*Title.*)

A. B, the above-named plaintiff, states as follows:—

1. The plaintiff is a shoe-maker, carrying on business at The defendant is a merchant of

2. On the [23rd May, 1875], the plaintiff was walking eastward along Chowringhee, in the city of Calcutta, at about three o'clock in the afternoon. He was obliged to cross Harington street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant's drawn by two horses, under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning, turned at a rapid and dangerous pace out of Harington Street into Chowringhee. The pole of the carriage struck the plaintiff, and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

The plaintiff claims rupees damages.

(*Title.*)

Written Statement of Defendant.

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, or that it was under the charge or control of the defendant's servants. The carriage belonged to [Messrs. *E. F.* and *G. H.*] of Street, Calcutta, livery stable-keepers, employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said Messrs. *E. F.* and *G. H.*

2. The defendant does not admit that the said carriage was turned out of Harington Street either negligently, suddenly, or without warning, or at a rapid or dangerous pace.

3. The defendant says, that the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4. The defendant does not admit the statements of the third paragraph of the plaint.

No. 89.

For Libel; the Words being libellous in themselves.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at the defendant published in a newspaper, called the

[*or*, in a letter addressed to *E. F.*], the following words concerning the plaintiff:—

[*Set forth the words used.*]

2. That the said publication was false and malicious.

[*Demand of judgment.*]

NOTE.—If the libel was in a language not the language of the Court, set out the libel *verbatim* in the foreign language in which it was published, and then proceed thus:—"Which said words, being translated into the language, have the meaning and effect following, and were so understood by the persons to whom they were so published, that is to say, [*here set out a literal translation of the libel in the language of the Court.*]

No. 90.

For Libel; the Words not being libellous in themselves.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That the plaintiff [is, and] was, on and before the day of 18 , merchant, doing business in the city of

2. That, on the day of 18 , at the defendant published in a newspaper, called the [*or*, in a letter addressed to *E. F.*, *or otherwise show how published*], the following words concerning the plaintiff:—

["*A. B.*, of this city, has modestly retired to foreign lands. It is said that creditors to the amount of rupees are anxiously seeking his address."]

3. That the defendant meant thereby that [the plaintiff had absconded to avoid his creditors, and with intent to defraud them.]

4. That the said publication was false and malicious.

[*Demand of judgment.*]

No. 91.

For Slander; the Words being actionable in themselves.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at the defendant falsely and maliciously spoke, in the hearing of *E. F.*, (*or*, sundry persons,) the following words concerning the plaintiff: ["He is a thief."]

2. That, in consequence of the said words, the plaintiff lost his situation as in the employ of

[*Demand of judgment.*]

No. 92.

For Slander; the Words not being actionable in themselves.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at , the defendant falsely and maliciously said to one *E. F.* concerning the plaintiff: [" He is a young man of remarkably easy conscience."]

2. That the plaintiff was then seeking employment as a clerk, and the defendant meant, by the said words, that the plaintiff was not trustworthy as a clerk.

3. That in consequence of the said words, [the said *E. F.* refused to employ the plaintiff as a clerk.]

[*Demand of judgment.*]

No. 93.

For Malicious Prosecution.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at the defendant obtained a warrant of arrest from [a Magistrate of the said city, *or, as the case may be.*] on a charge of , and the plaintiff was arrested thereon, and imprisoned for [days, *or* hours, and gave bail in the sum of rupees to obtain his release.]

2. That in so doing, the defendant acted maliciously and without reasonable or probable cause.

3. That, on the day of 18 , the said Magistrate dismissed the complaint of the defendant, and acquitted the plaintiff.

4. That many persons, whose names are unknown to the plaintiff, hearing of the said arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him; *or*, that, in consequence of the said arrest, the plaintiff lost his situation as clerk to one *E. F.*, *or*, that by reason of the premises the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[*Demand of judgment.*]

D.—PLAINTS IN SUITS FOR SPECIFIC PROPERTY.

No. 94.

By the Absolute Owner for the Possession of Immoveable Property.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That *X. Y.* was the absolute owner of [the estate, *or*, the

share of the estate, called , situate in the District of the Government revenue of which is rupees and the estimated value rupees *or*, of the house No. , street in the town of Calcutta, the estimated value of which is rupees .]

2. That, on the day of 18 , *Z.* illegally dispossessed the said *X. Y.* of the said estate [*or* share *or* house.]

3. That the said *X. Y.* has since died intestate, leaving the plaintiff the said *A. B.* his heir him surviving.

4. That the defendant withholds the possession of the estate [*or* share *or* house] from the plaintiff.

The plaintiff prays judgment:

(1) For the possession of the said premises;

(2) For rupees compensation for withholding the same.

Another Form.

A. B., the above-named plaintiff, states as follows:—

1. On the day of , the plaintiff, by an instrument in writing, let to the defendant a house and premises No. 52, Russell Street, in the , for a term of five years from the day of , at the monthly rent of rupees 300.

2. By the said instrument the defendant covenanted to keep the said house and premises in good and tenantable repair.

3. The said instrument also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved, whether demanded or not, should be in arrear for twenty-one days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the day of 187 , a month's rent became due, and on the day of 187 , another month's rent became due; on the day of 187 , both had been in arrear for twenty-one days, and both are still due.

5. On the same day of 187 , the house and premises were not and are not now in good or tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value. The plaintiff claims:

(1) Possession of the said house and premises;

(2) Rupees for arrears of rent;

(3) Rupees compensation for the defendant's breach of his covenant to repair.

(4) Rupees for the occupation of the house and premises from the day of 187 , to the day of recovering possession.

No. 95.

By the Tenant.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That one *E. F.* is the absolute owner of [a piece of land in the town of Calcutta, , bounded as follows :], the estimated value of which is rupees .

2. That, on the day of 18 , the said *E. F.* let the said premises to the plaintiff for years, from .

3. That the defendant withholds the possession thereof from the plaintiff.

[*Demand of judgment.*]

No. 96.

For Moveable Property wrongfully taken.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , plaintiff owned [*or* was possessed of] one hundred barrels of flour, the estimated value of which is rupees .

2. That, on that day, at , the defendant took the same.

The plaintiff prays judgment :

(1) For the possession of the said goods, or for rupees in case such possession cannot be had ;

(2) For rupees compensation for the detention thereof.

No. 97.

For Moveables wrongfully detained.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, on the day of 18 , plaintiff owned [*or, state facts showing a right to the possession*] the goods mentioned in the schedule hereto annexed [*or, describe the goods*], the estimated value of which is rupees .

2. That, from that day until the commencement of this suit, the defendant has detained the same from the plaintiff.

3. That before the commencement of this suit, to wit, on the day of 18 , the plaintiff demanded the same from the defendant, but he refused to deliver them.

The plaintiff prays judgment :

(1) For the possession of the said goods, or for rupees, in case such possession cannot be had ;

(2) For rupees compensation for the detention thereof.

The Schedule.

No 98.

Against a Fraudulent Purchaser and his Transferee with notice.

(*Title.*)

A B, the above-named plaintiff, states as follows:—

1. That, on the day of 18 , at the defendant [*C. D*], for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth rupees over all his liabilities]

2. That the plaintiff was thereby induced to sell and deliver to the said *C. D.* [one hundred boxes of tea], the estimated value of which is rupees.

3. That the said representations were false, and were then known by the said *C D.* to be so. [*Or*, that at the time of making the said representations, the said *C. D.* was insolvent, and knew himself to be so.]

4. That the said *C. D.* afterwards transferred the said goods to the defendant *E F.*, without consideration [*or* who had notice of the falsity of the representation]

The plaintiff prays judgment:

(1) For the possession of the said goods, or for rupees, in case such possession cannot be had;

(2) For rupees compensation for the detention thereof.

E.—PLAINTS IN SUITS FOR SPECIAL RELIEF.

No 99

For Rescission of a Contract on the Ground of Mistake.

(*Title*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at , contained [ten bighas.]

2. That the plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true, and signed an instrument of agreement, of which a copy is hereto annexed. But no conveyance of the same has been executed to him.

3. That, on the day of 18 , the plaintiff paid the defendant rupees as part of such purchase-money.

4. That the said piece of ground contained in fact only [five bighas.]

The plaintiff prays judgment:

(1) For rupees, with interest from the day of 18 ;

(2) That the said agreement of purchase be delivered up and cancelled.

BENGAL SECRETARIAT LIBRARY

No. 100.

For an Injunction restraining Waste.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff is the absolute owner of [*describe the property.*]

2. That the defendant is in possession of the same under a lease from the plaintiff.

3. That the defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.

The plaintiff prays judgment, that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

[*Pecuniary compensation might also be prayed.*]

No. 101.

For Abatement of a Nuisance.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No. , street, Calcutta].

2. That the defendant is, and at all the said times was, the absolute owner of [a plot of ground in the same street].

3. That, on the day of 18 , the defendant erected upon his said lot a slaughter-house, and still maintains the same ; and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff].

4. That [the plaintiff has been compelled, by reason of the premises, to abandon the said house, and has been unable to rent the same].

The plaintiff prays judgment, that the said nuisance be abated.

No. 102.

For an Injunction against the Diversion of a Watercourse.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

[*As in No.* 81.]

The plaintiff prays judgment, that the defendant be restrained by injunction from diverting the water as aforesaid.

No. 103.

For Restoration of Moveable Property, threatened with Destruction, and for an Injunction.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grandfather, which was executed by an eminent painter], and of which no duplicate exists [*or state any facts showing that the property is of a kind that cannot be replaced by money*].

2. That, on the day of 18 , he deposited the same for safe-keeping with the defendant.

3. That, on the day of 18 , he demanded the same from the defendant, and offered to pay all reasonable charges for the storage of the same.

4. That the defendant refuses to deliver the same to the plaintiff, and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. That no pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the said [painting].

The plaintiff prays judgment:

(1.) That the defendant be restrained by injunction from disposing of, injuring, or concealing the said [painting];

(2.) That he return the same to the plaintiff.

No. 104.

Interpleader.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. That, before the date of the claims hereinafter mentioned, one *G. H.* deposited with the plaintiff [*describe the property*] for [safe-keeping].

2. That the defendant, *C. D.*, claims the same [under an alleged assignment thereof to him from the said *G. H.*]

3. That the defendant, *E. F.*, also claims the same [under an order of the said *G. H.*, transferring the same to him].

4. That the plaintiff is ignorant of the respective rights of the defendants.

5. That he has no claim upon the said property, and is ready and willing to deliver it to such persons as the Court shall direct.

6. That this suit is not brought by collusion with either of the defendants.

The plaintiff prays judgment:

(1.) That the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto;

(2.) That they be required to interplead together concerning their claims to the said property;

[(3.) That some person be authorized to receive the said property pending such litigation];

(4.) That upon delivering the same to such [person], the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 105.

Administration by Creditor.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. *E. F.*, late of , was, at the time of his death, and his estate still is, indebted to the plaintiff in the sum of [*here insert nature of debt and security, if any.*]

2. The said *E. F.* made his will, dated the day of and thereof appointed *C. D.* executor [*or*, devised his estate in trust, *&c.*, *or*, died intestate, *as the case may be.*]

3. The said will was proved by the said *C. D.* [*or*, letters of administration were granted, *&c.*].

4. The defendant has possessed himself of the moveable [and immoveable, *or*, the proceeds of the immoveable] property of the said *E. F.*, and has not paid the plaintiff his said debt.

5. The said *E. F.* died on or about the day of .

6. The plaintiff prays that an account may be taken of the moveable [and immoveable] property of the said *E. F.*, deceased, and that the same may be administered under the decree of the Court.

No. 106.

Administration by Specific Legatees.

(*Title.*)

[*Alter Form* 105 *thus*:—].

[*Omit paragraph* 1, *and commence paragraph* 2] *E. F.*, late of , duly made his last will, dated the day of and thereof appointed *C. D.* executor, and by such will bequeathed to the plaintiff [*here state the specific legacy*].

For paragraph 4, *substitute*—

The defendant is in possession of the moveable property of the said *E. F.*, and, amongst other things, of the said [*here name the subject of the specific bequest*].

For the commencement of paragraph 6, *substitute*—

The plaintiff prays that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*], or that, &c.

No. 107.

Administration by Pecuniary Legatees.

(*Title.*)

[*Alter Form* 105 *thus*:—].

[*Omit paragraph* 1, *and substitute for paragraph* 2] *E. F.*, late of , duly made his last will, dated the day of , and thereof appointed *C. D.* executor, and by such will bequeathed to the plaintiff a legacy of rupees

In paragraph 4 *substitute* "legacy" *for* "debt."

Another Form.

Between *E. F.* ... ... *Plaintiff*,

and

G. H. ... ... *Defendant.*

A. B., the above-named plaintiff, states as follows:—

1. *A. B.* of *K.* in the duly made his last will, dated the [first day of March, 1873], whereby he appointed the defendant and *M.N.* [who died in the testator's lifetime] executors thereof, and bequeathed his property, whether moveable or immoveable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at-law, and as to his moveable property for the persons who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The testator died on the [first day of July, 1873], and his will was proved by the defendant on the [fourth of October, 1873.] The plaintiff has not been married.

3. The testator was at his death entitled to moveable and immoveable property; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property; he has sold some part of the immoveable property.

The plaintiff claims—

(1) To have the moveable and immoveable property of *A. B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken.

(2) Such further or other relief as the nature of the case may require.

Between *E. F.* ... ... *Plaintiff,*

and

G. H. ... ... *Defendant.*

Written Statement of Defendant.

1. *A. B.'s* will contained a charge of debts; he died insolvent; he was entitled at his death to some immoveable property which the defendant sold, and which produced the nett sum of rupees , and the testator had some moveable property which the defendant got in, and which produced the nett sum of rupees .

2. The defendant applied the whole of the said sums and the sum of rupees which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.

3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the [tenth of January, 1875], and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.

4. The defendant submits that the plaintiff ought to pay the costs of this suit.

No. 108.

Execution of Trusts.

IN THE COURT OF AT

CIVIL REGULAR NO.

A. B. of ... *Plaintiff,*

against

C. D. of , the beneficiary [*or*, one of the beneficiaries] ... *Defendant.*

A. B., the above-named plaintiff, states as follows:—

1. That he is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of the said *E. F.* and *G. H.*, the father and mother of the defendant [*or*, an instrument of assignment of the estate and effects of *E. F.* for the benefit of *C. D.*, the defendant, and other the creditors of *E. F.*]

2. The said *A. B.* has taken upon himself the burden of the said trust, and is in possession of [*or*, of the proceeds of] the moveable and immoveable property conveyed [*or* assigned] by the before-mentioned deed.

3. The said *C. D.* claims to be entitled to a beneficial interest under the before-mentioned deed.

4. The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and the proceeds of the sale of the said, *or* of part of the said, immoveable property, *or* moveable, *or* the proceeds of the sale of, *or* of part of, the said moveable, property, *or* the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the

Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of the said *C. D.*, the defendant, and all other persons who may be interested in such administration, in the presence of the said *C. D.* and such other persons so interested as the Court may direct, or that the said *C. D.* may shew good cause to the contrary.

[N. B.—*Where the suit is by a beneficiary, the plaint may be modelled,* mutatis mutandis, *on the plaint by a legatee.*]

No 109.

Foreclosure or Sale.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. By an instrument of mortgage bearing date on or about the day of 18 , a house with the garden and appurtenances, situated within the jurisdiction of this Court, were conveyed [*or* assigned] by the defendant to him the plaintiff, his heirs [*or* executors, administrators], and assigns, for securing the principal sum of Rs. , together with interest thereon after the rate of Rs. per centum per annum, subject to redemption upon payment by the said defendant of the said principal and interest at a day long since past.

2. There is now due from the defendant to the plaintiff the sum of Rs. for principal and interest on the said mortgage.

3. The plaintiff prays (*a*) that the Court will order the defendant to pay him the said sum of Rs. , with such further interest as may accrue between the filing of the plaint and the day of payment, and also the costs of this suit, on some day to be named by the Court, and in default that the equity of redemption of the said mortgaged premises may be foreclosed and the plaintiff placed in possession of the same premises; or (*b*) that the said premises may be sold, and the proceeds applied in and towards the payment of the amount of the said principal, interest, and costs; and (*c*) that if such proceeds shall not be sufficient for the payment in full of such amount, the defendant do pay to the plaintiff the amount of the deficiency with interest thereon at the rate of six per cent. per annum until realization; and (*d*) that for that purpose all proper directions may be given and accounts taken by the Court.

No. 110.

Redemption.

(*Title.*)

[*Alter Form* 109 *thus*] :—

Transpose parties and also the facts in paragraph 1.

For paragraph 2, *substitute*—

2. There is now due from the plaintiff to the defendant, for principal and interest on the said mortgage, the sum of Rs.

which the plaintiff is ready and willing to pay to the defendant, of which the defendant, before filing this plaint, had notice.

For paragraph 3, *substitute*—

The plaintiff prays that he may redeem the said premises, and that the defendant may be ordered to re-convey [*or* re-assign] the same to him upon payment of the said sum of Rs. and interest, with such costs (if any) as the Court may order upon a day to be named by the Court, and that the Court will give all proper directions for the preparation and execution of such re-conveyance [*or* assignment], and doing such other acts as may be necessary to put him into possession of the said premises, freed from the said mortgage.

No. 111.

Specific Performance (No. 1).

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. By an agreement dated the day of and signed by the above-named defendant, *C. D.*, he the said *C. D.* contracted to buy of [*or* sell to] him certain immoveable property, therein described and referred to, for the sum of Rs. .

2. He has applied to the said *C. D.* specifically to perform the said agreement on his part, but he has not done so.

3. The said *A. B.* has been and still is ready and willing specifically to perform the said agreement on his part, of which the said *C. D.* has had notice.

4. The plaintiff prays that the Court will order the said *A. B.* specifically to perform the said agreement, and to do all acts necessary to put the said *A. B.* in full possession of the said property [*or* to accept a conveyance and possession of the said property] and to pay the costs of the suit.

[N. B.—*In suit for delivery up, to be cancelled, of any agreement, omit paragraphs* 2 *and* 3, *and substitute a paragraph stating generally the grounds for requiring the agreement to be delivered up to be cancelled, such as that the plaintiff signed it by mistake, under distress, or by the fraud of the defendant, and alter the prayer according to the relief sought.*]

No. 112.

Specific Performance (No. 2).

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. That, on the day of 18 , the defendant was absolutely entitled to certain immoveable property described in the agreement hereto annexed.

2. That, on the same day, the plaintiff and defendant entered into an agreement, under their hands, a copy of which is hereto annexed.

3. That, on the day of 18 , the plaintiff tendered rupees to the defendant, and demanded a conveyance of the said property.

4. That, on the day of 18 , the plaintiff again demanded such conveyance [*Or*, that the defendant refused to convey the same to the plaintiff]

5. That the defendant has not executed such conveyance.

6. That the plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

The plaintiff prays judgment:

(1) That the defendant execute to the plaintiff a sufficient conveyance of the said property [*following the terms of the agreement*]

(2) For rupees compensation for withholding the same.

No 113

Partnership.

(*Title.*)

A B., the above-named plaintiff, states as follows :—

1. He and the said *C. D.*, the defendant, have been for the space of years [*or* months] last past carrying on business together at within the jurisdiction of this Court, under certain articles of partnership in writing, signed by them respectively [*or*, under a certain deed sealed and executed by them respectively, *or*, under a verbal agreement between them, the said plaintiff and defendant].

2. Divers disputes and differences have arisen between the plaintiff and defendant as such partners, whereby it has become impossible to carry on the said business in partnership with advantage to the partners.

3 The plaintiff desires to have the said partnership dissolved, and he is ready and willing to bear his share of the debts and obligations of the partnership according to the terms of the said articles [*or* deed *or* agreements].

4. The plaintiff prays the Court to decree a dissolution of the said partnership, and that the accounts of the said partnership trading may be taken by the Court, and the assets thereof realized, and that each party may be ordered to pay into Court any balance due from him upon such partnership-account, and that the debts and liabilities of the said partnership may be paid and discharged, and that the costs of the suit may be paid out of the partnership-assets, and that any balance remaining of such assets, after such payment and discharge, and the payment of the said costs, may be

divided between the plaintiff and defendant, according to the terms of the said articles [*or* deed *or* agreement], or that, if the said assets shall prove insufficient, he, the plaintiff, and the said defendant may be ordered to contribute in such proportions as shall be just to a fund to be raised for the payment and discharge of such debts, liabilities, and costs. And to give such other relief as the Court shall think fit.

This plaint was filed by of

Pleader for the plaintiff, *or* by

[N. B.—*In suits for winding-up of any partnership, omit the prayer for dissolution: but instead thereof insert a paragraph stating the fact of the partnership having been dissolved*]

No 114.

Forms of concise Statements.

[*Code of Civil Procedure, section* 58.]

Money lent.	The plaintiff's claim is rupees for money lent [and interest].
Several demands.	The plaintiff's claim is rupees, whereof rupees is for the price of goods sold, and rupees for money lent, and rupees for interest.
Rent.	The plaintiff's claim is rupees for arrears of rent.
Salary, &c.	The plaintiff's claim is rupees for arrears of salary as a clerk [*or, as the case may be*].
Interest.	The plaintiff's claim is rupees for interest upon money lent.
General average.	The plaintiff's claim is rupees for a general average contribution.
Freight, &c.	The plaintiff's claim is rupees for freight and demurrage.
Banker's balance.	The plaintiff's claim is rupees for money deposited with the defendant as a banker.
Fees, &c., as pleader.	The plaintiff's claim is rupees for fees for work done [and rupees, money expended] as a pleader.
Commission.	The plaintiff's claim is rupees for commission earned as [*state character, as* auctioneer, cotton-broker, &c.]
Medical attendance, &c.	The plaintiff's claim is rupees for medical attendances.
Return of premium.	The plaintiff's claim is rupees for a return of premiums paid upon policies of insurance.
Warehouse rent	The plaintiff's claim is rupees for the warehousing of goods.

Carriage of goods.

The plaintiff's claim is rupees for the carriage of goods by railway.

Use and occupation of houses.

The plaintiff's claim is rupees for the use and occupation of a house.

Hire of goods

The plaintiff's claim is rupees for the hire of [furniture].

Work done.

The plaintiff's claim is rupees for work done as a [surveyor]

Board and lodging.

The plaintiff's claim is rupees for board and lodging.

Schooling.

The plaintiff's claim is rupees for the [board, lodging and] tuition of *X. Y.*

Money received.

The plaintiff's claim is rupees for money received by the defendant as pleader [*or* factor, *or* collector, *or*, *&c.*] of the plaintiff.

Fees of office.

The plaintiff's claim is rupees for fees received by the defendant under colour of the office of

Money overpaid.

The plaintiff's claim is rupees for a return of money overcharged for the carriage of goods by railway,

The plaintiff's claim is rupees for a return of fees overcharged by the defendant as

Return of money by stake-holder.

The plaintiff's claim is rupees for a return of money deposited with the defendant as stake-holder.

Money won from stake-holder.

The plaintiff's claim is rupees for money entrusted to the defendant as stake-holder and become payable to plaintiff.

Money entrusted to agent.

The plaintiff's claim is rupees for a return of money entrusted to the defendant as agent of the plaintiff.

Money obtained by fraud.

The plaintiff's claim is rupees for a return of money obtained from the plaintiff by fraud.

Money paid by mistake.

The plaintiff's claim is rupees for a return of money paid to the defendant by mistake.

Money paid for consideration which has failed.

The plaintiff's claim is rupees for a return of money paid to the defendant for [work to be done, *or* work left undone; *or* a bill to be taken up, *or* a bill not taken up, *or*, *&c.*]

The plaintiff's claim is rupees for a return of money paid as a deposit upon shares to be allotted.

Money paid by surety for defendant.

The plaintiff's claim is rupees for money paid for the defendant as his surety.

Rent paid.

The plaintiff's claim is rupees for money paid for rent due by the defendant.

Money paid on accommodation-bill.

The plaintiff's claim is rupees upon a bill of exchange accepted [*or* indorsed] for the defendant's accommodation.

Contribution by surety.

The plaintiff's claim is rupees for a contribution in respect of money paid by the plaintiff as surety.

By co-debtor.

The plaintiff's claim is rupees for a contribution in respect of a joint debt of the plaintiff and the defendant paid by the plaintiff.

Money paid for calls.

The plaintiff's claim is rupees for money paid for calls upon shares, against which the defendant was bound to indemnify the plaintiff.

Money payable under award

The plaintiff's claim is rupees for money payable under an award.

Life policy.

The plaintiff's claim is rupees upon a policy of insurance upon the life of *X. Y.*, deceased.

Money-bond.

The plaintiff's claim is rupees upon a bond to secure payment of rupees and interest.

Foreign judgment.

The plaintiff's claim is rupees upon a judgment of the Court in [the Empire of Russia].

Bills of exchange, &c.

The plaintiff's claim is rupees upon a cheque drawn by the defendant.

The plaintiff's claim is rupees upon a bill of exchange accepted [*or* drawn, *or* indorsed] by the defendant.

The plaintiff's claim is rupees upon a promissory note made [*or* indorsed] by the defendant.

The plaintiff's claim is rupees against the defendant, *A. B.*, as acceptor, and against the defendant, *C. D.*, as drawer [*or* indorser] of a bill of exchange.

Surety.

The plaintiff's claim is rupees against the defendant as surety for the price of goods sold.

The plaintiff's claim is rupees against the defendant, *A. B.*, as principal, and against the defendant, *C. D.*, as surety, for the price of goods sold [*or* for arrears of rent, *or* for money lent, *or* for money received by the defendant, *A. B.*, as traveller for the plaintiff, *or*, *&c.*]

Calls

The plaintiff's claim is rupees for calls upon shares.

Indorsement for costs, &c.

[*Add to the above Forms*] and rupees for costs; and if the amount claimed be paid to the plaintiff or his pleader within days [*or, if the summons is to be served out of the jurisdiction, insert the time for appearance limited by the order*] from the service hereof, further proceedings will be stayed.

Damages and other claims.

Agent, &c. The plaintiff's claim is for damages for breach of a contract to employ the plaintiff as traveller.

The plaintiff's claim is for damages for wrongful dismissal from the defendant's employment as traveller [and rupees for arrears of wages].

The plaintiff's claim is for damages for the defendant's wrongfully quitting the plaintiff's employment as manager.

The plaintiff's claim is for damages for breach of duty as factor [*or, &c.*] of the plaintiff [and rupees for money received as factor, *or, &c.*]

Apprentices. The plaintiff's claim is for damages for breach of the terms of a deed of apprenticeship of *X. Y.* to the defendant [*or* plaintiff].

Arbitration. The plaintiff's claim is for damages for non-compliance with the award of *X. Y.*

Assault, &c. The plaintiff's claim is for damages for assault [and false imprisonment, and for malicious prosecution].

By husband and wife. The plaintiff's claim is for damages for assault and false imprisonment of the plaintiff, *C. D.*

Against husband and wife. The plaintiff's claim is for damages for assault by the defendant, *C. D.*

Pleader. The plaintiff's claim is for damages for injury by the defendant's negligence as pleader of the plaintiff.

Bailment. The plaintiff's claim is for damages for negligence in the custody of goods [and for wrongfully detaining the same]

Pledge. The plaintiff's claim is for damages for negligence in the keeping of goods pawned [and for wrongfully detaining the same].

Hire.

The plaintiff's claim is for damages for negligence in the custody of furniture [*or*, a carriage] lent on hire [and for wrongfully, *&c.*]

Banker.

The plaintiff's claim is for damages for wrongfully neglecting [*or* refusing] to pay the plaintiff's cheque.

Bill.

The plaintiff's claim is for damages for breach of a contract to accept the plaintiff's drafts.

Bond.

The plaintiff's claim is upon a bond conditioned not to carry on the trade of a

Carrier.

The plaintiff's claim is for damages for refusing to carry the plaintiff's goods by railway.

The plaintiff's claim is for damages for refusing to carry the plaintiff by railway.

The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of coals by railway.

The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of machinery by sea.

Charter-party.

The plaintiff's claim is for damages for breach of charter-party of ship [*Mary*].

Claim for return of goods; damages.

The plaintiff's claim is for return of household furniture [*or, &c.*], or their value, and for damages for detaining the same.

Damages for depriving of goods.

The plaintiff's claim is for wrongfully depriving plaintiff of goods, household furniture, &c.

Defamation.

The plaintiff's claim is for damages for libel.

Wrongful distress.

The plaintiff's claim is for damages for slander.

The plaintiff's claim is for damages for improperly distraining.

[*This Form shall be sufficient whether the distress complained of be wrongful or excessive or irregular.*]

Ejectment.

The plaintiff's claim is to recover possession of a house, No. in Street, or of a farm called Blackacre, situate in the of in the of .

To establish title and recover rents.

The plaintiff's claim is to establish his title to [*here describe property*] and to recover the rents thereof.

[*The two previous Forms may be combined.*]

Fishery.

The plaintiff's claim is for damages for infringement of the plaintiff's right of fishing.

Fraud

The plaintiff's claim is for damages for fraudulent misrepresentation on the sale of a horse [*or* a business, *or* shares, *or*, *&c.*]

The plaintiff's claim is for damages for fraudulent misrepresentation of the credit of *A. B.*

Guarantee.

The plaintiff's claim is for damages for breach of a contract of guarantee for *A. B.*

The plaintiff's claim is for damages for breach of a contract to indemnify the plaintiff as the defendant's agent to distrain.

Insurance.

The plaintiff's claim is for a loss under a policy upon the ship [*Royal Charter*], and freight of cargo [*or* for return of premiums].

[*This Form shall be sufficient whether the loss claimed be total or partial.*]

The plaintiff's claim is for a loss under a policy of fire insurance upon house and furniture.

Fire insurance.

The plaintiff's claim is for damages for breach of a contract to insure a house.

The plaintiff's claim is for damages for breach of a contract to keep a house in repair.

Landlord and tenant

The plaintiff's claim is for damages for breaches of covenants contained in a lease of a farm.

Medical man.

The plaintiff's claim is for damages for injury to the plaintiff from the defendant's negligence as a medical man.

Mischievous animal.

The plaintiff's claim is for damages for injury by the defendant's dog.

Negligence.

The plaintiff's claim is for damages for injury to the plaintiff by the negligent driving of the defendant or his servants.

The plaintiff's claim is for damages for injury to the plaintiff while a passenger on the defendant's railway by the negligence of the defendant's servants.

The plaintiff's claim is for damages for injury to the plaintiff at the defendant's railway-station from the defective condition of the station.

Act XIII of 1855.

The plaintiff's claim is as executor of *A. B.*, deceased, for damages for the death of the said *A. B.*, from injuries received while a passenger on the defendant's railway, by the negligence of the defendant's servants.

Promise of marriage.

The plaintiff's claim is for damages for breach of promise of marriage.

Sale of goods.

The plaintiff's claim is for damages for breach of contract to accept and pay for goods.

The plaintiff's claim is for damages for non-delivery [*or* short delivery, *or* defective quality, *or other breach of contract of sale*] of cotton [*or, &c.*]

Sale of goods.

The plaintiff's claim is for damages for breach of warranty of a horse.

Sale of land.

The plaintiff's claim is for damages for breach of a contract to sell [or purchase] land.

The plaintiff's claim is for damages for breach of a contract to let [*or* take] a house.

The plaintiff's claim is for damages for breach of a contract to sell [*or* purchase] the lease, with good-will, fixtures, and stock-in-trade of a public house.

The plaintiff's claim is for damages for breach of covenant for title [*or* for quiet enjoyment, *or, &c.*] in a conveyance of land.

Trespass on land.

The plaintiff's claim is for damages for wrongfully entering the plaintiff's land and drawing water from his well [*or* cutting his grass, *or* felling his timber, *or* pulling down his fences, *or* removing his gate, *or* using his road or path, *or* crossing his field, *or* depositing sand there, *or* carrying away gravel from thence, *or* carrying away stones from his river].

Support.

The plaintiff's claim is for damages for wrongfully taking away the support of plaintiff's land [*or* house, *or* mine].

Way.

The plaintiff's claim is for damages for wrongfully obstructing a way [public highway, *or* private way].

Watercourse, &c.

The plaintiff's claim is for damages for wrongfully diverting [*or* obstructing, *or* polluting, *or* diverting water from] a watercourse.

The plaintiff's claim is for damages for wrongfully discharging water upon the plaintiff's land [*or* into the plaintiff's mine].

The plaintiff's claim is for damages for wrongfully obstructing the plaintiff's use of a well.

Pasture. The plaintiff's claim is for damages for the infringement of the plaintiff's right of pasture.

[*This Form shall be sufficient whatever the nature of the right to pasture be.*]

Light. The plaintiff's claim is for damages for obstructing the access of light to plaintiff's house.

Patent. The plaintiff's claim is for damages for the infringement of the plaintiff's patent.

Copyright The plaintiff's claim is for damages for the infringement of the plaintiff's copyright.

Trade-mark. The plaintiff's claim is for damages for wrongfully using [*or* imitating] the plaintiff's trade-mark.

Work. The plaintiff's claim is for damages for breach of a contract to build a ship [*or* to repair a house, &c.]

The plaintiff's claim is for damages for breach of a contract to employ the plaintiff to build a ship, &c.

Nuisance. The plaintiff's claim is for damages to his house, trees, crops, &c., caused by noxious vapours from the defendant's factory [*or, &c.*]

The plaintiff's claim is for damages from nuisance by noise from the defendant's works [*or* stables, *or*, &c.]

Injunction. [*Add to indorsement*] :—and for an injunction.

[*Add to indorsement where claim is to land, or to establish title, or both*] :—

Mesne profits. and for mesne profits.

Arrears of rent and for an account of rents or arrears of rent.

Breach of covenant and for breach of covenant for [repairs.]

1. *Creditor to administer Estate.*

The plaintiff's claim is as a creditor of *X. Y.*, of , deceased, to have the moveable and immoveable property of the said *X. Y.* administered. The defendant, *C. D*, is sued as the administrator of the said *X. Y.* [and the defendants, *E. F.* and *G. H.*, as his co-heirs at law].

2. *Legatee to administer Estate.*

The plaintiff's claim is as a legatee under the will dated the day of 18

of *X. Y.*, deceased, to have the moveable and immoveable property of the said *X. Y* administered. The defendant, *C. D*, is sued as the executor of the said *X. Y.* [and the defendants, *E. F.* and *G. H*, as his devisees]

3. *Partnership.*

The plaintiff's claim is to have an account taken of the partnership dealings between the plaintiff and the defendant [under articles of partnership dated the day of], and to have the affairs of the partnership wound up

4. *By Mortgagee.*

The plaintiff's claim is to have an account taken of what is due to him for principal, interest, and costs on a mortgage dated the day of , made between [*parties*] [*or*, by deposit of title-deeds], and that the mortgage may be enforced by foreclosure or sale.

5. *By Mortgagor.*

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated and made between [*parties*], and to redeem the property comprised therein.

6. *Raising Portions.*

The plaintiff's claim is that the sum of rupees which, by an indenture of settlement, dated , was provided for the portions of the younger children of may be raised.

7. *Execution of Trusts.*

The plaintiff's claim is to have the trusts of an indenture, dated and made between [*parties*], carried into execution.

8. *Cancellation, or Rectification.*

The plaintiff's claim is to have a deed, dated and made between [*parties*], set aside or rectified.

9. *Specific Performance.*

The plaintiff's claim is for specific performance of an agreement, dated the day of , for the sale by the plaintiff to the defendant of certain [freehold] hereditaments at

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No 115

Probate.

1. *By an executor or legatee propounding a will in solemn form.*

The plaintiff claims to be executor of the last will, dated the day of of *C. W.*, late of deceased, who died on the day of , and to have the said will established. This summons is issued against you as one of the next-of-kin of the said deceased [*or, as the case may be*].

2. *By an executor or legatee of a former will, or a next-of-kin, &c, of the deceased, seeking to obtain the revocation of a probate granted in common form.*

The plaintiff claims to be executor of the last will, dated the day of of *C. D*, late of deceased, who died on the day of , and to have the probate of a pretended will of the said deceased, dated the day of , revoked. This summons is issued against you as the executor of the said pretended will [*or, as the case may be*].

3. *By an executor or legatee of a will when letters of administration have been granted as in an intestacy.*

The plaintiff claims to be executor of the last will of *C. D.*, late of deceased, who died on the day of

The plaintiff claims that the grant of letters of administration of the estate of the said deceased obtained by you should be revoked, and probate of the said will granted to him.

4. *By a person claiming a grant of administration as a next-of-kin of the deceased, but whose interest as next-of-kin is disputed.*

The plaintiff claims to be the brother and sole next-of-kin of *C. D.* of deceased, who died on the day of intestate, and to have as such a grant of administration to the personal estate of the said intestate. This writ is issued against you because you have entered a caveat, and have alleged that you are the sole next-of-kin of the deceased [*or, as the case may be*].

Indorsements of character of Parties.

The plaintiff's claim is as executor [*or* administrator] of *C. D.*, deceased, for, *&c.*

The plaintiff's claim is against the defendant, *A. B.*, as executor [*or, &c.*] of *C. D.*, deceased, for, *&c.*

The plaintiff's claim is against the defendant, *A. B.*, as executor of *X. Y.*, deceased, and against the defendant, *C. D.*, in his personal capacity, for, *&c.*

By husband and wife-executrix

The claim of the plaintiff, *C. D.*, is as executrix of *X. Y.*, deceased, and the claim of the plaintiff, *A. B.*, as her husband, for .

Trustees.

The plaintiff's claim is as [*or*, the plaintiff's claim is against the defendant as] trustee under the will of *A. B.* [*or*, under the settlement upon the marriage of *A. B.* and *X. Y.*, his wife].

Public officer.

The plaintiff's claim is as public officer of the bank for .

The plaintiff's claim is against the defendant as public officer of the bank for .

The plaintiff's claim is against the defendant, *A. B.*, as principal, and against the defendant, *C. D.*, as public officer of the bank, as surety, for .

Heir and devisee.

The plaintiff's claim is against the defendant as heir-at-law of *A. B.*, deceased.

The plaintiff's claim is against the defendant, *C. D.*, as heir-at-law, and against the defendant, *E. F.*, as devisee, of lands under the will of *A. B.*

F.—MISCELLANEOUS.

No. 116.

Section 58 of the Code of Civil Procedure.

COURT of the of holden at

REGISTER OF CIVIL SUITS in the year 18 .

Date of presentation of plaint.	Number of Suit.	PLAINTIFF.			DEFENDANT.			CLAIM.			APPEARANCE			JUDGMENT.			APPEAL.		EXECUTION.					RETURN OF EXECUTION.		
		Name.	Description.	Place of abode.	Name.	Description.	Place of abode.	Particulars.	Amount of value.	When the Cause of Action accrued.	Day for parties to appear.	Plaintiff.	Defendant.	Date.	For whom.	For what, or amount.	Date of Appeal.	Judgment in Appeal.	Date of Application.	Date of Order	Against whom.	For what, and amount of money.	Amount of Costs.	Amount paid into Court	Arrested.	Minute of other Return than payment of Arrest, and date of every Return.

No 117.

Summons for Disposal of Suit.

Sections 64 and 68 of the Code of Civil Procedure.

(*Title.*)

To

dwelling at

WHEREAS has instituted a suit against you for , you are hereby summoned to appear in this Court in person or by a duly authorized pleader of the Court, duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions, on the day of 18 , at o'clock in the forenoon, to answer the abovenamed plaintiff; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce all your witnesses on that day; and you are hereby required to take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence; and you will bring with you, or send by your pleader, which the plaintiff desires to inspect, and any documents on which you intend to rely in support of your defence.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have subpœnas from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court at any time before the trial, on your depositing their necessary subsistence-money.

2. If you admit the demand, you should pay the money into Court with the costs of the suit, to avoid the summary execution of the decree, which may be against your person or property, or both, if necessary.

NOTE.—*If written statements are required, say*—You are (*or*, such a party is, *as the case may be*) required to put in a written statement by the day of

No. 118.

Summons for Settlement of Issues

Sections 64 and 68 of the Code of Civil Procedure.

(*Title*)

To

dwelling at

WHEREAS has instituted a suit against you for , you are hereby summoned to appear in this Court in person or by a duly authorized pleader of the Court, duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions, on the day of 18 , at o'clock in the forenoon, to answer the above-named plaintiff; and you are hereby required to take notice that, in default of your appearance on the day before-mentioned, the issues will be settled in your absence; and you will bring with you, or send by your pleader, which the plaintiff desires to inspect, and any document on which you intend to rely in support of your defence.

GIVEN under my hand and the seal of the Court this day of 18

L. S.

Judge.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have subpœnas from this Court to compel the attendance of any witness, and the production of any document that you have a right to call on the witness to produce, on applying to the Court at any time before the trial, on your depositing their necessary subsistence-money.

2. If you admit the demand, you should pay the money into Court with the costs of the suit, to avoid the summary execution of the decree, which may be against your person or property, or both, if necessary.

NOTE.—*If written statements are required, say*—You are (*or*, such a party is, *as the case may be*) required to put in a written statement by the day of

No. 119.

Summons to appear.

Section 68 of the Code of Civil Procedure.

No. OF SUIT

IN THE COURT OF AT

Plaintiff,
Defendant.

To (*Name, description, and address.*)

WHEREAS [*here enter the name, description, and address of the plaintiff*] has instituted a suit in this Court against you [*here state the particulars of the claim as in the register*], you are hereby summoned to appear in this Court in person on the day of at in the forenoon [*If not especially required to appear in person, state*—"in person or by a pleader of the Court duly instructed and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions"] to answer the above-named plaintiff. [*If the summons be for the final disposal of the suit, this further direction shall be added here*—"and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce all your witnesses on that day"]: and you are hereby required to take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence; and you will bring with you (or send by your agent) [*here mention any document the production of which may be required by the plaintiff*] which the plaintiff desires to inspect, and any document on which you intend to rely in support of your defence.

No. 120

Order for Transmission of Summons for Service in the Jurisdiction of another Court.

Section 85 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT No. OF 18

A. B. of

against

C. D. of

The day of 18 .

WHEREAS it is stated in the plaint that , the defendant in the above suit, is at present residing in , but that the right to sue accrued within the juris-

diction of this Court, it is ordered that a summons, returnable on the day of 18 , be forwarded for service the said defendant to the Court of with a duplicate of this proceeding.

L. S.

Judge.

No. 121.

To accompany Return of Summons of another Court.

Section 85 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT No. OF 18

A. B. of

against

C. D. of

The day of 18

READ proceeding from the forwarding for service on in Civil No. of that Court.

Read bailiff's endorsement on the back of the process stating that the and proof of the above having been duly taken by me on the [oath *or*] affirmation of and , it is ordered that the be returned to the , with a copy of this proceeding.

L. S.

Judge.

[NOTE.—This form will be applicable to process other than summons, the service of which may have to be effected in the same manner.]

No. 122.

Defendant's Statement.

Section 110 of the Code of Civil Procedure.

(*Title.*)

I, the undersigned defendant [*or*, one of the defendants], disclaim all interest under the will of the said *E. F.* in the plaint named [*or*, as heir-at-law of, *or*, as next-of-kin, *or*, one of the next-of-kin, of *E. F.*, deceased, in the said plaint named].

Or, I the undersigned defendant state, that I admit [*or* deny] [*here repeat in the language of the plaint the statements admitted or denied*].

Or, I the undersigned defendant submit that, upon the facts stated in the plaint, it does not appear that there is any agreement which can be legally enforced [*or*, that it appears upon the said plaint that I am jointly liable with one *E. F.*, who is not a party to the suit, and not severally liable as by the plaint appears, *or*, that it appears by the said plaint that *G. H* should have been a joint plaintiff with the said *A. B.* in the said suit, *or, as the case may be*].

Or, that the plaintiff has conveyed [*or* assigned] his interest in the said mortgage [*or* equity of redemption] to one *I. J.* [*or*, that I have conveyed or assigned to *H. L.* by way of further charge for securing the sum of Rs. , the equity of redemption in the property sought by the suit to be foreclosed].

Or, that since the dissolution of the partnership the plaintiff has executed an instrument, whereby the plaintiff covenants to discharge all debts and liabilities of the partnership, and generally to release me from all claims and liabilities either by or to himself and others in respect of the said partnership trading [*or, as the case may be*].

(Signed) *C. D.*,
Defendant.

No. 123.

Interrogatories.

Section 121 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT No. OF 18

A. B.
against
C. D.
E. F.
and
G. H.

INTERROGATORIES on behalf of the above-named *A. B.* [*or C. D.*] for the examination of the above-named [*E. F.* and *G. H.*, *or A. B.*]—

1. Did not, &c.
2. Has not, &c.

The defendant, *E. F.*, is required to answer the interrogatories numbered

The defendant *G. H.* is required to answer the interrogatories numbered

No 124.

Form of Notice to produce Documents.

Section 131 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT No. OF 18

A. B.

against

C. D.

TAKE notice that the plaintiff [*or* defendant] requires you to produce for his inspection the following documents referred to in your plaint [*or* written statement, *or* affidavit], dated the day of 18 .

Describe documents required.

X. Y.,

Pleader for the plaintiff [or *the defendant*].

To *Z.*

Pleader for the defendant [or *plaintiff*].

No. 125.

Summons to attend and give Evidence

Sections 159 and 163 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS your attendance is required to on behalf of the in the above cause, you are hereby required [personally to appear before this Court] on the day of 18 , at the hour of A. M. [and] to bring with you, or to send to this Court,

A sum of Rs. , being your travelling and other expenses and subsistence-allowance for one day, is herewith sent. If you do not comply with this order, you will be subject to the consequence of non-attendance laid down in the Code of Civil Procedure, section 170.

Notice—(1.) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2.) If you are to be detained beyond the day aforesaid, a sum of Rs. will be tendered to you for each day's attendance beyond the day specified.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No 126.

Summons to attend and give Evidence.

Sections 159 and 163 of the Code of Civil Procedure.

Another Form.

No. OF SUIT

IN THE COURT OF AT

Plaintiff,

Defendant.

To (*Name, description, and address.*)

You are hereby summoned to appear in this Court in person on the day of at in the forenoon, to give evidence on behalf of the plaintiff [*or* the defendant] in the above-mentioned suit, and to produce [*here describe with convenient certainty any document the production of which may be required. If the summons be only to give evidence, or if it be only to produce a document, it must be expressed accordingly*]; and you are not to depart thence until you have been examined [*or* have produced the document] and the Court has risen, or unless you have obtained the leave of the Court.

FORMS OF DECREES.

No. 127.

Simple Money-Decree.

(*Title.*)

Claim for

THIS cause coming on for final disposal before in the presence of , on the part of the plaintiff, and on the part of the defendant, it is ordered that the do pay to the the sum of Rs. , with interest thereon at the rate of per cent. per from to the date of realization of the said sum, and do also pay to the the costs of this suit as taxed by the officer of the Court, with interest thereon at the rate aforesaid from the date of taxation to the date of realization.

Costs of Suit.

PLAINTIFF.				DEFENDANT.			
	Rs	A	P		Rs.	A.	P.
1. Stamp for plaint ..				Stamp for power ...			
2. Do. for power ..				Do. for petition ...			
3. Do. exhibits				Pleader's fee			
4. Pleader's fees on Rs.				Subsistence for witnesses			
5. Translation fee ..				Service of process ..			
6 Subsistence for witness for attendance ..				Translation fee ...			
7. Commissioner's fee ...				Commissioner's fee ...			
8. Service of process ...							
9. &c.							
TOTAL ...				TOTAL ...			

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 128.

Decree for Sale in a Suit by a Mortgagee or Person entitled to a Lien.

(*Title.*)

IT is ordered that it be referred to the Registrar [*or* Taxing Officer] to take an account of what is due to the plaintiff for principal and interest on the mortgage [*or* lien] mentioned in the plaint, and to tax the plaintiff's costs of the suit, and that the Registrar do certify to the Court on the day of what he shall find to be due for principal and interest as aforesaid, and for costs; and upon the defendant paying into Court what shall be certified to be due to the plaintiff for principal and interest as aforesaid, together with the said costs, within six months after the Registrar [*or* Taxing Officer] shall have presented his certificate, it is ordered that the plaintiff do re-convey the said mortgaged premises free and clear from all incumbrances done by him, or any claiming by, from, or under him, and do deliver up to the Registrar [*or* Taxing Officer] all deeds and writings in his custody or power

relating thereto, and that upon such re-conveyance being made, and deeds and writings being delivered up, the Registrar [*or* Taxing Officer] shall pay out to the plaintiff the said sum so paid in as aforesaid for principal, interest, and costs; but in default of the defendant paying into Court such principal, interest, and costs as aforesaid by the time aforesaid, then it is ordered that the said mortgaged premises [*or* the premises subject to the said lien] be sold with the approbation of the Registrar [*or* Taxing Officer]. And it is ordered that the money to arise by such sale be paid into Court, to the end that the same may be duly applied in payment of what shall be found due to the plaintiff for principal, interest, and costs as aforesaid, and that the balance (if any) shall be paid to the defendant.

No. 129.

Final Decree for Foreclosure.

(*Title.*)

WHEREAS it appears to the Court that the defendant has not paid into Court the sum , which was on the day of last certified by the Registrar to be due to the plaintiff for principal and interest upon the mortgage in the plaint mentioned, and for costs, pursuant to the order made in this suit on the day of last, and that the period of six months has elapsed since the said day of

It is ordered that the defendant do stand absolutely debarred and foreclosed of, and from all equity of, redemption of, in, and to, the said mortgaged premises.

No. 130

Preliminary Order—Administration Suit.

Section 213 of the Code of Civil Procedure.

(*Title.*)

IT is ordered that the following accounts and inquiries be taken and made; that is to say:—

In creditor's suit—

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

In suits by legatees—

2. An account be taken of the legacies given by the testator's will.

In suits by next-of-Kin—

An inquiry be made and account taken of what, or of what share, if any, the plaintiff is entitled to as next-of-kin [*or* one of the next-of-kin] of the intestate.

[*After the first paragraph, the order will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, heirs-*

at-law, and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors, will follow the first paragraph, and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit.]

3. An account of the funeral and testamentary expenses.

4. An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

5. An inquiry what part [if any] of the moveable property of the deceased is outstanding and undisposed of.

6. And it is further ordered, that the defendant do, on or before the day of next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or to his use.

7. And that if the *Registrar* shall find it necessary, for carrying out the objects of the suit, to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

8. And that Mr. *E. F.* be receiver in the suit [*or* proceeding], and receive and get in all outstanding debts and outstanding moveable property of the deceased, and pay the same into the hands of the Registrar [and shall give security by bond for the due performance of his duties to the amount of rupees].

9. And it is further ordered, that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken; that is to say—

(*a*) an inquiry what immoveable property the deceased was seized of or entitled to at the time of his death;

(*b*) an inquiry what are the incumbrances [if any] affecting the immoveable property of the deceased, or any part thereof;

(*c*) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

10. And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrances [if any] of such incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent.

11. And it is ordered that *G. H.* shall have the conduct of the sale of the immoveable property, and shall prepare the conditions and contracts of sale subject to the approval of the Registrar, and that in case any doubt or difficulty shall arise, the papers shall be submitted to the Judge to settle.

12. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the Registrar shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the Registrar to give the most useful publicity to such inquiries.

13. And it is ordered that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before the day of , and that the Registrar do certify the result of the inquiries and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

14. And, lastly, it is ordered that this suit [*or* matter] stand adjourned for making final decree to the day of .

[*Such part only of this order is to be used as is applicable to the particular case.*]

No. 131.

Final Decree in an Administration Suit by a Legatee.

Section 213 of the Code of Civil Procedure.

1. IT is ordered that the defendant do, on or before the day of , pay into Court the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the estate of , the testator, and also the sum of Rs. for interest, at the rate of Rs. per centum per annum, from the day of to the day of , amounting together to the sum of Rs. ,

2. Let the Registrar [*or* Taxing Officer] of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed, be paid out of the said sum of Rs. ordered to be paid into Court as aforesaid, as follows:—

(*a.*)—The costs of the plaintiff to Mr. , his attorney [*or* pleader], and the costs of the defendant to Mr. , his attorney [*or* pleader].

(*b.*)—And (*if any debts are due*), with the residue of the said sum of Rs. after payment of the plaintiff's and defendant's costs as aforesaid, let the sums found to be owing to the several creditors mentioned in the schedule to the Registrar's certificate, together with subsequent interest on such of the debts as bear interest, be paid; and after making such payments, let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid), be paid to them.

3. And if there should then be any residue, let the same be paid to the residuary legatee.

Decree in an Administration Suit by a Legatee, where an Executor is held personally liable for the Payment of Legacies.

Section 213 of the Code of Civil Procedure.

1. Declare that the defendant is personally liable to pay the legacy of Rs. bequeathed to the plaintiff;

2. And it is ordered that an account be taken of what is due for principal and interest on the said legacy;

3. And it is also ordered that the defendant do, within weeks after the date of the Registrar's certificate, pay to the plaintiff the amount of what the Registrar shall certify to be due for principal and interest;

4. And it is ordered that the defendant do pay the plaintiff his costs of suit, the same to be taxed in case the parties differ.

Final Decree in an Administration Suit by Next-of-Kin.

Section 213 of the Code of Civil Procedure.

1. Let the Registrar of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff's costs, when so taxed, be paid by the defendant to the plaintiff out of the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the personal estate of *E. F.*, the intestate, within one week after the taxation of the said costs by the said Registrar, and let the defendant retain for her own use out of such sum her costs, when taxed.

2. And it is ordered, that the residue of the said sum of Rs. , after payment of the plaintiffs' and defendant's costs as aforesaid, be paid and applied by defendant as follows :—

(*a.*)—Let the defendant, within one week after the taxation of the said costs by the Registrar as aforesaid, pay one-third share of the said residue to the plaintiffs, *A. B.*, and *C.*, his wife, in her right, as the sister and one of the next-of-kin of the said *E. F.*, the intestate.

(*b.*)—Let the defendant retain for her own use one other third share of the said residue, as the mother, and one other of the next-of-kin of the said *E. F.*, the intestate.

(*c.*)—And let the defendant, within one week after the taxation of the said costs by the Registrar as aforesaid, pay the remaining one-third share of the said residue to *G. H.*, as the brother and the other next-of-kin of the said *E. F.*, the intestate.

No. 132.

Order—Dissolution of Partnership.

Section 215 of the Code of Civil Procedure.

(*Title.*)

IT is declared that the partnership in the plaint mentioned between the plaintiff and defendant ought to stand dissolved as

from the day of ; and it is ordered that the dissolution thereof as from that day be advertised in the *Gazette, &c.*

And it is ordered that be the receiver of the partnership-estate and effects in this suit, and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken :—

1. An account of the credits, property, and effects now belonging to the said partnership ;
2. An account of the debts and liabilities of the said partnership ;
3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the good-will of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the Registrar may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken and all the other acts required to be done be completed before the day of , and that the Registrar do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of .

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the day of

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No. 133.

Partnership—Final Decree.

Section 215 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL REGULAR NO.

A. B. of

against

C. D. of

IT is ordered that the fund now in Court, amounting to the sum of Rs. , be applied as follows :—

1. In payment of the debts due by the partnership set forth in the Registrar's certificate amounting in the whole to Rs.

2. In payment of the costs of all parties in this suit, amounting to Rs. [*These costs must be ascertained before the decree is drawn up*].

3. In payment of the sum of Rs. to the plaintiff as his share of the partnership-assets, of the sum of Rs. , being the

residue of the said sum of Rs. now in Court, to the defendant as his share of the partnership-assets.

[*Or*, And that the remainder of the said sum of Rs. be paid to the said plaintiff (*or* defendant) in part payment of the sum of Rs. certified to be due to him in respect of the partnership-accounts.

And that the defendant (*or* plaintiff) do, on or before the day of , pay to the plaintiff (*or* defendant) the sum of Rs. , being the balance of the said sum of Rs. due to him, which will then remain due].

No. 134.

Certificate of Non-satisfaction of Decree.

Section 221 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

A. B. of

against

C. D. of

CERTIFIED that no [*or* partial, *as the case may be, and if partial, state to what extent*] satisfaction of the decree of this Court, in Civil Suit No. of 18 , a copy of which is hereunto attached, has been obtained by execution within the jurisdiction of this Court.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 135.

Notice to show Cause why Execution should not issue.

Section 248 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

MISCELLANEOUS NO. OF 18

A. B. of

against

C. D. of

To

WHEREAS has made application to this Court for execution of decree in Civil

Suit No. of 18 , this is to give you notice that you are to appear before this Court on the day of 18 , either in person or by a pleader of this Court, or agent duly authorized and instructed to show cause, if any, why execution should not be granted.

GIVEN under my hand and the seal of the Court. this day of 18

L. S.

Judge.

No 136.

Warrant of Attachment of moveable Property in Defendant's Possession in Execution of a Decree for Money.

Section 254 of the Code of Civil Procedure.

(*Title.*)

TO THE BAILIFF OF THE COURT.

WHEREAS was ordered, by decree of this Court, passed on the day of 18 in Suit No. of 18 , to pay to the plaintiff the sum of Rs. as noted in the margin; and whereas the said sum of Rs. has not been paid

DECREE.			
Principal			
Interest			
Costs			
Costs of decree . .			
Interest thereon .			
Total of attachment			
TOTAL ...			

THESE ARE TO COMMAND YOU to attach the moveable property of the said as set forth in the list hereunto annexed, or which shall be pointed out to you by the said , and unless the said shall pay to you the said sum of Rs. together with Rs. , the costs of this attachment, to hold the same until further orders from this Court.

YOU ARE FURTHER COMMANDED to return this warrant on or before the day of 18 , with an endorsement cer-

tifying the date and manner in which it has been executed, or why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 18

SCHEDULE.

L. S.

Judge.

No. 137.

Warrant to the Bailiff to give Possession of Land, &c.

Section 263 of the Code of Civil Procedure.

(*Title.*)

TO THE BAILIFF OF THE COURT.

WHEREAS , in the occupancy of , has been decreed to , the plaintiff in this suit, you are hereby directed to put the said in possession of the same, and you are hereby authorized to remove any person who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 138.

Attachment in Execution.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY, TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF.

Section 268 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS has failed to satisfy a decree passed against on the day of 18 in favour of for Rs. , it is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from

receiving from the following property in the possession of the said , that is to say, , to which the defendant is entitled, subject to any claim of the said , and the said is hereby prohibited and restrained, until the further order of this Court, from delivering the said property to any person or persons whomsoever.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 139.

Attachment in Execution.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS NOT SECURED BY NEGOTIABLE INSTRUMENTS.

Section 268 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS has failed to satisfy a decree passed against on the day of 18 , in Civil Suit No. of 18 , in favour of , for Rs. , it is ordered that the defendant be, and hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant, namely, , and that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No 140

Attachment in Execution.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN PUBLIC COMPANY, &c.

Section 268 of the Code of Civil Procedure.

(*Title.*)

To

Defendant, and to

Manager of *Company.*

WHEREAS has failed to satisfy a decree passed against on the day of 18 , in Civil Suit No. of 18 , in favour of , for Rs. , it is ordered that you, the defendant, be, and you are hereby, prohibited and restrained, until the further order of this Court, from making any transfer of shares in the aforesaid Company, namely, , or from receiving payment of any dividends thereof; and you , the Manager of the said Company, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 141.

Attachment in Execution.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVEABLE PROPERTY.

Section 274 of the Code of Civil Procedure.

(*Title.*)

To

Defendant.

WHEREAS you have failed to satisfy a decree passed against you on the day of 18 , in Civil Suit No. of 18 , in favour of , for Rs. , it is ordered that you, the said , be, and you are hereby, prohibited

and restrained, until the further order of this Court, from alienating the property specified in the schedule hereunto annexed, by sale, gift, or otherwise, and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift, or otherwise.

GIVEN under my hand and the seal of the Court, this day of 18

SCHEDULE.

L. S.

Judge.

No. 142

Attachment.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY SECURITY IN THE HANDS OF A COURT OF JUSTICE OR OFFICER OF GOVERNMENT.

Sections 272 and 486 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

A B. of

against

C. D. of

To

SIR,

THE plaintiff having applied, under section of the Code of Civil Procedure, for an attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed, on what account, &c.*), I request that you will hold the said money subject to the further order of this Court.

I have the honor to be,

SIR,

Your most obedient Servant

L. S.

Judge.

Dated the day of 18

No. 143.

Order for Payment to the Plaintiff, &c., of Money, &c., in the hands of a Third Party.

Section 277 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

MISCELLANEOUS NO. OF 18

A. B. of

against

C. D. of

TO THE BAILIFF OF THE COURT AND TO

WHEREAS the following property has been attached in execution of a decree in Civil Suit No. of 18 , passed on the day of 18 , in favour of , for Rs. ; it is ordered that the property so attached, consisting of Rs. in money, and Rs. in bank-notes, or a sufficient part thereof to satisfy the said decree, shall be paid over by you, the said , to ; and that the said property, so far as may be necessary for the satisfaction of the said decree, shall be sold by you, the Bailiff of the Court, by public auction in the manner prescribed for sale in execution of decrees, and that the money which may be realized by such sale, or a sufficient part thereof to satisfy the said decree, shall be paid over to the said , and the remainder, if any, shall be paid to you, the said .

GIVEN under my hand and the seal of the Court, this day of 18

L. S

Judge.

No. 144.

Notice to Attaching Creditor.

Section 278 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

MISCELLANEOUS NO. OF 18

A. B. of

against

C. D. of

To

WHEREAS has made application to this Court for the removal of attachment on

placed at your instance in execution of the decree in Civil Suit No. of 18 , this is to give you notice to appear before this Court on , the day of 18 , either in person or by a pleader of the Court duly instructed, to support your claim as attaching creditor.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 145.

Warrant of Sale of Property in Execution of a Decree for Money.

Section 287 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

MISCELLANEOUS NO. OF 18

A. B. of

against

C. D. of

TO THE BAILIFF OF THE COURT.

THESE ARE TO COMMAND YOU to sell by auction, after giving days' previous notice, by affixing the same in this Court-house, and after making due proclamation,* the property attached under a warrant from this Court, dated the of 18 , in execution of a decree in favour of in suit No. of 18 , or so much of the said property as shall realize the sum of Rs. , being the of the said decree and costs still remaining unsatisfied.

YOU ARE FURTHER COMMANDED to return this warrant on or before the day of 18 with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

---

* This proclamation shall specify the time, the place of sale, the property to be sold, the revenue assessed, should the property consist of land paying revenue to Government, and the amount for the recovery of which the sale is ordered.

No. 146.

Notice to Person in Possession of moveable Property sold in Execution.

Section 300 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT No. OF 18

A. B. of

against

C. D. of

To

WHEREAS has been the purchaser at a sale by auction in execution of the decree in the above suit of , now in your possession, you are hereby prohibited from delivering possession of the said to any persons except the said .

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 147.

Prohibitory Order against Payment of Debts sold in Execution to any other than the Purchaser.

Section 301 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT No. OF 18

A. B. of

against

C. D. of

To and to

WHEREAS has become the purchaser at a public sale in execution of the decree in the above suit of certain debt due from you to you , that is to say,

it is ordered that you be, and you are hereby, prohibited from receiving, and you from making payment of, the said debt to any person or persons except the said .

GIVEN under my hand and the seal of the Court, this day of 18

L. S

Judge.

No. 148.

Prohibitory Order against the Transfer of Shares sold in Execution.

Section 301 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

A. B. of

against

C. D. of

To and

Manager of *Company.*

WHEREAS has become the purchaser at a public sale in execution of the decree in the above suit of certain shares in the above Company, that is to say, of , standing in the name of you , it is ordered that you be, and you are hereby, prohibited from making any transfer of the said shares to any person except the said , the purchaser aforesaid, or from receiving any dividends thereon : and you , Manager of the said Company, from permitting any such transfer or making any such payment to any person except the said , the purchaser aforesaid.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No 149.

Order confirming Sale of Land, &c.

Section 312 of the Code of Civil Procedure

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

A. B of

against

C. D. of

WHEREAS the following land (or immoveable property) was on the day of 18 sold by the Bailiff of this Court in execution of the decree in this suit; and whereas thirty days have elapsed and no application has been made (*or* objection allowed) to the said sale, it is ordered that the said sale be, and the said sale is hereby, confirmed.

GIVEN under my hand and the seal of the Court, this day of 18 .

SCHEDULE.

L. S

Judge.

No. 150

Certificate of Sale of Land.

Section 316 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18 .

A. B of

against

C D. of

THIS is to certify that has been declared the purchaser at a sale by public auction on the day of 18 of the in execution of decree in this suit, and that the said sale has been duly confirmed by the Court.

GIVEN under my hand and the seal of the Court, this day of 18

L S.

Judge.

No. 151.

Order for Delivery to certified Purchaser of Land at a Sale in Execution.

Section 318 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

A. B. of

against

C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS has become the certified purchaser of at a sale in execution of decree in Civil Regular No. of 18 , and whereas such land is in the possession of , you are hereby ordered to put the said , the certified purchaser, as aforesaid, into possession of the said , and if need be, to remove any person who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 152.

Authority to the Collector to stay public Sale of Land on Securities being given.

Section 326 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

A. B. of

against

C. D. of

To

Collector of

SIR,

IN answer to your communication No. , dated , representing that the sale in execution of decree in

this suit of land, lying within your district, paying revenue to Government, is objectionable, I have the honor to inform you that you are authorized, on security to the amount of Rs. , decreed to the in the above suit, being given to your satisfaction, to make provision for the satisfaction of the said decree in the manner recommended by you instead of proceeding to a public sale of

I have the honor to be,

SIR,

Your obedient Servant,

L. S.

Judge.

No. 153.

Order for Committal for resisting, &c., Execution of Decree for Land.

Section 329 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS it appears to the Court that has without just cause resisted (*or* obstructed) the execution of the decree of the Court passed against on the day of 18 , in Civil Suit, No. of 18 , whereby certain land or immoveable property was adjudged to , it is ordered that the said be committed to custody for a period of days.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 154.

Warrant of Arrest in Execution.

Section 337 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18 .

MISCELLANEOUS NO. OF 18 .

A. B. of

against

C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS was adjudged by a decree of the Court, in No. of 18 , dated 18 , to pay to the plaintiff the sum of Rs. , as noted in the margin, and whereas the said sum of Rs. has not been paid to the said plaintiff in satisfaction of the said decree, these are to command you to arrest the said defendant, and unless the said defendant shall pay to you the said sum of Rs. , together with Rs. for the costs of executing this process, to bring the said defendant before the Court with all convenient speed. You are further commanded to return this warrant on or before the day of 18 , with an endorsement certifying the day and manner in which it has been executed, or the reason why it has not been executed.

Principal ...			
Interest ...			
Costs ...			
Execution ...			
TOTAL ...			

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No 155

Notice of Payment into Court.

Section 377 of the Code of Civil Procedure.

IN THE 187

B No.

A B. v. *C. D.*

TAKE notice that the defendant has paid into Court Rs. and says that that sum is enough to satisfy the plaintiff's claim [*or* the plaintiff's claim for, *&c*]

To Mr. *X. Z*,

the Plaintiff's Pleader,

Z.,

Defendant's Pleader.

No 156.

Commission to examine absent Witnesses.

Section 386 of the Code of Civil Procedure

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

A. B of

against

C. D. of

To

WHEREAS the evidence of is required by the in the above suit; and whereas you are requested to take the examination on interrogatories [*or* vivâ voce] of such witnesses , and you are hereby appointed a Commissioner for that purpose, and you are further requested to make return of such examination so soon as it may be taken [Process to require the attendance of the witness will be issued by this Court on your application] *

GIVEN under my hand and the seal of the Court, this day of 18

L S

Judge.

* Not necessary where the commission goes to another Court.

No 157.

Commission for a local Investigation, or to examine Accounts.

Sections 392 and 395 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

A. B. of

against

C. D. of

To

WHEREAS it is deemed requisite, for the purposes of this suit, that a commission for
should be issued; you are hereby appointed Commissioner for the purpose of [process to compel the attendance before you of any witnesses, or for the production of any documents which you may desire to examine or inspect, will be issued by this Court on your application]*

A sum of Rs. , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 158.

Warrant of Arrest before Judgment.

Section 478 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

A. B. of

against

C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS , the plaintiff in the above suit, has proved to the satisfaction of the Court that there is probable cause for believing that the defendant is about to
these are to command you to take
the said into custody, and to bring
before the Court, in order that he may show cause why he should not furnish security to the amount of Rs. for

* Not necessary where the commission goes to another Court.

personal appearance before the Court, until such time as the said suit shall be fully and finally disposed of, and until execution or satisfaction of any decree that may be passed against in the suit.

GIVEN under my hand and the seal of the Court, this day of 18

L S.

Judge.

No 159

Order for Committal

Section 481 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT No. OF 18

A. B. of

against

C. D. of

To

WHEREAS , plaintiff in this suit, has made application to the Court that security be taken for the appearance of the defendant to answer any judgment that may be passed against in the suit; and whereas the Court has called upon the defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which has failed to do; it is ordered that the said defendant be committed to custody until the decision of the suit; or if judgment be given against until the execution of the decree.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 160.

Attachment before Judgment, with Order to call for security for Fulfilment of Decree.

Section 484 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT No. OF 18

A. B. of

against

C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS has proved to the satisfaction of the Court that the defendant in the above suit these are to command you to call upon the said defendant on or before the day of either to furnish security for the sum of Rs. to produce and place at the disposal of this Court when required or the value thereof, or such portion of the value as may be sufficient to fulfil any decree that may be passed against or to appear and show cause why should not furnish security; and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court, and in what manner you shall have executed this warrant make appear to the Court immediately after the execution hereof, and have you here then this Warrant.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 161.

Attachment before Judgment, on Proof of Failure to furnish Security.

Section 485 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT No. OF 18

A. B. of

against

C. D. of

TO THE BAILIFF OF THE COURT.

WHEREAS , the plaintiff in this suit, has applied to the Court to call upon , the defendant, to furnish security to fulfil any decree that may be passed against in the suit, and whereas the Court has called upon

the said to furnish such security which has failed to do; these are to command you to attach , the property of the said , and keep the same under safe and secure custody until the further order of the Court; and in what manner you shall have executed this warrant make appear to this Court immediately after the execution hereof, and have you here then this warrant.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 162.

Attachment before Judgment.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY, TO WHICH THE DEFENDANT IS ENTITLED, SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSONS TO THE IMMEDIATE POSSESSION THEREOF.

Section 486 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT No. OF 18 .

A. B. of

against

C. D. of

To

Defendant.

IT is ordered that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from receiving from the following property in the possession of the said , that is to say, , to which the defendant is entitled, subject to any claim of the said , and the said is hereby prohibited and restrained, until the further order of this Court, from delivering the said property to any persons whomsoever.

GIVEN under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

No. 163.

Attachment before Judgment.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVEABLE PROPERTY.

Section 486 of the Code of Civil Procedure.

IN THE COURT OF

CIVIL SUIT NO. OF 18

A. B. of

against

C. D. of

To

Defendant.

IT is ordered that you, the said be, and you are hereby, prohibited and restrained, until the further order of this Court, from alienating the property specified in the schedule hereunto annexed, by sale, gift, or otherwise, and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift, or otherwise.

GIVEN under my hand and the seal of the Court, this day of 18

SCHEDULE.

L. S.

Judge.

No. 164.

Attachment before Judgment.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY IN THE HANDS OF OTHER PERSONS, OR OF DEBTS NOT BEING NEGOTIABLE INSTRUMENTS.

Section 486 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

A. B. of

against

C. D. of

To

IT is ordered that the defendant be, and he is hereby, prohibited and restrained, until the further order of this Court, from receiving from the [money now in hands belonging to the said defendant or debts, *as the case may be, describing them*], and that the said be and hereby prohibited

and restrained, until the further order of this Court, from making payment of the said [money, *&c*], or any part thereof, to any person whomsoever.

GIVEN under my hand and the seal of the Court, this
day of 18

L S.

Judge.

No 165

Attachment before Judgment.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN A PUBLIC COMPANY, &c

Section 486 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT No OF 18

A B of

against

C. D of

To

Defendant, and to

Manager of *Company.*

IT is ordered that , the defendant, be and hereby, prohibited and restrained, until the further order of the Court, from making any transfer of shares, being in the aforesaid Company, or from receiving payment of any dividends thereof; and you , Manager of the said Company, are hereby prohibited and restrained from permitting any such transfer, or making any such payment.

GIVEN under my hand and the seal of the Court, this
day of 18

L S

Judge.

No 166

Temporary Injunctions.

Section 492 of the Code of Civil Procedure.

UPON motion made unto this Court by , pleader of (*or* counsel for) the plaintiff *A B*, and upon reading the peti-

tion of the said plaintiff in this matter filed (this day) [*or* the plaint filed in this cause on the day of , *or* the written statement of the said plaintiff filed on the day of] and upon hearing the evidence of and in support thereof [*if after notice, and defendant not appearing, add,* and also the evidence of as to service of notice of this motion upon the defendant *C. D.*], this Court doth order that an injunction be awarded to restrain the defendant *C. D.*, his servants, workmen, and agents from pulling down, or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned [*or* in the written statement *or* petition of the plaintiff and evidence at the hearing of this motion mentioned] being No. 9, Oilmongers Street, Hindupur, in the Taluq of , and from selling the materials whereof the said house is composed, until the hearing of this cause or until the further order of this Court.

Dated this day of 187 .

Civil Judge.

[*Where the injunction is sought to restrain the negotiation of a bill, note or security, the ordering part of the order may run thus:*—]

to restrain the defendants and from parting with out of the custody of them or any of them, or endorsing, assigning or negotiating the promissory note in question, dated on or about the , *&c.*, mentioned in the plaintiff's plaint [*or* petition] and the evidence heard at this motion, until the hearing of this cause, or until the further order of this Court.

[*In copyright cases.*]

to restrain the defendant, *C. D.*, his servants, agents, or workmen, from printing, publishing, or vending a book, called , or any part thereof, until the, *&c.*

[*Where part only of a book is to be restrained.*]

to restrain the defendant, *C. D.*, his servants, agents, or workmen, from printing, publishing, selling, or otherwise disposing of such parts of the book in the plaint [*or* petition and evidence, *&c.*] mentioned to have been published by the defendant as hereinafter specified, namely, that part of the said book which is entitled and also that part which is entitled (*or* which is contained in p. to p. both inclusive) until the, *&c.*

[*In patent cases.*]

to restrain the defendant, *C. D.*, his agents, servants, and workmen, from making or vending any perforated bricks (*or as the case may be*) upon the principle of the inventions in the plaintiff's plaint [*or* petition, *&c.*,

or written statement, *&c.*] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint (*or as the case may be*) mentioned, and from counterfeiting, imitating or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, *&c.*

[*In cases of trade-marks.*]

to restrain the defendant, *C. D.*, his servants, agents or workmen, from selling, or exposing for sale, or procuring to be sold, any composition or blacking (*or as the case may be*) described as or purporting to be blacking manufactured by the plaintiff, *A. B.*, in bottles having affixed thereto such labels as in the plaintiff's plaint [*or* petition, *&c.*] mentioned, or any other labels so contrived or expressed as, by colorable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff, *A. B*, and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff, *A. B.*, until the, *&c.*

[*To restrain a partner from in any way interfering in the business.*]

to restrain the defendant, *C. D.*, his agents and servants, from entering into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note or written security, in the name of the partnership firm of *B. & D.*, and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing or causing to be done, any act, in the name or on the credit of the said partnership firm of *B. & D.*, or whereby the said partnership firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking, until the, *&c.*

No. 167.

Notice of Application for Injunction.

Section 494 of the Code of Civil Procedure.

IN THE COURT OF AT

A. B. of

against

C. D. of

TAKE notice that I, *A. B*, intend to apply at the sitting of the Court at aforesaid, on the day of for an injunction to restrain *C. D.* from further prosecuting a suit,

which he has commenced against me in to recover damages for the breach of the contract for the specific performance of which this suit was commenced [*or* to restrain him from receiving and giving discharges for any of the debts due to the partnership in the matter of the partnership between us for the winding up of which the suit was commenced, *or* from digging the turf from the land which was agreed to be sold by him to me by the agreement, the specific performance of which this suit is commenced to enforce, *or, as the case may be*].

Dated this day of 18

A. B.

To *C. D.*

[N B.—*Where the injunction is to be applied for against a party whose name and address does not appear upon any proceeding already filed in the suit, it must be stated in full to enable the proper officer to serve the notice*]

No. 168.

Appointment of a Receiver.

Section 503 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT No. OF 18

A. B. of

against

C. D. of

To

WHEREAS has been attached in execution of a decree passed in the above suit on the day of 18 , in favour of , you are hereby (subject to your giving security to the satisfaction of the Registrar) appointed receiver of the said property under section 503 of the Code of Civil Procedure, with full powers under the provisions of that section.

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on . You will be entitled to remuneration, at the rate of per cent. upon your receipts under the authority of this appointment.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 169.

Bond to be given by Receiver.

Section 503 of the Code of Civil Procedure.

IN THE COURT OF AT

CIVIL SUIT NO. OF 18

A. B. of

against

C. D. of

KNOW all men by these presents, that we, *A. B.* of, &c., and *C. D.* of, &c., and *E. F.* of, &c., are jointly and severally bound to *G. H.*, Registrar of the Court of in Rs. , to be paid to the said *G. H.* or his attorney, executors, administrators or assigns. For which payment to be made, we bind ourselves, and each of us, in the whole, our and each of our heirs, executors, and administrators, jointly and severally, by these presents.

Dated this day of 18 .

And whereas a plaint has been filed in this Court by *A. B.* against *C. D.* for the purpose of (*here insert object of suit*).

And whereas the said *A. B.* has been appointed, by order of the above-mentioned Court, to receive the rents and profits of the immoveable property, and to get in the outstanding moveable property of *C. D.*, the testator in the said plaint named.

Now the condition of this obligation is such, that if the above-bounden *A. B.* shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immoveable property, and in respect of the moveable property of the said *C. D.* [*or as may be*] at such periods as the said Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

A. B.

C. D.

Signed and delivered by the above-bounden in the presence of

NOTE.—*If deposit of money be made, the memorandum thereof should follow the terms of the condition of the bond.*

No. 170.

Order of Reference to Arbitration under Agreement of Parties.

Section 508 of the Code of Civil Procedure.

(*Title.*)

To

WHEREAS the above-mentioned plaintiff and defendant have agreed to refer the matters in difference between them in the above

suit to your arbitration and award, you are hereby appointed accordingly to determine all the said matters in difference between the parties, and with power, by consent of the parties, to determine which party shall pay the costs of this reference.

You are required to deliver your award in writing to this Court on or before the day of 18 , or such other day as this Court may further fix.

Process to compel the attendance before you of any witnesses, or for the production of any documents which you may desire to examine or inspect, will be issued by this Court on our application, and you are empowered to administer to such witnesses oath or affirmation.

A sum of Rs. , being your fee in the above suit, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 171.

Order of Reference to Arbitration by Court with consent.

Section 508 of the Code of Civil Procedure.

(*Title.*)

UPON reading a petition of the plaintiff, filed this day, and on the consent of for the defendant, and upon hearing for the plaintiff and for the defendant, it is ordered, by and with the consent of all the parties, that all matters in difference in this suit, including all dealings and transactions between all parties, be referred to the final determination of , who is to make his award in writing and submit the same to this Court, together with all proceedings, depositions, and exhibits in this suit, within one month from the date hereof. And it is ordered further, by and with the like consent, that the said arbitrator is to be at liberty to examine the parties and their witnesses upon oath or affirmation, which he is empowered to administer, and that the said arbitrator shall have all such powers or authorities as are vested in arbitrators under the Code of Civil Procedure, including therein

power to call for all books of account that he may consider necessary. And it is further ordered, by and with the like consent, that the costs of this suit, together with the costs of reference to arbitration, up to and including the award of the said arbitrator, and the enforcement thereof, do abide the result of the finding of the said arbitrator. And it is further ordered, by and with the like consent, that the said arbitrator be at liberty to appoint a competent accountant to assist him in the investigation of the several matters referred to him as aforesaid, and that the remuneration of such accountant and other charges attending thereto be in the discretion of the said arbitrator.

GIVEN under my hand and the seal of the Court, this day of 18

L S.

Judge.

No. 172.

Summons in Summary Suit on Negotiable Instrument.

Section 532 of the Code of Civil Procedure.

No. OF SUIT

IN THE COURT OF AT

Plaintiff,

Defendant.

To [*Here enter the defendant's name, description, and address*]

WHEREAS [*here enter the plaintiff's name, description, and address*] has instituted a suit in this Court against you under Chapter XXXIX of the Code of Civil Procedure for Rs. , principal and interest [*or* Rs. , balance of principal and interest] due to him as the payee [*or* indorsee] of a bill of exchange [*or* hundi *or* promissory note], of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within seven days from the service hereof, inclusive of the day of such service, to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such seven days to obtain a decree for any sum not

exceeding the sum of Rs. [*here state the sum claimed*] and the sum of Rs. for costs.

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.

[*Here copy the bill of exchange, hundi or promissory note, and all endorsements upon it*]

No. 173.

Memorandum of Appeal.

Section 540 of the Code of Civil Procedure.

MEMORANDUM OF APPEAL.

(*Name, &c., as in Register.*) Plaintiff—Appellant.

(*Name, &c, as in Register.*) Defendant—Respondent.

[*Name of Appellant*] [plaintiff *or* defendant] above-named appeals to the High Court at [*or* District Court at *as the case may be*] against the decree of in the above suit, dated the day of , for the following reasons, namely [*here state the grounds of objection*].

No. 174.

Register of Appeals.

Section 550 of the Code of Civil Procedure.

COURT (*OR* HIGH COURT) AT

REGISTER OF APPEALS FROM DECREES in the year 18

Date of memorandum.	No. of appeal.	APPELLANT.			RESPONDENT.			DECREE APPEALED FROM.				APPEARANCE.			JUDGMENT.		
		Name.	Description.	Place of abode.	Name.	Description.	Place of abode.	Of what Court.	No. of original suit.	Particulars.	Amount or value.	Day for parties to appear.	Appellant.	Respondent.	Date.	Confirmed, reversed or altered	For what, or amount.

No. 175.

Notice to Respondent of the Day fixed for the Hearing of the Appeal.

Section 553 of the Code of Civil Procedure

IN THE COURT OF AT

, *Appellant,*

v.

, *Respondent.*

Appeal from the of the Court of dated the day of 18

To

Respondent.

TAKE notice that an appeal from the decree of in this case has been presented by and registered in this Court, and that the day of 18 has been fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal, it will be heard and decided *ex parte* in your absence.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

[NOTE.—If a stay of execution has been ordered, intimation should be given of the fact on this notice.]

No. 176.

Decree on Appeal.

Section 579 of the Code of Civil Procedure.

IN THE COURT OF AT

, *Appellant,*

v.

, *Respondent.*

Appeal from the of the Court of dated the day of 18 .

MEMORANDUM OF APPEAL.

, *Plaintiff,*

, *Defendant.*

Plaintiff [*or* defendant] above-named appeals to the Court at against the decree of in the above suit, dated the day of 18 , for the following reasons, namely :—

[*Here state the reasons*]

This appeal coming on for hearing on the day of 18 before , in the presence of , for the Appellant, and of for the respondent, it is ordered—

[*Here state the relief granted*]

The costs of this appeal, amounting to , are to be paid by . The costs of the original suit are to be paidby .

GIVEN under my hand this day of 18

L. S.

Judge.

No. 177.

Register of Appeals from Appellate Decrees.

Section 587 of the Code of Civil Procedure.

HIGH COURT AT

REGISTER OF APPEALS FROM APPELLATE DECREES.

Date of memorandum.	No. of appeal.	APPELLANT.			RESPONDENT.			DECREE APPEALED FROM.				APPEARANCE.			JUDGMENT.		
		Name.	Description.	Place of abode	Name.	Description.	Place of abode.	Of what Court	No. of original suit, and of appeal.	Particulars.	Amount or value.	Day for parties to appear.	Appellant.	Respondent.	Date.	Confirmed, reversed or altered.	For what, or amount.

No. 178.

Notice to show Cause why a Review should not be granted.

Section 626 of the Code of Civil Procedure.

IN THE COURT OF AT

, *Plaintiff*,

v.

, *Defendant*.

To

TAKE notice that has applied to this Court for a review of its judgment passed on the day of 18 in the above case. The day of 18 is fixed for you to show cause why the Court should not grant a review of its judgment in this case.

GIVEN under my hand and the seal of the Court, this day of 18

L. S.

Judge.

No. 179.

Notice of Change of Pleader.

IN THE COURT OF AT

A. B. of

against

C. D. of

TO THE REGISTRAR OF THE COURT.

TAKE notice that I, *A. B.* [*or C. D.*], have hitherto employed as my pleader *G. H.* of in the above-mentioned cause, but that I have ceased to employ him, and that my present pleader is *J. K.* of

A. B. [*or C. D.*]

No. 180.

Memorandum to be placed at foot of every Summons, Notice, Decree, or Order of Court, or any other Process of the Court.

HOURS of attendance at the office of the Registrar [*place of office*] from *ten* till *four*, except on [*here insert the day on which the office will be closed*], when the office will be closed at *one*.

BENGAL SECRETARIAT LIBRARY

APPENDIX.

COURTS OF CIVIL JUDICATURE ESTABLISHED IN INDIA.

THE Courts of Civil Judicature in India are either established by Royal Charter or by Acts of the Indian Legislature.

The Courts established by Charter are the High Courts at Calcutta, Madras, and Bombay, and at Allahabad in the North-Western Provinces. This last Court was established in 1866 by Charter granted under the Act of Parliament, 24 and 25 Vict., c. 104.

The other Chartered High Courts were first established under a Charter of of 1862 granted under the same Act, but are now regulated by new Charters in all respects similar to each other granted in 1865. It is not necessary again to describe the origin of the Chartered Courts in the three Presidency-towns. The reader is referred for this information to the Appendix to the third and fourth Editions of Broughton's Code of Civil Procedure (Act VIII of 1859). It is sufficient to say that these Courts were constituted on the amalgamation of the old Supreme Courts and the Courts of Sudder Dewanny Adawlut, which were the Courts of ultimate appeal in India from the Courts constituted by the East India Company.

XXIV & XXV VICTORIA, CAP. CIV.

An Act for establishing High Courts of Judicature in India.

[*6th August*, 1861.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

High Courts may be established in the several Presidencies of India.

1. It shall be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at *Fort William* in *Bengal* for the *Bengal* division of the Presidency of *Fort William* aforesaid, and by like Letters Patent to erect and establish like High Courts at *Madras* and *Bombay* for those Presidencies respectively, such High Courts to be established in the said several Presidencies at such time or respective times as to Her Majesty may seem fit, and the High Court to be established under any such Letters Patent in any of the said Presidencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency, or such other time as in such Letters Patent may be appointed in this behalf.

Constitution of High Court.

2. The High Court of Judicature at *Fort William* in *Bengal*, and at the Presidency of *Madras* and *Bombay* respectively, shall consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty may, from time to time, think fit and appoint, who shall be selected from—

1*st*.—Barristers of not less than five years' standing; or,

2*nd*.—Members of the Covenanted Civil Service of not less than ten

years' standing, and who shall have served as Zillah Judges, or shall have exercised the like powers as those of a Zillah Judge for at least three years of that period; or,

3rd.—Persons who have held Judicial office not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years; or,

4th.—Persons who have been Pleaders of a Sudder Court or High Court for a period of not less than ten years, if such Pleaders of a Sudder Court shall have been admitted as Pleaders of a High Court:

Provided that not less than one-third of the Judges of such High Courts respectively, including the Chief Justice, shall be Barristers, and not less than one-third shall be Members of the Covenanted Civil Service.

Certain existing Judges herein named to be the first Judges of the High Court

3. Provided always, that the persons who at the time of the establishment of such High Court in any of the said Presidencies are Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewanny Adawlut or Sudder Adawlut of the same Presidency, shall be and become Judges of such High Court without further appointment for that purpose; and the Chief Justice of such Supreme Court shall become the Chief Justice of such High Court.

Tenure of office of High Court.

4. All the Judges of the High Courts established under this Act shall hold their offices during Her Majesty's pleasure: Provided that it shall be lawful for any Judge of a High Court to resign such office of Judge to the Governor-General of *India* in Council or Governor in Council of the Presidency in which such High Court is established.

Precedence of Judges of High Courts.

5. The Chief Justice of any such High Court shall have rank and precedence before the other Judges of the same Court, and such of the other Judges of such Court as on its establishment shall have been transferred thereto from the Supreme Court shall have rank and precedence before the Judges of the High Court not transferred from the Supreme Court, and, except as aforesaid, all the Judges of each High Court shall have rank and precedence according to the seniority of their appointments, unless otherwise provided in their Patents.

Salaries, &c., of Judges of the High Courts.

6. Any Chief Justice or Judge, transferred to any High Court from the Supreme Court, shall receive the like salary and be entitled to the like retiring pension and advantage as he would have been entitled to for and in respect of service in the Supreme Court if such Court had been continued, his service in the High Court being reckoned as service in the Supreme Court; and, except as aforesaid, it shall be lawful for the Secretary of State in Council of *India* to fix the salaries, allowances, furloughs, retiring pensions, and (where necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts under this Act, and from time to time to alter the same: Provided always, that such alteration shall not affect the salary of any Judge appointed prior to the date thereof.

Provision for vacancy of the office of Chief Justice or other Judge.

7. Upon the happening of a vacancy in the office of Chief Justice, and during any absence of a Chief Justice, the Governor-General in Council, or Governor in Council, as the case may be, shall appoint one of the Judges of the same High Court to perform the

duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the office of Chief Justice of the same Court, and has entered on the discharge of the duties of such office, or until the Chief Justice has returned from such absence; and upon the happening of a vacancy in the office of any other Judge of any such High Court, and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice, it shall be lawful for the Governor-General in Council or Governor in Council, as the case may be, to appoint a person, with such qualifications as are required in persons to be appointed to the High Court, to act as a Judge of the said High Court, and the person so appointed shall be authorised to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court, and has entered on the discharge of duties of such office, or until the absent Judge has returned from such absence, or until the Governor-General in Council or Governor in Council, as aforesaid, shall see cause to cancel the appointment of such acting Judge.

Abolition of Supreme Courts and Sudder Courts.

8. Upon the establishment of such High Court as aforesaid in the Presidency of *Fort William* in *Bengal*, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Nizamut Adawlut at *Calcutta* in the same Presidency, shall be abolished:

And upon the establishment of such High Court in the Presidency of *Madras*, the Supreme Court and the Court of Sudder Adawlut and Foujdarry Adawlut in the same Presidency shall be abolished:

And upon the establishment of such High Court in the Presidency of *Bombay*, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Foujdarry Adawlut in the same Presidency shall be abolished.

And the records and documents of the several Courts so abolished in each Presidency shall become and be records and documents of the High Court established in the same Presidency.

Jurisdiction and powers of High Court.

9. Each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established as Her Majesty may, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency-town as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts.

High Courts to exercise same jurisdiction as Supreme Courts.

10. *Until the Crown shall otherwise provide under the powers of this Act, all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras, and Bombay, respectively, over inhabitants of such parts of India as may not be comprised within the local limits of the Letters*

Patent to be issued under this Act establishing High Courts at Fort William, Madras, and Bombay, shall be exercised by such High Court respectively.

Repealed by 28 Vict., c. 15, s. 2, *post*, p. vi.

Existing provisions applicable to Supreme Courts to apply to High Courts.

11. Upon the establishment of the said High Courts in the said Presidencies respectively, all provisions then in force in *India* of Acts of Parliament, or of any Orders of Her Majesty in Council, or Charters, or of any Acts of the Legislature of *India*, which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at *Fort William in Bengal*, *Madras*, and *Bombay*, respectively, or to the Judges of those Courts, shall be taken to be applicable to the said High Courts and to the Judges thereof respectively, so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council.

Provision as to pending proceedings in abolished Courts.

12. From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and such proceedings, and all previous proceedings in the said last mentioned Courts, shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively.

Power to High Courts to provide for exercise of jurisdiction of single Judges or Division Courts.

13. Subject to any laws or regulations which may be made by the Governor-General in Council, the High Court established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court, of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice.

Chief Justice to determine what Judges shall sit alone or in the Division Court.

14. The Chief Justice of each High Court shall from time to time determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid.

High Court to superintend and to frame rules of practice for subordinate Courts.

15. Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction, and shall have power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Courts for which it shall think necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the Officers, and also to settle tables of fees to be allowed to the Sheriff,

Attorneys, and all Clerks and Officers of Courts, and from time to time to alter any such rule or form or table; and the rules so made, and the forms so framed, and the tables so settled, shall be used and observed in the said Courts: provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall, before they are issued, have received the sanction, in the Presidency of *Fort William*, of the Governor-General in Council, and in *Madras* or *Bombay* of the Governor in Council of the respective Presidencies.

Section 622 of the Code of Civil Procedure gives the High Court, as defined by that Act, power of supervision over the inferior Courts, similar to the powers which the Chartered High Courts have exercised under this clause. A variety of cases in which the High Courts have interfered or refused to interfere with is found collected in the note to that section. The superintendence contemplated by this section appears to be superintendence by way of appeal, reference, or revision; thus the High Court has superintendence over Courts constituted under Act X of 1870, which gives an appeal only in certain cases to the High Court (*a*) A Small Cause Court in a Presidency-town is a Court of inferior jurisdiction and subject to the order and control of the High Court (*b*).

Orders made by the High Court under this section are subject to an appeal to Her Majesty in Council (*c*).

Her Majesty may establish a High Court in the North-Western Provinces.

16. It shall be lawful for Her Majesty, if at any time hereafter Her Majesty see fit so to do, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in *India*, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and of such number of other Judges, with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty from time to time may think fit and appoint; and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any jurisdiction, powers, and authority as under this Act is authorized to be conferred on or will become vested in the High Court to be established in any Presidency hereinbefore mentioned, and, subject to the directions of such Letters Patent, all the provisions of this Act having reference to the High Court established in any such Presidency, and to the Chief Justice and other Judges of such Court, and to the Governor-General or Governor of the Presidency in which such High Court is established, shall, as far as circumstances may permit, be applicable to the High Court established in the said territories, and to the Chief Justice and other Judges thereof, and to the person administering the government of the said territories.

Other or supplemental Charters may be granted within three years after establishment of a Court.

17. It shall be lawful for Her Majesty, if Her Majesty shall so think fit, at any time within three years after the establishment of any High Court under this Act, by her Letters Patent, to revoke all or such parts or provisions as Her Majesty may think fit of the Letters Patent by which such Court was established, and to grant and make such other powers and provisions as Her Majesty may think fit

(*a*) Syud Abdool Ali, petitioner, 15 B. L. R, 197, Couch, C. J., and L. S. Jackson, J.

(*b*) *In re* Omritolall Dey, I. L. R., 1 Calc, 78, Phear, J.

(*c*) Girdharee Singh *v.* Hurdoy Narain Sahoo, 21 Suth. W. R, 263, Couch, C J., L. S. Jackson and Pontifex, JJ.

and as might have been granted or made by such first Letters Patent, or without any such revocation as aforesaid, by like Letters Patent to grant and make any additional or supplementary powers and provisions which might have been granted or made in the first instance.

This power is extended by 28 Vict., c. 15, *post.*

Territorial limits of jurisdiction of Court may be altered by order in Council.

18. *It shall be lawful for Her Majesty from time to time, by her Order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under this Act, and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts as to Her Majesty, with the advice of Her Privy Council, may seem meet.*

Repealed by 28 Vict., c. 15, s. 2, *post.*

Interpretation of terms.

19. The word "Barrister" in this Act shall be deemed to include Barristers of *England* or *Ireland* or Members of the Faculty of Advocates in *Scotland*; and the words "Governor-General and Governor" shall comprehend the Officer administering the Government.

XXVIII VICTORIA, CAP. 15.

An Act to extend the term for granting fresh Letters Patent for the High Courts in India, and to make further provision respecting the Territorial Jurisdiction of the said Courts. [*7th April*, 1865.]

XXIV and XXV Vict., c. 104.

WHEREAS it is expedient to extend the time fixed for granting fresh Letters Patent for the High Courts in *India* under the provisions of an Act passed in the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, entitled *an Act for establishing High Courts of Judicature in India*, and to make further provision than is in the said Act contained for empowering the alteration, from time to time, of the local limits of the said High Courts, and for the exercise, in places beyond the limits of the Presidencies, or places within and for which such High Courts are established, of the jurisdiction and powers conferred by Her Majesty's Letters Patent on the said High Court: Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Extension of time for granting fresh Letters Patent.

1. The time fixed for granting fresh Letters Patent for the High Courts in *India* by Section 17 of the said recited Act, is hereby extended to the first day of *January*, one thousand eight hundred and sixty-six.

Sections 10 and 18 of XXIV and XXV Vict., c. 104, repealed.

2. Sections 10 and 18 of the said Act of the twenty-fourth and twenty-fifth years of Her present Majesty are hereby repealed.

Power to the Governor-General in Council to alter local limits of jurisdiction of the High Courts.

3. It shall be lawful for the Governor General of *India* in Council, by order, from time to time, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established or to be established under the said Act, and to authorize and empower any High Court to

exercise all or any portion of the jurisdiction and powers conferred on it by Her Majesty's Letters Patent establishing the same, or any other Letters Patent issued by Her Majesty under the provisions of the above recited Act of the twenty-fourth and twenty-fifth years of Her Majesty, within any such portions of Her Majesty's dominions in *India*, not included within the limits of the Presidency or place or places for which such High Court was established, as the said Governor-General in Council may from time to time determine, and also to exercise any such jurisdiction in respect of Christian subjects of Her Majesty resident within the dominions of such of the Princes and States of *India* in alliance with Her Majesty as the said Governor-General in Council may, in manner aforesaid, from time to time determine, anything in the said recited Act of the twenty-fourth and twenty-fifth year of Her present Majesty notwithstanding.

Power to Crown to disallow any order of the Governor-General for that purpose.

4. Whenever any such order has been passed by the Governor-General in Council, he shall transmit to the Secretary of State for *India* an authentic copy thereof; and it shall be lawful for Her Majesty to signify, through the Secretary of State for *India* in Council, her disallowance of such order; and such disallowance shall make void and annul such order from and after the day on which the Governor-General shall make known by proclamation, or by signification to his Council, that he has received the notification of such disallowance by Her Majesty: Provided always that all acts, proceedings, and judgments done, taken, or given by such High Courts, and not set aside by any competent authority before the promulgation or signification as aforesaid of such disallowance by Her Majesty, shall be deemed to be and to have been valid and effectual for all purposes whatever such disallowance notwithstanding.

Time when Act shall come into operation.

5. So much of this Act as relates to the jurisdiction of the High Courts shall commence and come into operation as soon as the same shall have been published by the Governor-General in Council.

Not to interfere with certain powers of Governor-General.

6. Nothing in this Act contained shall interfere with the powers of the Governor-General in Council at meetings for the purpose of making Laws and Regulations.

By order of the Governor-General in Council, No. 1331, *Gazette of India, p.* 940, *August* 26*th*, 1865.

Until the Governor-General in Council shall otherwise provide under the powers conferred by the 28 Vict., c. 15, all jurisdiction formerly exercised by the Supreme Court of Calcutta, Madras, and Bombay, respectively, over the inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent issued under the 24 and 25 Vict., c. 104, establishing High Courts at Fort William, Madras, and Bombay, shall be exercised by such High Courts, respectively.

The following Notification was published in supersession of the preceding:—

Until the Governor-General in Council shall otherwise provide under the powers conferred by 28 Vict., c. 15, all jurisdiction formerly exercised by the Supreme Courts of Calcutta, Madras, and Bombay, respectively, over the inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent issued under the 24 and 25 Vict., c. 104, establishing High Courts at Fort William, Madras, and Bombay, shall, subject to the provisions of the said Letters Patent, be exercised in such High Courts,

respectively, to the intent that the jurisdictions exercised by the said High Courts respectively, at the time of the coming into operation of the said first mentioned Act, shall, thenceforth, until such other provisions as aforesaid, continue to be maintained—No. 4366, *Gazette of India*, Nov. 25th, 1865, p. 1194.

This order does not extend the ordinary original civil jurisdiction conferred by the Letters Patent (*a*).

LETTERS PATENT

For the High Court of Judicature at Fort William in Bengal, bearing date the 28th December, 1865.

Recital of Act XXIV and XXV Vict., cap. 104.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, To all to whom these Presents shall come, greeting; Whereas by an Act of Parliament passed in the twenty-fourth and twenty-fifth years of Our reign, intituled "An Act for establishing High Courts of Judicature in India," it was amongst other things enacted that it should be lawful for Her Majesty, by Letters Patent, under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid, and that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who should be selected from among persons qualified as in the said Act is declared; Provided always, that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature, and permanent Judges of the Court of Sudder Dewanny Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Nizamut Adawlut at Calcutta, in the said Presidency, should be abolished.

And that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the said Presidency as Her Majesty might, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil, and criminal jurisdiction beyond the limits of the Presidency-town as might be prescribed thereby; and, save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts:

And whereas We did, upon full consideration of the premises, think fit to erect and establish, and by our Letters Patent under the Great

(*a*) Indian Carrying Company *v.* Macarthy, 1 In. Jur., N. S., 61.

Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminister the fourteenth day of May, in the twenth-fifth year of Our reign, in the year of Our Lord one thousand eight hundred and sixty-two, did, accordingly, for Us, Our heirs and successors, erect and establish at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid, a High Court of Judicature, which should be called the High Court of Judicature at Fort William in Bengal, and did thereby constitute the said Court to be a Court of Record; and whereas We did thereby appoint and ordain that the said High Court of Judicature at Fort William in Bengal should, until further or other provision should be made by Us, or Our heirs and successors in that behalf, in accordance with the recited Act, consist of a Chief Justice and thirteen Judges, and did thereby, in addition to the persons who at the time of the establishment of the said High Court were Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewanny Adawlut, in the said Presidency respectively, constitute and appoint certain other persons, being respectively qualified, as in the said Act is declared, to be Judges of the said High Court:

And whereas on the thirtieth day of January, one thousand eight hundred and sixty-three, We did, in the manner in the said recited Act provide, direct, and ordain that the said High Court should consist of a Chief Justice and fourteen Judges:

S. 17.

And whereas by the said recited Act it is declared lawful for Her Majesty, at any time within three years after the establishment of the said High Court, by her Letters Patent, to revoke all such parts or provisions as Her Majesty might think fit of the Letters Patent by which such Court was established, and to grant and make such other powers and provisions as Her Majesty might think fit, and as might have been granted or made by such first Letters Patent:

Title.

And whereas by the Act of the twenty-eighth of Our Reign, chapter fifteen, entitled "An Act to extend the Term for granting fresh Letters Patent for the High Courts in India, and to make further provision respecting the territorial jurisdiction of the said Courts," the time for issuing fresh Letters Patent has been extended to the first of January, one thousand eight hundred and sixty-six:

And whereas, in order to make further provision respecting the constitution of the said High Court, and the administration of justice thereby, it is expedient that the said Letters Patent, dated the fourteenth of May, one thousand eight hundred and sixty-two, should be revoked, and that some of the powers and provisions thereby granted and made should be granted and made with amendments and additional powers and provisions by fresh Letters Patent:

Revocation of Letters Patent of 1862.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to revoke, and do by these presents (from and after the date of the publication thereof, as hereinafter provided, and subject to the provisions thereof) revoke Our said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, except so far as the Letters Patent of the fourteenth year of His Majesty King George the Third, dated the twenty-sixth March, one thousand seven hundred and seventy-four,

establishing a Supreme Court of Judicature at Fort William in Bengal were revoked or determined thereby.

High Court at Fort William to be continued.

2. And We do by these presents grant, direct, and ordain that, notwithstanding the revocation of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, the High Court of Judicature called the High Court of Judicature at Fort William in Bengal shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid ; and that the said Court shall be and continue a Court of Record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication, and that all rules and orders in force in the said High Court, immediately before the date of the publication of these Letters Patent, shall continue in force, except so far as the same are altered hereby, until the same are altered by competent authority.

Judges of the said High Court to be continued.

3. And We do hereby appoint and ordain that the person and persons who shall immediately before the date of the publication of these Letters Patent be the Chief Justice or Judges, or acting Chief Justice or Judges, if any, of the said High Court of Judicature at Fort William in Bengal, shall continue to be the Chief Justice and Judges, or acting Chief Justice or Judges, of the said High Court, until further or other provision shall be made by Us or Our heirs and successors in that behalf in accordance with the said recited Act for establishing High Courts of Judicature in India.

Clerks, &c., of the said High Court to be continued.

4. And We do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at Fort William in Bengal, appointed by virtue of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, shall continue to hold and enjoy his office and employment, with the salary thereunto annexed, until he be removed from such office and employment ; and he shall be subject to the like power of removal, regulations, and provisions as if he were appointed by virtue of these Letters Patent.

Declaration to be made by Judges.

5. And We do hereby ordain that the Chief Justice and every Judge who shall be from time to time appointed to the said High Court of Judicature at Fort William in Bengal previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it :—

"I, *A. B.*, appointed Chief Justice [*or* a Judge] of the High Court of Judicature at Fort William in Bengal, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge, and judgment."

6. And We do hereby grant, ordain, and appoint that the said High Court of Judicature at Fort William in Bengal shall have and use, as occasion may require, a Seal bearing a device and impression of Our

Royal Arms, with an exergue or label surrounding the same, with this inscription: "The Seal of the High Court at Fort William in Bengal." And We do further grant ordain, and appoint that the said Seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of s. 7 of the said recited Act; and We do further grant, ordain, and appoint that, whensoever it shall happen that the office of Chief Justice or of Judge to whom the custody of the said seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize, and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession.

L. S.

Writs, &c., to issue in the name of the Crown, and under seal.

7. And We do hereby further grant, ordain, and appoint that all writs, summons, precepts, rules, orders, and other mandatory process to be used, issued, or awarded by the said High Court of Judicature at Fort William in Bengal, shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court.

Appointment of officers.

8. And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Governor-General in Council, and shall be either confirmed or disallowed by the Governor-General in Council; and it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, give, grant, direct, and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time, appoint for each office and place respectively, and as the Governor-General in Council shall approve of: Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they shall hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave, in accordance with the said Rules.

Admission of Advocates, Vakeels, and Attorneys.

Powers of High Court in admitting Advocates, Vakeels, and Attorneys.

9. And We do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit, and enrol such and so many Advocates, Vakeels, and Attorneys as to the said High Court shall seem meet; and such Advocates, Vakeels,

and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

In making rules for the qualifications, &c., of Advocates, Vakeels, and Attorneys.

10. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels, and Attorneys-at-law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-law; and no person whatsoever but such Advocates, Vakeels, or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf, or on behalf of a co-suitor.

Giving instructions to counsel in references from the Small Cause Court is acting for the suitor within the meaning of cl. 10, and can only be done by an attorney of the Court (*a*).

As to the position of the vakeels and attornies in Madras, see the Petition of the Attornies (*b*).

Civil Jurisdiction of the High Court.

Local limits of the ordinary original jurisdiction of the High Court.

11. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any law made by competent legislative authority for India, and until some local limits shall be so declared and prescribed within the limits declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Governor-General in Council on the tenth day of September in the year of our Lord one thousand seven hundred and ninety-four, and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.

As to those limits, see Smoult and Ryan's Rules and Orders, Apdx. VIII. See also orders of the Governor-General in Council, August, 1865, and November, 1865, *ante*, p. vii, after Act 28 Vict., c. 15.

Original jurisdiction as to suits.

12. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits: except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for, does not exceed one hundred rupees.

(*a*) Moran *v.* Dewan Ali Sirang, 8 B. L. R., 418. (*b*) I. L. R., 1 Mad., 24.

The provisions of this clause are analogous to those of s. 17 of the Code of Civil Procedure, to which the reader is referred, and in addition the High Court has power to grant to the plaintiff leave to sue. Such leave cannot be dispensed with in cases to which this particular provision is applicable (*a*). It is not usually refused, and although an appeal would lie against an order of a single Judge refusing such leave, the Court would not disturb such an order except on very strong grounds (*b*). It was doubted apparently by Couch, C. J., whether an appeal would lie at all (*c*); but it was unnecessary to decide the point in that case, because, assuming that there was an appeal, it was considered that the single Judge whose order was appealed against was right. The question whether there is an appeal or not depends upon the construction to be put upon the 15th clause of this Charter, which gives an appeal from a judgment (not being a sentence or order passed or made on any criminal trial).

The word "defendant" includes the plural. So that if one defendant dwells, &c., within the jurisdiction, and another does not, the suit cannot be maintained under that head of jurisdiction without an order of Court (*d*). This order may now be made either under this clause or under s. 17 of the Code; but if the defendant who dwells, &c., within the jurisdiction consents, no order is necessary.

Where the plaintiff, in an action for malicious prosecution, alleged that the defendant had instituted criminal proceedings against him before the Magistrate at Moradabad, causing a warrant to be issued by the Magistrate and having him arrested under that warrant in Calcutta, it was held, that the whole cause of action did not arise at Moradabad; that part of the cause of action arose in Calcutta so as to entitle the plaintiff, with leave of the Court, to bring an action in the High Court (*e*). Where a hundi had been drawn out of the jurisdiction, upon a person within the jurisdiction, indorsed and delivered out of the jurisdiction to one who, out of the jurisdiction, indorsed the same and sent it to a person who, within the jurisdiction, received it, got it accepted, and presented it for payment to the drawee, by whom it was dishonored within the jurisdiction,—it was held, that the dishonor of the hundi by the drawee within the jurisdiction was a material part of the cause of action by the holder against the first indorser; and, consequently, that such material part of the cause of action having arisen within the jurisdiction, and the holder having obtained leave to bring his suit under cl. 12 of the Letters Patent, the Court had jurisdiction to entertain the suit (*f*).

The necessity for leave to sue where part of the property being immoveable is within, and part without, the jurisdiction, appears to be done away with by s. 19 of the Code (*g*); but some doubt has been entertained since the decision of that case as to whether the Charter has been interfered with by the Code, and the former practice is, in Calcutta, still retained. The widow of one A. D. applied under s. 12 of the Charter for leave to bring a suit in the High Court against the administrator of her husband's estate, to have it declared that the maintenance allowed her was insufficient and to have it enhanced and declared a charge upon the said estate; she prayed also for an account and the appointment of a receiver. It appeared that all the moveable property and the greater part of the immoveable was in Benares, a portion only of the latter being within the ordinary original civil jurisdiction of the High Court. The application was granted on 31st May, leave being reserved to the defendant to have the order set aside. The plaint was then filed. When the case came on for settlement of issues, the defendant questioned the jurisdiction of the High Court,

(*a*) Shaik Abdool Hamed *v.* Promothonath Bose, 1 In. Jur., N. S, 218; Mothoor Mohun Roy *v.* Jadoomoney Dossee, 10 B. L. R., 122.

(*b*) DeSouza *v.* Coles, 3 Mad. H. C. Rep., 385, Bittleston and Holloway, JJ.; Hadjee Ismail Hadjee Hubbeeb *v.* Hadjee Mahomed Hadjee Joosub, 13 B. L. R., 91.

(*c*) Radha Bibee *v.* Mucksoodun Dass, 21 Suth. W. R., 204, Couch, C. J., and Pontifex, J.

(*d*) Hadjee Ismail Hadjee Hubbeeb *v.* Hadjee Mahomed Hadjee Joosub, 13 B. L. R., 91.

(*e*) Luddy *v.* Johnson, 6 B. L. R., 141. Phear, J.

(*f*) Mulchand Joharimal *v.* Suganchand Shiodas, I. L. R., 1 Bomb., 23, Westropp, C. J., and Sargent, J.

(*g*) Narain Sing *v.* Ram Lall Mookerjee, I. L. R., 3 Cal., 370, Pontifex, J.

and the Judge of the Court of Original Jurisdiction, who found that the defendant was in no way subject personally to the jurisdiction, withdrew the permission which had been granted to the plaintiff to institute the suit. It was held in appeal that, having acted on the order of 31st May, the plaintiff could not object to the validity of the reservation it contained; and that as the parties and witnesses resided in Benares, there was no reason why the suit should be tried in Calcutta, and as there was ample property within the jurisdiction of the Court at Benares to satisfy the maintenance, there was no necessity for its being declared a charge upon the property in Calcutta (*a*).

When the leave of the Court is obtained, the decree in a suit for land may embrace property out of the jurisdiction as well as within it (*b*). The words "either wholly, or in case the leave of the Court shall have been first obtained in part" were held to apply both to the immediately antecedent participle "arisen" and to the previous participle "situated;" consequently, a suit can be brought for land situated in part within the jurisdiction, if the leave of Court is first obtained under this clause (*c*). Since the decision of this case the practice appears to have been uniformly in favour of this jurisdiction. Phear, J., in one case (*d*) entertained a suit for arrears of rent on a covenant contained in a lease of lands situated out of the jurisdiction, the defendant being resident within the jurisdiction. In another case (*e*) Macpherson, J., entertained a suit for damages for a nuisance in respect of lands without the jurisdiction. In these cases the defendants were living within the jurisdiction, and there was consequently jurisdiction

Where the amount *bonâ fide* claimed is over one hundred rupees, a suit will lie in the High Court, though the amount proved to be due may be under that amount (*f*). But the plaintiff could not add to his claim a sum clearly not due in order to bring the suit within the jurisdiction (*g*).

Extraordinary original civil jurisdiction.

13. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

This section gives the Court power to order a suit to be transferred for trial only where the transfer is agreed on by the parties, or for the purposes of justice; and in the absence of agreement it must be made out that there will be inconvenience amounting to this, that if the case be tried in the Court in which it was originally laid, the trial will be unsatisfactory (*h*). An application to the High Court to remove a case under this clause should be made to a Judge sitting on the Original Side of the Court (*i*). That case was originally tried by the Zillah Judge, and on appeal to the High Court on its Appellate Side, the Judges of that Court remanded it to the Court below for

(*a*) Radha Bibee *v.* Mucksoodun Doss, 21 Suth. W. R., 204; Couch, C. J, and Pontifex, J.

(*b*) Bank of Hindustan *v.* Nundololl Sen, 11 B L. R, 301, Macpherson, J

(*c*) S M Jagadamba Dasi *v* S. M Padmamani Dasi, 6 B L. R, 686, Phear, J., following the opinion of Norman, J, in Prasannamayi Dasi *v.* Kadambini Dasi, 3 *ib.*, O. C., 85.

(*d*) Khalatchunder Ghose *v.* Minto, 1 In. Jur., N S, 426

(*e*) Rajmohun Bose *v.* The E. I. Ry Co, 10 B. L R., 241.

(*f*) Sikhurchund *v.* Sooringmull, 1 Hyde, 272, Wells, J

(*g*) Bonomally Nawn *v.* Campbell, 10 B L R, 199, Couch, C. J, and Pontifex, J.; see also Raja Neelmonee Singh Deo *v.* Gordon, Stuart & Co, 1 In. Jur., N S., 356; *In re* Wise, 10 B. L. R., Apx., 20.

(*h*) Rajah Ojooderam Khan *v.* S M. Nobinmoney Dossee, 1 In Jur., N. S., 396, Markby, J.

(*i*) Doucett *v.* Wise, 4 Suth. W R., Mis., 7, Loch and Glover, JJ.

a fresh trial, intimating that it was a proper case to be transferred under this clause, and where it appeared that questions of English law were involved in the case, that the witnesses and parties were chiefly British subjects, and the plaintiff an officer of the High Court, and resident in Calcutta,—the Court ordered the case to be transferred for trial to the High Court in its Original Jurisdiction (*a*). The mere fact that it would be less expensive to try the case in the High Court is not sufficient of itself for the Court to act upon and order the case to be transferred (*b*). In Bombay it was also held (*c*), that this clause does not give the Court jurisdiction to hear and determine a suit brought before it in the first instance. There must be a suit already instituted in some Court, otherwise there is nothing to remove. It was held by Phear, J. (*d*), that the words "remove and try and determine any suit being or falling within the jurisdiction of the Court" include a pending suit at any stage. In that case property had been sold in a regular way in execution of a decree, and the Court refused to call up the case at the instance of an official liquidator appointed by the Court of Chancery (the company being an English company) in proceedings in liquidation. The order for winding up was made by the Court of Chancery on the 12th November, the attachment of the lands was on the 27th October, two days after the petition for winding up. The sale in execution was on the 9th December. Where a Deputy Commissioner had evinced a manifest animus against the plaintiff, this chiefly, but with other circumstances, was the ground on which a case was transferred under this clause (*e*). G. and H. S. applied for the removal of a suit in which they were defendants from the Court of Hooghly in the mofussil, where it had been instituted, to the High Court for trial by the High Court in the exercise of its extraordinary original civil jurisdiction. The suit was decreed for the plaintiff, and the defendants appealed. It was held that on appeal the defendant H. S could not object to jurisdiction (*f*). The High Court at Calcutta has no jurisdiction to remove a case from the Court of the Civil and Sessions Judge at Allahabad, that Court not being subject to its superintendence (*g*).

Joinder of several causes of action.

14. And We do further ordain, that where plaintiff has several causes of action against a defendant, such causes of action not being for land or other immoveable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit.

This clause is an addition, and was not contained in the Charters of 1862.

Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.

15. And We do further ordain, that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal, from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court, or of one

(*a*) Doucett *v.* Wise, 1 In. Jur., N. S., 227, Morgan, J.

(*b*) Rajah Ojooderam Khan *v.* S. M. Nobinmoney Dossee, 1 In. Jur., N. S., 396, Markby, J.

(*c*) Inhabitants of Mahalingpore *v.* Anderson, 7 B. L. R., 452 note, *per* Bayley, J., in Bombay, following Markby, J., in the last case.

(*d*) *In re* the Bangpara Tea Estates Company, of Assam, Ld., 7 B. L. R., 305.

(*e*) Thakoor Kapilnauth Sahai Deo *v.* Government, 10 B. L. R., 168, Macpherson, J. See also Borradaile *v.* Gregory, 4 Bourke O. C. J., 3; Courjon *v.* Courjon, 9 B. L. R., Apx. 10, Macpherson, J. In both which instances the Court refused to remove the case.

(*f*) Grose *v.* Amirtamayi Dassi, 4 B. L. R., O. C. J., 1, Peacock, C.J., and Macpherson, J., on appeal from the decision of Phear, J.

(*g*) G. E. Hotel Co. *v.* The Secy. of State for India, 1 In. Jur., N. S., 219, Phear, J.

Judge of any Division Court, pursuant to s. 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such Division Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Court, shall be to Us, Our heirs or successors, in our or their Privy Council, as hereinafter provided.

This clause corresponds with cl. 14 of the Charter of 1862, but is wider in its terms; it had been decided (Levinge, J., dissenting) that the High Court had power under that clause to entertain appeals in testamentary causes (*a*). Under the provisions of this section an appeal lies from any judgment (not being a sentence or order passed or made in a criminal trial) of a Division Court in the exercise of *appellate* jurisdiction, when the Judges of such Court are equally divided in opinion, and do not amount in number to a majority of Judges (*b*)—the rule in which case was afterwards made absolute (*c*)—or there may be an appeal to the Privy Council under cl. 39 (*d*). Clause 10 of the Letters Patent of the High Court at Allahabad corresponds with this clause. It has been there held that, to allow of an appeal, there must have been a judgment disposing of the suit, passed by the Division Court (*e*). The word "judgment" must be held to have the general meaning of any decision or determination affecting the rights or the interest of any suits or applicant (*f*). It was so held in a case of an appeal from an order under cl. 12 of this Charter; but see the note to that clause. An order of a single Judge granting leave to appeal to the Queen in Council is not now considered in Bengal to be an appealable order; see note to s. 597 of the Code of Civil Procedure, Act X of 1877. Where two Judges decided a case in original civil jurisdiction under the original Letters Patent, but the decree was sealed and the appeal preferred after the amended Letters Patent came into operation, it was held that the right of appeal to the High Court from the decision of two Judges existing under the old Letters Patent was taken away by the 15th clause of the new Letters Patent (*g*). A right of action is not taken away by a change in the law, unless by express enactment; but in the case of mere procedure, unless something is said to the contrary, the new law, where its language is general in its terms, applies without reference to the former law or procedure (*h*). See the notes to ss. 540 and 588 of the Code of Civil Procedure, where this subject is more fully discussed. It has been held in Bengal, that, on an appeal under this clause, it is open to the parties to go into the whole case (*i*), while in the North-Western Provinces it has been decided that no other point can be heard on the appeal from the Division Court except the point argued before that Court (*j*). There appears to be no period prescribed by the Limitation Act within which an appeal under this clause must be presented.

(*a*) S M. Sarodasoondery Dossee *v.* Tincowry Nundy, 1 Hyde, 70, Morgan and Levinge, JJ.

(*b*) Ranee Shurno Moyee *v.* Luchmeeput Doogur, 7 Suth W. R., 52, F B

(*c*) *Ibid*, 512, Full Bench; and see *In re* Court of Wards, 7 B. L. R., 734, Macpherson, J.

(*d*) *Ibid.*

(*e*) Ghasi Ram *v.* Mussammat Nuraj Begam, I. L. R., 1 All., 31, Turner, Offg. C. J., Pearson. Spankie, and Oldfield JJ.

(*f*) De Souza *v.* Coles, 3 Mad. H C. Rep., 384. *per* Bittleston, J.

(*g*) Framji Bomanji *v.* Hormasji Barjorji, 3 Bom H. C Rep., O. J., 49, Couch, C J., Newton and Sarjent, JJ.

(*h*) Wilde, B., in Wright *v.* Hale, 30 L. J., Exch., 40.

(*i*) Shahazadi Hajra Begum *v.* Khaja Hossein Ali Khan, 4 B. L. R., A. C., 101, *per* Peacock, C. J.

(*j*) Roy Nandipat Mahata *v.* Urquhart, 4 B. L. R, A. C., 181; *contra* in Ram Dial *v.* Ram Dass, I. L. R., 1 All., 181, Spankie, J., dissenting.

Appeal from Courts in the Provinces.

16. And We do further ordain, that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force.

This clause corresponds with cl. 15 of the Charter of 1862, but it is considerably modified; it narrows the jurisdiction to that part of the Presidency called the Bengal Division. This change was made in consequence of the establishment of a High Court in the North-Western Provinces.

Jurisdiction as to infants and lunatics.

17. And We do further ordain, that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics within the Bengal Division of the Presidency of Fort William, as that which was vested in the said High Court immediately before the publication of these presents.

This clause corresponds with cl. 16 of the Charter of 1862, but it confines the jurisdiction within the limits of the Bengal Division of the Presidency. See Act XXXIV of 1858, as to lunatics It follows the former Charter and the Charter of the late Supreme Court in making no distinction in point of nationality.

Provision with respect to the Insolvent Court.

18. And We do further ordain that the Court for Relief of Insolvent Debtors at Calcutta shall be held before one of the Judges of the said High Court of Judicature at Fort William in Bengal, and the said High Court and any such Judge thereof shall have and exercise, within the Bengal Division of the Presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction, and otherwise as are constituted by the laws relating to insolvent debtors in India.

This clause has narrowed the jurisdiction of the Insolvent Court to that portion of the Presidency over which the authority of the Lieutenant-Governor of Bengal extends (*a*). It corresponds with cl. 17 of the Charter of 1862. The law relating to insolvency, which is administered under this clause, is contained in an Act of Parliament, 11 and 12 Vict., c. 21. The High Court, as a Court of original jurisdiction, has also the same powers with regard to insolvent debtors as are conferred on other Courts of original jurisdiction by chap. xx of the Code of Civil Procedure, Act X of 1877.

Law to be administered by the High Court of Judicature at Fort William in Bengal.

By the High Court in the exercise of ordinary original civil jurisdiction.

19. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.

This corresponds with cl. 18 of the Charter of 1862, which was in force at the time of the issue of this Charter, no other special provision having been

(*a*) *In re* Tietkins, an insolvent, 1 B. L. R., O. O. C. J., 84.

made. The law to be administered is, therefore, the law or equity which would have been applied in the late Supreme Court at Calcutta, modified by legislative enactment since the establishment of the High Court in 1862, and that law, subject to such modification, was (*a*)—

1. The Common Law as it prevailed in England in the year 1726, and which has not subsequently been altered by Statutes especially extending to India, or by the Acts of the Legislative Council of India.

2. The Statute Law which prevailed in England in 1726, and which has not subsequently been altered by Statutes especially extending to India, or by the Acts of the Legislative Council of India.

3. The Statute Law expressly extending to India which has been enacted since 1726, and has not since been repealed, and the Statutes which have been extended to India by the Acts of the Legislative Council of India.

4. The civil law as it obtained in the Ecclesiastical and Admiralty Courts in England.

5. Regulations made by the Governor-General in Council and the Governors in Council previously to the 3rd and 4th Wm. IV., c. 85, and registered in the Supreme Courts; and the Acts of the Legislative Council of India made under the 3rd and 4th Wm. IV., c. 85; Acts of the Governor-General in Council and of the Lieutenant-Governor of Bengal in Council under the 24 and 25 Vict., c. 77.

6. The Hindu law in actions regarding inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party in which a Hindu is a defendant.

7. The Muhammadan law in actions regarding inheritance and succession to lands, rents, and goods, and all matters and contracts between party and party in which a Muhammadan is a defendant.

In the exercise of extraordinary original civil jurisdiction.

20. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

This corresponds with the 19th clause of the Charter of 1862, and leaves the law on the same footing.

By the High Court in the exercise of appellate jurisdiction.

21. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

This is in the same terms as cl. 20 of the Charter of 1862.

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

22. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction; and also in respect of all such persons both within the limits

(*a*) See a letter from the Judges of the Supreme Court at Calcutta, dated 16th October, 1830, printed in Morley's Digest, Vol. I, p. xxii, of the Introduction.

of the Bengal Division of the Presidency of Fort William and beyond such limits, and not within the limits of the criminal jurisdiction of any other High Court or Courts established by competent legislative authority for India, as the said High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these Presents.

This corresponds with cl. 21 of the Charter of 1862, altered with reference to the establishment of a High Court with ordinary original criminal jurisdiction in the North-West Provinces of the Bengal Presidency.

It was contended in a case (*a*) that cl. 21 of the Letters Patent of the High Court at Calcutta, 1862, was a substantive part of the Charter Act, cl. 9, and that it was consequently not subject to repeal or amendment by an Act of the Governor-General in Council, which gave jurisdiction to Magistrates in the mofussil, who are also Justices of the Peace, over European British-born subjects. This contention was, however, negatived. In support of it the case of *Reg.* v. *Reay* (*b*) was cited; there the Governor of Bombay in Council had passed an Act, VII of 1867 (Bom. C.), under s. 31 of which the prisoner had been convicted, purporting to confer upon the Mofussil Magistrates criminal jurisdiction over British-born subjects. This Act was held by the High Court at Bombay to be *ultra vires*, and in order to remedy the defect, Act XXII of 1870 was passed by the Governor-General in Council, which Act after reciting that "the Governors of the Presidencies of Fort St. George and Bombay and the Lieutenant-Governor of Bengal in Council have severally passed divers Acts purporting to apply generally to all persons within the local extent of the said Acts," and "that doubts had been raised as to the validity of such Acts in so far as they affect to render European British subjects liable to be convicted and punished by tribunals other than the High Courts of Judicature at Fort William, Madras, and Bombay," and "for the purpose of removing such doubts" it was enacted that "every such Act passed by the Governor of the Presidency of Madras in Council or by the Governor of the Presidency of Bombay in Council, or by the Lieutenant-Governor of Bengal in Council, shall, so far as regards the liability of European British subjects to be convicted and punished thereunder, be and be deemed to have been as valid as if it had been passed by the Governor-General of India in Council at a meeting for making laws and regulations." Conceding that this Act, XXII of 1870, was itself a valid legislative measure, it still left untouched the power of the local Councils to legislate in the same direction for the future, and an Act of Parliament was therefore passed, 34 and 35 Vict., c. 34, which, after reciting that it is expedient that the power of making laws and regulations conferred on Governors of Presidencies in India in Council by the Indian Council Act 24 and 25 Vict., c. 67, s. 42, should in certain respects be extended, provides that "no law or regulation heretofore made or hereafter to be made by any Governor or Lieutenant-Governor in Council in India in manner prescribed by the aforesaid Act shall be invalid only by reason that it confers on Magistrates being Justices of the Peace the same jurisdiction over European British subjects as such Governor or Lieutenant-Governor in Council, by regulation made as aforesaid, could have lawfully conferred or could lawfully confer on Magistrates in the exercise of authority over natives in like cases;" and this goes far to support the contention that the Governor-General in Council had power to subject European British subjects to a jurisdiction other than that of the High Courts, because (the learned Chief Justice observed) "it cannot be supposed that the imperial legislature would give to the Governors of Madras and Bombay a power which it did not intend the Governor-General in Council to have. But not only is this done, but the Act, XXII of 1870, of the Governor-General in Council is noticed in s. 3, and its validity is recognized by its being provided that the Governors of Madras and Bombay and the Lieutenant-Governor of Bengal in Council shall have power to repeal or amend any of the Acts declared by it to be valid." It appeared also to his Lordship that the "clause in the second Letters Patent issued in 1866,

(*a*) Reg. *v.* Meares, 14 B. L. R. 106. (*b*) 7 Bom. H. C. Rep., Cr. C., 6.

by which Her Majesty declared that the provisions of the Charter are subject to the legislative powers of the Governor-General in Council, was only a declaration of what the law was, inserted perhaps for the purpose of clearly showing that the jurisdiction was subject to the Indian legislature;" see s. 44 of the Letters Patent of 1865—a clause which has no place in the Letters Patent of 1862, although similar but more limited clauses appear in both Letters Patents—cls 37 and 58 of Letters Patent of 1862 and cls. 37 and 38 of Letters Patent of 1865—relating to the criminal and civil procedure of these Courts.

Jurisdiction as to persons.

23. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Corresponding with cl. 22 of the Charter of 1862.

Extraordinary original criminal jurisdiction.

24. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such person brought before it on charges preferred by the Advocate-General or by any Magistrate or other officer specially empowered by the Government in that behalf.

Corresponding with cl. 23 of the Charter of 1862, which gave extraordinary original criminal jurisdiction "over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut at Calcutta, whether within or without the Bengal Division of the Presidency of Fort William," &c.

No appeal from High Court exercising original jurisdiction.
Court may reserve points of law.

25. And We do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

This clause corresponds with cl. 24 of the Charter of 1862.

High Courts to review on certificate of the Advocate-General.

26. And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General, that in his judgment there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

This clause corresponds with cl. 25 of the Charter of 1862.

27. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

Appeals from Criminal Courts in the provinces.

This corresponds with cl. 26 of the Charter of 1862: but the jurisdiction is restricted in consequence of the establishment of the High Court in the North-Western Provinces.

28. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers now authorized to refer cases to the said High Court, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction, as are now subject to reference to, or revision by, the said High Court.

Hearing of referred cases and revision of criminal trials.

The corresponding clause (27) of the Charter of 1862 differs from this in the same manner and for the same reason. It was held that that clause did not give the High Court as a Court of Revision jurisdiction on its Appellate Side over Criminal Courts dealing with offences committed by European British subjects (*a*). The Criminal Procedure Code now in force, Act X of 1872, gives power by chap. xxii to the High Courts as Courts of Revision, and the limits of the jurisdictions of Magistrates and others over European British subjects are defined in chap. vii of that Code; and the High Courts have the same jurisdictions as Courts of Revision in these as in other cases. The High Court will not interfere so as to give an appeal virtually where no appeal is given by law (*b*).

29. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

High Court may direct the transfer of a case from one Court to another.

This corresponds with cl. 28 of the Charter of 1862.

Criminal Law.

30. And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference, or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding

Offenders to be punished under Indian Penal Code.

(*a*) R. *v.* Brae, 3 Suth. W. R., Cr. C. 64.

(*b*) Narayanbhai Lalbhai *v.* Ganga Krishna Balkrishna, 4 Bomb. H. C. Rep. A. C., 87, Couch, C. J., and Newton, J.

the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

This corresponds with the 29th clause of the Charter of 1862.

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

Judges may be authorized to sit in any places by way of circuit or special commission.

31. And We do further ordain that whenever it shall appear to the Governor-General in Council convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceeding in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

This corresponds with the 30th clause of the Letters Patent of 1862, but is restricted, as before-mentioned—see notes to cls. 27 and 28, *ante*—to the Province of Lower Bengal. This clause has never been acted on.

Admiralty and Vice-Admiralty Jurisdiction.

Civil.

32. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes, and other maritime questions arising in India, as may now be exercised by the said High Court.

Under cl 31 of the Charter of 1862, the High Court was vested with jurisdiction "as may now be exercised by the said Supreme Court as a Court of Admiralty or by any Judge of the said Court as Commissary of the Vice-Admiralty Court, and also such jurisdiction for the trial and adjudication of prize causes, and other maritime questions arising in India, as is now vested in any Commissioner or Commissioners appointed by us or our predecessors under the powers given by an Act passed in the session of Parliament held in the thirty-ninth and fortieth year of his late Majesty King George the Third, 'for establishing further regulations for the government of the British territories in India, and the better administration of justice within the same.'"

It was held by Westropp, J., that the Admiralty Act of 1861 (24 Vict., c. 10) did not extend to the Vice-Admiralty Courts established by these Charters; that their jurisdiction derived from the Vice-Admiralty jurisdiction of the Supreme Court did not expand with the jurisdiction conferred upon the Court of Admiralty in England by successive English enactments (*a*). The later Act of 1862, 26 Vict., c. 24, was not adverted to in that case, which was instituted in 1867. That Act is expressly passed to extend the jurisdiction of Vice-Admiralty Courts abroad, but not apparently in India Norman, J., however, held that both Acts were applicable to these Courts under this Charter (*b*). The 26 Vict., c. 24 gives jurisdiction by s. 10 in—

(1.) Claims for seamen's wages.

(2.) Claims for master's wages and for his disbursements on account of the ship.

(*a*) The Asia, 5 Bom , O. J., 64. (*b*) The Portugal, 6 B L. R., 323.

(3.) Claims in respect of pilotage.
(4.) Claims in respect of salvage of any ship or of life or goods therefrom.
(5.) Claims in respect of towage.
(6.) Claims for damage done by any ship.
(7.) Claims in respect of bottomry or respondentia bonds.
(8.) Claims in respect of any mortgage where the ship has been sold by a decree of the Vice-Admiralty Court, and the proceeds are under its control.
(9.) Claims between the owners of any ship registered in the possession in which the Court is established touching the ownership, possession, employment, or earnings of such ship
(10.) Claims for necessaries supplied in the possession in which the Court is established to any ship in which no owner or part owner is domiciled within the possession at the time of the necessaries being supplied.
(11.) Claims in respect of the building, equipping, or repairing within any British possession of any ship of which no owner or part owner is domiciled within the possession at the time of the work being done.

Section 11 enacts that the Vice-Admiralty Courts shall also have jurisdiction,
(1.) In all cases of breach of the regulations and instructions relating to Her Majesty's Navy at Sea;
(2.) In all matters arising out of Droits of Admiralty.

Section 12 enacts that nothing contained in this Act shall be construed to take away or restrict the jurisdiction conferred upon any Vice-Admiralty Court by any Act of Parliament in respect of seizures for breach of the Revenue, Customs, Trade or Navigation Laws, or the laws relating to the abolition of the slave-trade, or to the capture of pirates and piratical vessels, or any other jurisdiction now exercised by any such Court, or any jurisdiction now lawfully exercised by any other Court within Her Majesty's dominions.

Section 13 enacts that the jurisdictions of the Vice-Admiralty Courts, except where it is expressly confined by this Act to matters arising within the possession in which the Court is established, may be exercised, whether the cause or right of action has arisen within or beyond the limits of such possession.

Provision is further made for the promulgation of Rules of Practice to be established by order in Council.

The Act applies to the Courts enumerated in the Schedule A, which does not include the Courts in India, and to "any Vice-Admiralty Court which shall hereafter be established in any British possession;" and these words were considered by Norman, J., in the case already quoted, to apply to the Vice-Admiralty Courts established two years later, *i. e.*, in 1865, under these Charters.

This opinion was, however, questioned in a later case in Bombay, in which it was held that the Statutes 3 and 4 Vict., c. 65, 24 Vict., c. 10, and 26 and 27 Vict., c. 24, do not apply to the Admiralty or Vice-Admiralty jurisdiction of the High Court (*a*, following the decision in *The Asia*, disapproving that in *The Portugal;* and their Lordships held, that the High Courts, as now existing, were *continued*, not *established*, within the meaning of the Admiralty Act, 1863, by their present Charters. It was also held, that the High Court has jurisdiction under the common maritime law to entertain a suit in respect of a collision upon the high seas, between two foreign vessels, although that collision may not have occurred in British or Anglo-Indian waters, and notwithstanding the opposition of the Consul of the State to which the defendant belongs. It was questioned whether the Court had a discretion to decline to entertain such a suit (*a*). In an early case in Bengal, it was also decided that the Court had jurisdiction under 2 Wm. iv, c. 51, s. 6, to try causes maritime of any ships, foreign or British, wherever the cause of action may have accrued, provided the ships come within the Court's jurisdiction (*b*).

A person who has sued in the High Court for damages caused by a collision at sea, and out of the jurisdiction of the High Court, subjects himself to a cross-

(*a*) Bardot *v.* The Augusta, 10 Bom. H. C. 110. Westropp, C. J., Sarjent and Melvill, JJ.

(*b*) The Garland *v.* The Dragon, 1 Hyde, 275, Levinge, J.

suit for damages in respect of the same collision (*a*). Queen's ships cannot be arrested, and proceedings *in rem* are inapplicable to them. This rule extends to the pilot brigs which ply at the mouth of the Hooghly (*b*).

Criminal.

33. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise all such criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, or otherwise in connection with maritime matters or matters of prize.

Corresponding with the 32nd clause of the Charter of 1862.

Testamentary and Intestate Jurisdiction.

Testamentary and Intestate jurisdiction.

34. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority as that which may now be lawfully exercised by the said High Court [except within the limits of the jurisdiction for that purpose of any other High Court established by Her Majesty's Letters Patent] in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, whether within or without the said Bengal Division [subject to the orders of the Governor-General in Council as to the period when the said High Court shall cease to exercise testamentary and intestate jurisdiction in any place or places beyond the limits of the provinces or places for which it was established: Provided always, that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.] .

This corresponds with the 33rd and 34th clauses of the Charter of 1862. The parts within brackets relate to the High Court in Agra, established shortly after these Letters Patent were published.

The Indian Succession Act, X of 1865, gives to all District Judges, that is, (s. 3) Judges of a principal Court of civil jurisdiction, testamentary and intestate jurisdiction under that Act. The High Court is such a Court, and therefore has, under the Indian Succession Act, and independent of the Charter, such jurisdiction. Act X of 1865, ss. 187, 190, and 242, makes probate of a will or letters of administration operative only within the province wherein they are obtained. But an Act was passed in 1875, No. XIII, which, by ss. 3, 4, and 5, enables a person to apply to a High Court for probate of a will or letters of administration of an estate intended to have effect throughout British India.

In a case (*c*) tried before Markby, J., which was a suit equivalent to proving a will in solemn form under the old practice, the decree was drawn under the Code of Civil Procedure and as between plaintiff and defendant instead of promovent and impugnant. It has been held (*per* Phear and Markby, JJ.) that, in case where it is sought to establish the factum of a will, a plaint must be filed (*d*) Where a suit is cognizable by the High Court in its Testamentary Side, the Court can correct an error entitling it on the Original Side (*e*).

(*a*) Bombay Coast and River Steam Navigation Co. *v.* Heleux, 4 Bom H C. Rep., O. J, 149, Couch, C. J., and Westropp, J.

(*b*) The Kedgeree, 1 Hyde, 253, Morgan, J.

(*c*) Parbuty Thakoor *v.* Rajnarain Dutt, 16th March, 1868.

(*d*) In the Goods of Sreenath Bose, 16th March, 1868, MSS.

(*e*) Toyluckonauth Doss *v.* Megnauth Doss, 2 Ind. Jur., N. S., 245, Phear, J.

Matrimonial Jurisdiction.

Matrimonial jurisdiction.

35. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have jurisdiction [within the Bengal Division of the Presidency of Fort William] in matters matrimonial between Our subjects professing the Christian religion: Provided always, that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof.

This corresponds with cl. 35 of the Charter of 1862. The part within brackets is new; the jurisdiction formerly extended to the local limits within which the Supreme Court had ecclesiastical jurisdiction.

The Indian Divorce Act is Act IV of 1869, and the High Court has now no matrimonial jurisdiction independent of that Act, and it has been held that the High Court has therefore no jurisdiction to make a decree of nullity on the ground that the marriage was invalid (*a*); but it has jurisdiction when the parties reside and the adultery is committed (in the 24-Pergunnahs) outside of the limits of its original jurisdiction (*b*).

Powers of single Judges and Division Courts.

Single Judges and Division Courts.

36. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose under the provisions of the thirteenth section of the aforesaid Act of the twenty-fourth and twenty-fifth years of Our Reign [and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority; but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail.]

This corresponds with cl. 35 of the Charter of 1862. The last part of the section within brackets is an addition.

Two Judges differing in opinion on a criminal appeal, the opinion of the senior Judge prevails under this section (*c*); so in a civil case (*d*); and the judgment of the senior Judge of a Division Bench is final even when the junior Judge entertains doubts and expresses no final opinion; and the junior Judge cannot refer the case for the opinion of a Full Bench without the consent of the senior (*e*).

The Chief Justice, sitting alone, was held to have jurisdiction under the corresponding clause (27) of the Letters Patent, N.-W. P., 1866, to decide a point upon which two Judges of the High Court differed (*f*); and a single Judge can hear a criminal appeal (*g*). Peacock, C. J., was of opinion that if two Judges differed in opinion, they could abstain from giving judgment, and refer the case for argument before a Court composed of more members (*h*). Markby, J.,

(*a*) Gasper *v.* Gonsalves, 13 B. L. R., 109, Pontifex, J.

(*b*) Kelly *v.* Kelly and Saunders, 3 B. L. R., O. J., 67, Phear, J.

(*c*) R. *v.* Sheikh Soobhanee, 6 Suth. W. R., Cr., 88.

(*d*) Ranee Shurno Moyee *v.* Luchmee Put Chutter Sing, 6 Suth. W. R., Civ., 118.

(*e*) Chunderkant Buttacharjee *v.* Bindabun Chunder Mookerjee, 7 Suth. W. R., 277, F. B.

(*f*) Musst. Oodey Koowur *v.* Musst. Ladoo, 13 Moo. I. A., 585.

(*g*) R. *v.* Chandra Jugi, 9 B. L. R., 6, Couch, C. J., and Ainslie, J.

(*h*) Barlow *v.* Cochrane, Official Assignee, 2 B. L. R., O. C., 115.

dissented from this, considering that it was not competent to the two Judges to do this; but that they were bound to give judgment, leaving the unsuccessful party to his appeal under cl. 15. The Chief Justice being for a reversal, the decree was reversed. The Judicial Committee, to whom the case was appealed, without expressing any opinion as to the applicability of s. 36, having regard to Rule 26 of the High Court Rules, directed a hearing of appeal on the merits (*a*).

Before the Letters Patent of 1865, if, in a Court consisting of only two Judges, there was a difference of opinion upon a point of law, it was provided by s. 23 of Act XXIII of 1861, that the Judges should state the point on which they differed, and the case would have to be re-argued on that question before one or more of the other Judges, and would have been determined according to the opinion of the majority of the Judges by whom the appeal was heard.

Acts VIII of 1859 and XXIII of 1861 regulated the practice of the High Court under the 37th section of the Charter of 1862. By the 37th section of the Letters Patent of 1865, and the Rules of December, 1865, of the High Court at Calcutta, the proceeding in civil suits in that Court (except in its Admiralty, Vice-Admiralty, Testamentary, and Intestate jurisdiction) were regulated by Act VIII of 1859 and Act XXIII of 1861, and by such other Acts and by such rules and orders of the High Court as were in force at the time of the publication of the Letters Patent, except so far as they are at variance with the Letters Patent. The Code of Civil Procedure is now, however, applicable to the High Courts with certain modifications regarding Chartered High Courts contained in the Code itself. The provisions of s. 23 of Act XXIII of 1861 are at variance with s. 36 of the Letters Patent of 1865, consequently, instead of a reference and a re-argument, where two Judges differ, before one or more other Judges, the practice under s. 36 has been that the judgment of the senior Judge prevailed, subject to the provisions of s. 15, that whenever two or more Judges of the High Court or Division Court are equally divided in opinion, an appeal lies to the High Court from the judgment of the senior Judge (*b*). Section 575 of the present Code, Act X of 1877, takes the place of s. 23 of Act XXIII of 1861. It applies to the chartered High Courts, and will, it is presumed, regulate the practice.

Civil Procedure.

Regulation of proceedings.

37. And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, from time to time, to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate, and Matrimonial jurisdictions, respectively: Provided always, that the said High Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India.

This clause corresponds with cl. 37 of the Charter of 1862, but is entirely new. Although by these Letters Patent the provisions of Act VIII of 1859 were not expressly made applicable to the High Court, as was the case under the Letters Patent of 1862, yet proceedings of the High Court, analogous to proceedings under the Code, were treated in the same way; as for instance, when an injunction was made by the High Court, it was treated as if made under Act VIII

(*a*) Miller, Official Assignee, *v.* Barlow, 14 Moo. I. A., 209.

(*b*) *See per* Norman, J., in Roy Nandipat Mahata *v.* Urquhart, 4 B. L. R., A. C., 191.

of 1859, s. 92, and as appealable under s. 94 (*a*). The Code now in force (Act X of 1877) is wholly applicable to the High Courts except in the case of High Courts established by Charter, so far as they are excepted by special rules relating to them contained in chap. xlviii of that Code.

Criminal Procedure.

Regulation of proceedings.

38. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of 1861, or by such further or other law in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

The criminal procedure of the High Courts in the Presidency-towns in the exercise of their ordinary original criminal jurisdiction is regulated by Act X of 1875. In other cases by the Code of Criminal Procedure, Act X of 1872, which has superseded Act XXV of 1871.

Appeals to Privy Council.

Power to Appeal.

39. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature at Fort William in Bengal made on appeal, and from any final judgment, decree, or order made in the exercise of original jurisdiction by a majority of the full number of Judges of the said High Court [or of any Division Court, from which an appeal shall not lie to the said High Court, under the provisions contained in the 15th clause of these Presents]: Provided, in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand, or question to or respecting property amounting to or of the value of not less than 10,000 rupees; or from any other final judgment, decree, or order made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council. Subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency; except so far as the said existing rules and orders, respectively, are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

This corresponds with cl. 39 of the Charter of 1862, the words in brackets being added. Chap. xlv of Act X of 1877 regulates the procedure in appeals

(*a*) Moran *v.* River Steam Navigation Company, 14 B. L. R., 352, Macpherson, Offg. C. J., and Pontifex, J.

to the Queen in Council; it also enumerates, in its earlier sections (594 to 597) the cases in which appeals shall lie. It contemplates appeals to Her Majesty from decrees, judgments, and orders which are final in India; and, consequently, includes such appeals from High Courts, whether constituted by Charter or under the more general interpretation given by s. 2 of the General Clauses Act, I of 1868, or from final decrees, judgments, or orders of Courts which are not High Courts in any sense. An order of a Division Bench rejecting an application for a review of judgment passed on appeal, is not an order made on appeal from which an appeal lies to the Privy Council (*a*). The question whether an order of that kind would fall within the words of the second part of the clause as an order made on appeal or otherwise was not raised. Peacock, C. J., who delivered the judgment in the last of these cases, pointed out that the question raised was a very important one, inasmuch as if an order of this nature is an appealable order, the time for appealing against it to Her Majesty in Council would be reckoned from the time of the order, and not from the time of the original decree; and thus a party, by making a fruitless application for review, and getting that application refused, might, by a side wind, appeal against a decree long after the time for appealing against it had expired. It would be impossible for the Privy Council upon appeal against an order rejecting a review, to decide whether that order was right or wrong without themselves reviewing the judgment; and the proceedings on application for review, and the orders thereon, should not be sent to the Privy Council (*b*). In execution of a decree against G. S. his property was sold on the 9th September, 1872, and purchased by H. N. S. G. S. applied to the Subordinate Judge to have the sale set aside on the ground of irregularity and inadequacy of price. This application was rejected on 1st October, 1872, but no order confirming the sale was made. On the 4th of November, 1872, the Subordinate Judge admitted a petition from G. S. applying for a review of the order of the 1st of October, in which he stated that he brought the amount of the decree and interest, and without further enquiry ordered the amount to be deposited; and on the 9th of November, without hearing H. N. S., ordered the sale to be set aside. H. N. S., on the 11th of November, 1872, petitioned to the Subordinate Judge against the order of the 9th of November, which he contended was irregular. This petition was rejected. On the 23rd of November, 1872, H. N. S. appealed to the High Court on four grounds, two of which were objections to the jurisdiction of the Subordinate Judge in entertaining an application to review the order disallowing the objections to the sale, and the other two were objections to his jurisdiction in setting aside the sale. The petition set out the facts of the case, but did not conclude with any formal prayer that the sale should be confirmed. A rule was granted calling on G. S. to show cause why the order of the Subordinate Judge, dated the 9th of November, 1872, should not be set aside and the sale confirmed; and on the rule coming on for argument, the order was set aside on the 11th of March, 1873, and the sale was confirmed. From this order Markby, J., gave G. S. leave to appeal to the Queen in Council. H. N. S. appeared in that proceeding. Held by a Full Bench, Couch, C. J., L.S Jackson, and Pontifex, JJ., that the order of the 11th of March, 1873, was an appealable order under cl. 39 of the Letters Patent, 1865. The words of that clause should be construed liberally so as to give the person against whom the decision of the High Court is, a right to appeal to the Queen in Council, provided the matter is of sufficient value. It was considered that this decision did not conflict with the decision in the case of *Rajah Syud Enaet Hossein* v. *Ranee Rowshan Jehan* (*c*), and the Chief Justice seemed to doubt the correctness of that decision (*d*). The High Court has no power to consolidate appeals to the Privy Council, or to admit appeals to the Privy Council in cases in which the time for

(*a*) Soudamonee Dossee *v.* Maharaj Dheraj Mahtab Chand Bahadoor, 6 Suth. W. R, Mis., 102; Rajah Syud Enaet Hossain *v.* Ranee Rowshan Jehan, 1 B. L. R, F. B., 1; S C., 10 Suth. W. R., F. B., 1.

(*b*) See also as to this point Fakirúddin Mohammed Asan Chowdhry *v.* Najmunnissa Chowdhrain, 2 B. L. R., A. C., 265, Loch, J.; Sheikh Imdad Ali *v.* Musst. Kootby Begum, 3 Moo. I. A., 1.

(*c*) 1 B. L. R., F. B, 1.

(*d*) Hurdeo Narain Sahu *v.* Gridhari Singh, 13 B. L. R., 103.

filing an appeal has expired. Such consolidation or admission cannot be made without the permission of the Privy Council (*a*). But see another case (*b*), where it was held that the High Court had a discretion as to the admission of an appeal after time. Leave to appeal to the Privy Council will, in some cases, be allowed respecting property which, on the whole, is of the value of more than Rs. 10,000, notwithstanding that the portion of the property, the subject of the appeal, is below that value (*c*). So special leave to appeal was granted by the Privy Council itself, notwithstanding that no application had been made for such leave to the Court below, upon the allegation that though the amount decreed was much under the appealable value, the original demand being necessarily limited by the jurisdiction of the Court in which the suit was originally instituted, yet the subject-matter at issue exceeded in value the appealable amount (*d*). The Court may take into consideration, in allowing or rejecting a petition for appeal to the Privy Council, the fact that the property has increased in value since the commencement of the suit (*e*). In a suit for enhancement of rent, the value should be calculated at the enhanced rent allowed (*f*); or, in their discretion, they may allow interest, accrued after decree, to be added (*g*). When the appealable value is less than Rs. 10,000, but with the costs more than Rs. 10,000, it seems that the case is appealable to the Judicial Committee, and an objection to the value should be taken when the petition of appeal is lodged (*h*). Under Reg. XVI of 1797 (Bengal), s. 4, the Court must, if it order execution, take sufficient security from the decree-holder for the due performance of such order or decree as the Privy Council may make. Security to the extent of the whole sum decreed need not always be taken from the decree-holder. But if less is taken, the decree-holder should be restrained from issuing execution for any sum in excess of the amount for which security is given (*i*). Where the High Court stays execution pending an appeal to the Privy Council, the Court below cannot go on with the execution. The application for execution should be made under Reg. XVI of 1797, s. 4 (*j*). After execution has once issued under a decree of the High Court, subsequently appealed to the Privy Council, it has been held that it is beyond the power of the High Court to stay execution (*k*). It seems, however, to have been considered by the Judicial Committee, that the Court has still power, under such circumstances, to require security (*l*); and this case was acted on by Loch, J., in a later instance (*m*). The plaintiff obtained a decree for possession of a zemindaree; the decree was reversed on appeal by the High Court. The plaintiff then appealed to the Privy Council. It was held that, under such circumstances, the High Court had no power, under s. 4, Reg. XVI of 1797, to order security to be taken from

(*a*) Pran Nath Roy Chowdhree *v.* Kasheenath Chowdhree, 2 Suth. W. R., Mis., 26; Tamvaco *v* Skinner, 1 B. L. R, O. O. C. J., 39, Macpherson, J (1868).

(*b*) Radha Binode Misser, petitioner, 4 Wym. Rep, 20, Peacock, C.J., Loch, Kemp, and Macpherson, JJ. (1867).

(*c*) Onooroop Chunder Mookerjee *v.* Purtab Chunder Pal, 2 Wym. Rep, 87; See also Musst. Ameena Khatoor *v.* Radhabenod Misser, 7 Moo. I. A., 261; Rogers *v* Dutt, 8 *ib*, 103.

(*d*) Mutuswamy Jagavera Yettapa Naiker *v.* Vencataswara Yettia, 1 In. Jur., N S., 205, P.C.; see also Baboo Gopal Lall Thakoor *v.* Teluk Chunder Rai, 7 Moo., I. A., 548; Moofti Mohummud Ubdoollah *v.* Baboo Mootechund, 1 *ib.*, 363; Bose *v.* The Administrator-General of Bengal, 9 B. L. R., 425; Kokim *v.* Snadden, 1 Burma L R., 1, P. C.

(*e*) Lopes *v.* Mudun Thakoor, 2 Wym. Rep., 96; see also 1 In. Jur., N. S., 207, L. S Jackson, J.; see Onooroop Chunder Mookerjee *v.* Purbtab Chunder Pal, 2 Wym, 37. L. S Jackson, J.

(*f*) S. M. Rance Surnomoyee *v* Maharaja Sutteeschunder Roy, 8 Moo. I. A., 165; see further the note to s. 596 of Act X of 1877.

(*g*) Gooroopersad Khoond *v.* Juggutchunder, 8 Moo. I A., 166; Maharajah Sutteeschunder Roy *v.* Guneschunder, *ib.*, 164.

(*h*) Nilmadhub Doss *v.* Bishumber Doss, 13 Moo. I A., 85.

(*i*) Musst. Molka *v.* Musst. Sumput Koonwaree, 6 Suth W. R, Mis., 62

(*j*) Debee Pershad *v.* Umurthnath Chowdhry, 8 Suth. W. R., 275.

(*k*) Joynarain Pattur *v* Russeek Mohun Banerjee, 8 Suth. W. R, 145, F B

(*l*) Musst Jairat-ool-Butool *v.* Musst. Hossainee Begum, 10 Moo. I. A., 196

(*m*) Sooruj Monee Dayee *v.* Sudanund Mohapattur, 12 Suth. W. R., 296.

the defendant, respondent in the appeal to the Privy Council, for the due performance of such orders as the Privy Council might pass in appeal, or to suspend the decree reversing the decision of the first Court; that the order for security is only made when the judgment is also ordered to be carried into execution; and that here there was no judgment to be carried into execution, and no decree to suspend (*a*). So, where a plaintiff obtains a decree in the Court of original jurisdiction after having obtained an attachment before judgment, and his decree is set aside by the High Court on appeal, and he appeals to the Privy Council, the attachment must be released, the Court cannot continue it; nor can the High Court call upon a defendant, who has got a decree in his favor in this country, to give security to fulfill any decree which may be passed against him in the Privy Council (*b*). In such a case, if any order for release of attachment is necessary, the defendant is entitled to it. In a suit in which an appeal to the Privy Council from a decree of the High Court in appeal has been admitted, and is still pending, the Court of original jurisdiction, which made the decree first appealed from, has jurisdiction to issue execution. In such a case, however, the lower Court called on to execute the decree, and having notice of the appeal to the Privy Council, should stay its hand, unless it should see danger of the property being made away with in the interval (*c*). The High Court has the power and ought to exercise its discretion in each particular case with regard to restoring appeals to the Privy Council dismissed for default or removed for any reason from the file of the High Court (*d*). No appeal will be allowed to the Judicial Committee on a mere question of costs (*e*).

An appeal lies to the Privy Council from the order of the High Court in execution proceedings, when the amount involved is above the appealable value; see Act XXIII of 1861, s. 11 (*f*). Where a case has been heard by the High Court on special appeal, and on appeal to the Privy Council it is desired to include in the appeal the decisions of the lower Courts on the facts, an application for special leave to do so should be made previous to the hearing. The Judicial Committee will not, as a rule, allow a petition of appeal from those decisions to be put in at the hearing, *nunc pro tunc* (*g*). But it will do so under some circumstances (*h*). The Judicial Committee, as it has been already stated, occasionally grants special leave to appeal where it has been refused by the Courts below (*i*), where the question involved could not be measured by a money value, and the High Court had declined to certify that the case was a fit one for appeal. It appears that the Judicial Committee will not entertain an application for special leave to appeal from a decree of the High Court, where the suit is under the prescribed value, unless the petitioner has applied to the High Court for such leave and has been refused (*j*). So also leave to appeal was specially allowed after six months under special circumstances (*k*). A party applying for special leave to appeal to the Privy Council must set out a full statement of the facts and points of law involved (*l*). And the Judicial Committee will sometime, leave having been improperly granted by the Courts in India, dismiss the

(*a*) Nil Kishen Thakoor *v.* Beer Chunder Thakoor Gossain, 2 Suth. W. R., Mis., 23.

(*b*) *In re* Ditta Harakman Sing, 3 B. L. R., F. B., 45.

(*c*) Wise *v.* Rajkishen Roy, 6 Suth. W. R., Mis., 84, F. B.

(*d*) Radha Binode Misser *v.* Kripa Moyee Debea, 7 Suth. W. R, 531, F. B., overruling Sreekant Roy, petitioner, 7 Suth. W. R., 47, and Ameerunissa Begum *v.* Ranee Inderjeet Koonwar, 6 Suth. W. R., Mis., 97.

(*e*) Musst. Keemee Baee *v.* Latchman Das Narain Das, 1 Moo. I A., 470, 479.

(*f*) Musst. Velaety Begum *v.* Rugghoonath Pershad, 8 Suth. W. R., 147, F. B.; S. C., 2 In Jur., N. S., 263, and 4 Wym., 84; also see Rules as to Appeals to the Privy Council, *post*.

(*g*) Golam Ali *v.* Kallykishen Thakoor, 12 B. L. R., 107.

(*h*) Gajadhur Pershad *v.* The Widows of Emam Ali Beg, L R., 2 I. A, 205.

(*i*) *In re* Skinner, 13 Moo. I. A., 532.

(*j*) Gungowa Kome Malupa *v.* Erawa Kome Jogapa, 13 Moo. I. A, 433; Baboo Lekraj Roy *v.* Kanhya Singh, L. R., 1 I. A., 317.

(*k*) Nogender Chunder Ghose *v.* Mahomed Eusuff, 12 Moo. I. A., 107.

(*l*) Goree Monee Dossee *v.* Juggut Indro Narain Chowdhry, 11 Moo. I. A., 1.

case on objection taken, but such objection should be taken at the earliest opportunity (*a*). Special leave to appeal having been granted *ex parte*, a person was allowed to come in as respondent, and the petition was ordered to be amended on it appearing that this person was interested in the suit (*b*). An infant appellant, in an appeal at the suit of his guardian, pending in the Privy Council, came of age, and petitioned the High Court in India to be allowed to withdraw the appeal. The High Court enquired into the matter, and forwarded a supplementary record of these facts to the Privy Council. It was held that it was competent to the respondent in England to have the appeal dismissed for want of prosecution, although the guardian opposed his application and had given security for costs and paid the expenses of the appeal, and although the former infant was not served with notice of the motion (*c*). Although, as a rule, the Judicial Committee will not reverse the decision of the Courts below upon a question of fact, especially where there has been a concurrent decision (*d*), yet in some instances it has done so (*e*), and where there had been a miscarriage in point of principle, the Judicial Committee would not abstain from interfering (*f*). The Judicial Committee will give a liberal construction to pleadings in Indian Courts. But plaintiff cannot be entitled to rely on facts and documents neither stated nor referred to in the pleadings (*g*); nor will the Committee raise and try the case on fresh issues (*h*). Where a case has been heard and determined by the Judicial Committee *ex parte*, it will not, except under very special circumstances, allow it to be reopened (*i*).

Appeal from interlocutory judgment.

40. And We further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, at its discretion, on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the said High Court in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heir and successors, in Our or their Privy Council, subject to the same rules, regulations, and limitations as are herein expressed respecting appeals from final judgments, decrees, orders, and sentences.

This is the same as cl. 40 of the Charter of 1862.

Appeals in criminal cases, &c.

41. And We do further ordain that from any judgment, order, or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or succes-

(*a*) Gajadhur Pershad *v.* The Widows of Emam Ali Beg, L. R., 2 I. A, 205.

(*b*) Nawab Umjad Ally Khan *v.* Musst. Mohumdee Begum, 11 Moo. I. A., 517.

(*c*) Rani Bistuprya Patmadyi *v.* Basudeb Dhall, 6 B. L. R., 190.

(*d*) See Maharaj Kumar Baboo Ganeswar Sing *v.* Durga Dutt, 7 B. L. R., 651; Lalji Sahu *v.* Collector of Tirhoot, 6 B. L. R., 648.

(*e*) Guthrie *v.* Abul Mazaffar, 7 B. L. R., 631.

(*f*) Gabindsundari Debi *v.* Jagadamba Debi, 6 B. L. R., 168.

(*g*) Mahummud Zahoor Ali Khan *v.* Musst. Thakooranee Rutta Koer, 11 Moo. I. A., 468; see also Eshenchunder Singh *v.* Shamachurn Bhutto, *ib.*, 7.

(*h*) Sreemutty Dossee *v.* Ranee Lalunmonee, 12 Moo. I. A., 470.

(*i*) *Ex parte* Kisto Nauth Roy, 12 Moo. I. A., 254.

sors in Council, provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

The same as cl. 41 of the Charter of 1862.

Rules as to transmission of copies of evidence and other documents.

42. And We do further ordain that in all cases of appeal made from any judgment, order, sentence, or decree of the said High Court of Judicature at Fort William in Bengal to Us, Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees, and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a copy of the reasons given by the Judges of such Court or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or their Privy Council, shall think fit to make in the premises, in such manner as any original judgment, decree, or decretal orders, or other order or rule of the said High Court should or might have been executed.

This corresponds with cl. 42 of the Charter of 1862. See note to cl. 39.

Calls for Records, &c., by the Government.

High Court to comply with requisition from Government for records, &c.

43. And it is Our further will and pleasure that the said High Court of Judicature at Fort William in Bengal shall comply with such requisitions as may be made by the Government for records, returns, and statements, in such form and manner as such Government may deem proper.

This corresponds with cl. 43 of the Charter of 1862

Powers of Indian Legislature preserved.

44. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations, and also of the Governor-General in cases of emergency under the provisions of an Act of the twenty-fourth and twenty-fifth years of Our reign, Chapter sixty-seven, and may be in all respects amended and altered thereby.

This clause is new. See the note to cl. 22 of these Letters Patent.

Razeenamahs and sufurnamahs, as well as security bonds connected with appeals to England, need not be in English (*a*).

(*a*) Meer Mahomed Tukee Chowdhry *v.* Luchmeeput Sing Doogur, 7 Suth. W. R., 291.

Provisions of former Letters Patent inconsistent with these Letters Patent to be void.

45. And it is Our further will and pleasure that these Letters Patent shall be published by the Governor-General in Council, and shall come into operation from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent granted by His Majesty King George the Third, as was not revoked or determined by the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine, and be utterly void, to all intents and purposes whatsoever.

In witness thereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the twenty-eighth day of December, in the twenty-ninth year of Our reign.

(Signed) C. ROMILLY.

The new Letters Patent for the High Court at Madras are of the same date, and similar in all respects to those for the High Court at Fort William, *mutatis mutandis*. The Preamble states that the Court consists of a Chief Justice and five Judges, as provided in the former Charter, and that number is continued. By s. 11, the local limits of the ordinary original civil jurisdiction of the Court are to be such "as may from time to time be declared and prescribed by any law made by the Governor in Council, and until some local limits shall be so declared and prescribed within the limits of the local jurisdiction of the said High Court at Madras at the date of the publication of these Presents," &c. Section 22 gives the High Court ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, "and also in respect of all such persons beyond such limits over whom the said High Court of Judicature at Madras shall have criminal jurisdiction at the date of the publication of these Presents." Section 34 is as follows: "And we do further ordain that the said High Court of Judicature at Madras shall have the like power and authority as that which may now be lawfully exercised by the said High Court in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, whether within or without the Presidency of Madras: Provided," &c. (as in the Bengal Letters Patent). In other respects the Letters Patent are the same, having reference to the remarks made in regard to the former Letters Patent for the Court at Madras.

The new Letters Patent for the High Court at Bombay are of the same date: and the Preamble states that the Court consisted of a Chief Justice and six Judges, as provided in the former Charter, and that that number was increased to seven on the 6th July, 1863, which number is continued. By s. 11, the local limits of the ordinary original civil jurisdiction of the Court are to be such "as may from time to time be declared and prescribed by any law made by the Governor in Council, and until some local limits shall be so declared and prescribed within the limits of the local jurisdiction of the said High Court at Bombay at the date of the publication of these Presents," &c. Section 22 gives the High Court ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, "and also in respect of all such persons beyond such limits over whom the said High Court of Judicature at Bombay shall have criminal jurisdiction at the date of the publication of these Presents." Section 34 is the same as s. 34 of the Madras Letters Patent. In other respects, the Letters Patent are the same, *mutatis mutandis*, as those of the other Presidencies.

Act XXIII of 1866 corrects two clerical errors in the Letters Patent, 1865, of the High Court at Bombay. A doubt existed as to the jurisdiction of the High Court at Bombay over the province of Sind; it is declared by Act V of 1872 that

the Court has not and never had such jurisdiction. Act V of 1872 is again amended by Act XX of 1872, leaving untouched the Administrator-General's Act, the jurisdiction as regards European British subjects in criminal cases, and leaving valid grants of probate or letters of administration already granted, and saving the High Court's criminal jurisdiction as regards European Bristish subjects.

LETTERS PATENT

For the establishment of a High Court in the North-Western Provinces of the Bengal Presidency, dated March 17th, 1866.

NOTE.—The reader is referred to the notes on the corresponding sections of the Letters Patent of the High Court at Calcutta, which include cases decided in the North-Western Provinces on the construction of this Charter.

Recital of Acts 24 and 25 Vic., cap. 104.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To all to whom these Presents shall come, greeting: Whereas by an Act of Parliament passed in the twenty-fourth and twenty-fifth years of Our reign, intituled "An Act for establishing High Courts of Judicature in India," it was, amongst other things, enacted that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid, and that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who should be selected from among persons qualified as in the said Act is declared: Provided always, that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature, and permanent Judges of the Court of Sudder Dewanny Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that upon the establishment of such High Court as aforesaid the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Nizamut Adawlut at Calcutta, in the said Presidency, should be abolished:

And that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty, and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the said Presidency, as Her Majesty might by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations, as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency towns, as might be prescribed thereby; and save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever, in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last-mentioned Courts.

And whereas it is further declared by the said recited Act that it shall be lawful for Us by Letters Patent to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's Dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts established at the said Presidencies, as We from time to time might think fit and appoint; and that, subject to the directions of the Letters Patent, all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges of such Courts and to the Governor-General or Governor of the Presidency in which such High Courts were established, shall, as far circumstances may permit, be applicable to any new High Court which may be established in the said territories, and to the Chief Justice and other Judges thereof, and to the persons administering the government of the said territories.

And whereas We did, upon full consideration of the premises, think fit to erect and establish, and by Our Letters Patent under the Great Seal of the United Kingdem of Great Britain and Ireland, bearing date at Westminster, the fourteenth day of May, in the twenty-fifth year of Our Reign, in the year of Our Lord one thousand eight hundred and sixty-two, did accordingly, for Us, Our heirs and successors, erect and establish at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid, a High Court of Judicature, which should be called the High Court of Judicature at Fort William in Bengal, and did thereby constitute the said Court to be a Court of Record:

Establishment of High Court for the North-Western Provinces.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly, for Us, Our heirs and successors, erect and establish, for the North-Western Provinces of the Presidency of Fort William aforesaid, a High Court of Judicature which shall be called the High Court of Judicature for the North-Western Provinces, and We do hereby constitute the said Court to be a Court of Record:

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the said High Court of Judicature for the North-Western Provinces shall, until further or other provision shall be made by Us, or Our heirs and successors in that behalf, in accordance with the said recited Act, consist of a Chief Justice and five Judges, the first Chief Justice being Walter Morgan, Esquire, and the five Judges being Alexander Ross, Esquire, William Edwards, Esquire, William Roberts, Esquire, Francis Boyle Pearson, Esquire, and Charles Arthur Turner, Esquire, being respectively qualified as in the said Act is declared.

Declaration to be made by Judges.

3. And We do ordain that the Chief Justice and every Judge of the said High Court of Judicature for the North-Western Provinces, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it:—

"I, *A. B.*, appointed Chief Justice [*or* a Judge] of the High Court of Judicature for the North-Western Provinces, do solemnly declare that

I will faithfully perform the duties of my office to the best of my ability, knowledge, and judgment."

4. And We do hereby grant, ordain, and appoint that the said High Court shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal Arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court for the North-Western Provinces." And We do further grant, ordain, and appoint that the said Seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice, under the provisions of Section 7 of the said recited Act; and We do further grant, ordain, and appoint that, whenever it shall happen that the office of Chief Justice, or of the Judge to whom the custody of the said Seal be committed, shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize and take the said Seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her, or their possession.

Seal.

Writs, &c. to issue in name of the Crown and under seal.

5. And We do hereby further grant, ordain, and appoint that all writs, summons, precepts, rules, orders, and other mandatory process to be used, issued, or awarded by the said High Court of Judicature for the North-Western Provinces, shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court.

Appointment of Officers.

6. And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature for the North-Western Provinces from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to appoint so many and such clerks and other ministerial offices as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Lieutenant-Governor of the North-Western Provinces, and shall be either confirmed or disallowed by the said Lieutenant-Governor. And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, give, grant, direct, and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time, appoint for each office and place respectively, and as the Lieutenant-Governor of the North-Western Provinces, subject to the control of the Governor-General in Council, shall approve of: Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they shall hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave, in accordance with the said Rules.

Admission of Advocates, Vakeels, and Attorneys.

Powers of High Court in admitting Advocates, Vakeels, and Attorneys.

7. And we do hereby authorize and empower the said High Court of Judicature for the North-Western Provinces to approve, admit, and enrol such and so many Advocates, Vakeels, and Attorneys as to the said High Court shall seem meet; and such Advocates, Vakeels, and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its Rules and Directions determine, and subject to such Rules and Directions.

In making rules for the qualification, &c. of Advocates, Vakeels, and Attorneys.

8. And We do hereby ordain that the said High Court of Judicature for the North-Western Provinces shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels, and Attorneys-at-law of the said High Courts, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-law; and no person whatsoever, but such Advocates, Vakeels, or Attorneys, shall be allowed to act or to plead for, or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-suitor.

Civil Jurisdiction of the High Court.

Extraordinary original civil jurisdiction.

9. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.

10. And We do further ordain that an appeal shall lie to the said High Court of Judicature for the North-Western Provinces from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court, or of one Judge of any Division Court, pursuant to Section 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such Division Court, wherever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of judges of the said High Court, or of such Division Court, in such case shall be to Us, Our heirs or successors, in Our or their Privy Council, as hereinafter provided.

Appeal from Courts in the Provinces.

11. And we do further ordain that the said High Court of Judicature for the North-Western Provinces shall be a Court of Appeal from the Civil Courts of the North-Western Provinces, and from all other Courts to which there is now an appeal to the Sudder Dewanny Adawlut, and shall exercise

appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force.

Jurisdiction as to Infants and Lunatics.

12. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics within the North-Western Provinces, as that which is exercised in the Bengal Division of the Presidency of Fort William by the High Court of Judicature at Fort William in Bengal, but subject to the provisions of any laws or regulations now in force.

Law to be administered by the High Court of Judicature for the North-Western Provinces.

By the High Court in the exercise of extraordinary original civil jurisdiction.

13. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature for the North-Western Provinces, in the exercise of its extraordinary original civil jurisdiction, such law or equity shall, until otherwise provided, be the law or equity which would have been applied to such case by any local Court having jurisdiction therein.

By the High Court in the exercise of appellate jurisdiction.

14. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature for the North-Western Provinces, to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

15. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have ordinary original criminal jurisdiction in respect of all such persons within the said Provinces as the High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these presents; and the criminal jurisdiction of the said last-mentioned High Court over such persons shall cease at such date: Provided, nevertheless, that criminal proceedings which shall at such date have been commenced in the said last mentioned High Court shall continue as if these presents had not been issued.

Jurisdiction as to persons.

16. And We do further ordain that the said High Court of Judicature for the North-Western Provinces, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

17. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Niza-

mut Adawlut, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other Officer specially empowered by the Government in that behalf.

No appeal from High Court exercising original jurisdiction.

Court may reserve points of law.

18. And We do further ordain that there shall be no appeal to the said High Court from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

High Court to review cases on points of law reserved by one or more Judges of the said High Court.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

Appeals from Criminal Courts in the Provinces.

20. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall be a Court of appeal from the Criminal Courts of the said Provinces, and from all other Courts from which there is now an appeal to the Courts of Sudder Nizamut Adawlut for the said Provinces, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlut by virtue of any law now in force.

Hearing of referred cases, and revision of criminal trials.

21. And We do further ordain that the said High Court shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other Officers now authorised to refer cases to the Court of Sudder Nizamut Adawlut of the North-Western Provinces, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference to or revision by the said Court of Sudder Nizamut Adawlut.

High Court may direct the transfer of a case from one Court to another.

22. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other Officer or Court.

Criminal Law.

Offenders to be punished under Indian Penal Code.

23. And We do further ordain that all persons brought for trial before the said High Court of Judicature for the North-Western Provinces, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference, or revision, charged with any offence for which provision is made by Act No.

XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

Judges may be authorized to sit in any places by way of circuit or special commission.

24. And We do further ordain that whenever it shall appear to the Lieutenant-Governor of the North-Western Provinces, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court, should be exercised in any place within the jurisdiction of any Court, now subject to the superintendence of the Sudder Dewany Adawlut or the Sudder Nizamut Adawlut of the North-Western Provinces other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court, at such place or places, shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Testamentary and Intestate Jurisdiction.

Testamentary and intestate jurisdiction.

25. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have the like power and authority as that which is now lawfully exercised within the said provinces by the said High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate; and that the jurisdiction of the said last-mentioned High Court in relation thereto shall cease from the date of the publication of these presents: Provided always, that any proceedings already commenced in relation to any of the matters aforesaid in the said last-mentioned High Court shall continue as if these presents had not been issued: Provided also that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial Jurisdiction.

Matrimonial jurisdiction.

26. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have jurisdiction, within the said provinces, in matters matrimonial between our subjects professing the Christian religion: Provided always, that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said provinces lawfully possessed thereof.

Powers of single Judges and Division Courts.

Single Judges and Division Courts.

27. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature for the North-Western Provinces, in the exercise of its original or appellate jurisdiction, be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, under the provisions of the thirteenth Section of the aforesaid Act of the twenty-fourth and twenty-fifth years of Our reign ; and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail.

Civil Procedure.

Regulation of proceedings.

28. And We do further ordain that it shall be lawful for the said High Court of Judicature for the North-Western Provinces from time to time to make rules and orders for the purpose of adapting, as far as possible the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VIII of 1859, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate, and matrimonial jurisdictions respectively.

Criminal Procedure.

Regulation of proceedings.

29. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court, in the exercise of its ordinary original criminal jurisdiction, shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal immediately before the publication of these Presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India ; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

See Act XIII of 1869, to amend the Procedure of the High Court, North-Western Provinces, as amended by Act X of 1875, High Courts' Criminal Procedure.

Appeals to Privy Council.

Power to appeal.

30. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature for the North-Western Provinces made on appeal, and from any final judgment, decree, or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie

to the said High Court under the provision contained in the 10th clause of these Presents: provided, in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand, or question to or respecting property amounting to or of the value of not less than 10,000 rupees; or from any other final judgment, decree, or order made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council. Subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the said provinces; except so far as the said existing rules and orders, respectively, are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Appeal from interlocutory judgments.

31. And We further ordain that it shall be lawful for the said High Court of Judicature for the North-Western Provinces, at its discretion, on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or their Privy Council, subject to the same rules, regulations, and limitations, as are herein expressed respecting appeals from final judgments, decrees, orders, and sentences.

Appeal in criminal cases, &c.

32. And We do further ordain that from any judgment, order, or sentence of the said High Court of Judicature for the North-Western Provinces, made in the exercise of original criminal jurisdiction, or any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs and successors, in Council; provided, the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

* Rule as to transmission of copies of evidence and other documents.

33. And We do further ordain that, in all cases of appeal made from any judgment, order, sentence, or decree of the said High Court of Judicature for the North-Western Provinces to Us, Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees, and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed

against. And We do further ordain that the said High Court shall in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or their Privy Council, shall think fit to make in the premises, in such manner as any original judgment, decree, or decretal orders, or other order or rule of the said High Court, should or might have been executed.

Calls for Records, &c., by the Government.

High Court to comply with requisition from Government for records, &c.

34. And it is Our further will and pleasure that the said High Court of Judicature for the North-Western Provinces shall comply with such requisitions as may be made by the Government for records, returns, and statements, in such form and manner as such Government may deem proper.

Powers of Indian Legislature preserved.

35. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations, and also of the Governor-General in cases of emergency under the provisions of an Act of the twenty-fourth and twenty-fifth years of Our reign, chapter sixty-seven, and may be in all respects amended and altered thereby. In witness whereof, We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the seventeenth day of March, in the twenty-ninth year of Our reign.

By Warrant under the Queen's Sign Manual,

C. ROMILLY.

COURTS NOT ESTABLISHED BY ROYAL CHARTER.

The Small Cause Courts in the Presidency-towns were originally established by Royal Charter, 9th January, 1753 (26 Geo. II) as Courts of Request. They are now regulated by Act IX of 1850, see also 37 Geo III, c. 142, s 30; 39 and 40 Geo. III, c 79, s. 17, both now repealed by Act XIV of 1870, and the 21st, 47th, and 59th sections of the Charters of the Supreme Courts at Calcutta, Madras, and Bombay respectively, as amended by Acts XX of 1857 and XXVI of 1864. The Courts of Small Causes in the mofussil are established and regulated by Act XI of 1865, partly repealed by Act XIV of 1870 and by Act X of 1877, and separate commentaries have been published on these Acts. *Presidency-towns Small Cause Courts, by H. R. Fink, Esq.; Mofussil Small Cause Courts, by H. Millett, Esq., Chief Judge of the Small Cause Court at Calcutta, both published by Messrs. Thacker, Spink, and Co., Calcutta.* It is, therefore, unnecessary to reprint these Acts in this Appendix.

Military Courts of Request are established by the annual Mutiny Acts (see for example 41 Vict., c. 10, s. 99). They are presided over by Military Officers, and have jurisdiction in all actions of debt and all personal actions against officers or persons licensed to act as sutlers or other persons amenable to the Mutiny Act, not being soldiers, where the value in question does not exceed Rs. 400. But they have no jurisdiction where a Court of Small Causes is established.

CIVIL COURTS IN BENGAL.

The District and subordinate Civil Courts in Bengal are now regulated by Act VI of 1871, which extends to the territories under governments of the Lieutenant-Governors of the Lower and North-Western Provinces of the Presidency of Fort William in Bengal, and came into force on the 10th of February, 1871.

The Judges are all appointed by the Local Government (s. 3).

The general control over all the Civil Courts in any district is vested in the District Judge, but subject to the superintendence of the High Court (s. 11).

The District and Subordinate Judges are required to make a declaration in the form prescribed by the Act on taking office (s. 13).

The Local Government is to fix, and may from time to time vary, the local limits of the jurisdiction of any Civil Court.

There are District Judges, Additional (District) Judges, Subordinate Judges, and Moonsiffs.

The jurisdiction of a District Judge or of a Subordinate Judge extends, subject to the provisions of the Code of Civil Procedure (Act VIII of 1859), s 6 (see Act X of 1877, ss. 15 and 25), to all original suits cognizable by the Civil Court (s. 19).

The jurisdiction of Moonsiff extends to all like suits in which the amount or value of the subject-matter in dispute does not exceed Rs. 1,000 (s 20).

Appeals from the decrees and orders of District Judges and Additional Judges shall, when such appeals are allowed by law, lie to the High Court (s. 21).

Appeals from the decrees and orders of Subordinate Judges and Moonsiffs shall, when such appeals are allowed by law, lie to the District Judge, except where the amount or value of the subject-matter in dispute exceeds Rs. 5,000, in which case the appeal shall lie to the High Court: Provided that the High Court may from time to time, with the previous sanction of the Local Government, order that all appeals from the decrees of any Moonsiff shall be preferred to the Court of such Subordinate Judge as may be mentioned in the order, and such appeals shall thereupon be preferred accordingly (s. 22).

Every Court under this Act may require a witness or party to any suit pending in such Court, to take such oath as is prescribed by the law for the time being in force (s. 23).

Where in any suit or proceeding it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Muhammadan law in cases where the parties are Muhammadans, and the Hindu law in cases where the parties are Hindus, shall form the rule of decisions, except in so far as such law has, by legislative enactment, been abolished.

In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience (s. 24).

No Judge of any grade shall try any suit in which he is a party or personally interested, or adjudicate on any proceeding connected with such suit, or any appeal against a decree or order passed by himself in another capacity; but he shall transmit the record to the Court to which he is immediately subordinate, with a report, and the superior Court shall dispose of the case in the manner prescribed by the Code of Civil Procedure (s. 6). But the extraordinary original civil jurisdiction of the High Court is not affected by these provisions (s. 25).

Every District Judge may, from time to time, subject to the orders of the High Court, refer to any Subordinate Judge under his control any appeals pending before him from the decisions of Moonsiffs; and such Subordinate Judge shall hear and dispose of such appeals accordingly. The District Judge may, from time to time, withdraw any appeals so referred, and hear and dispose of appeals so withdrawn (s. 26).

The High Court may, from time to time, by order, authorize any District Judge to transfer to any Subordinate Judge under his control appeals from orders of Moonsiffs preferred under the Code of Civil Procedure, ss. 36, 76, 85, 94, 119, 231, and 257, or under Act XXIII of 1861, s. 11. The High Court may also, from time to time, by order, authorize any District Judge to transfer to a Subordinate Judge or Moonsiff under the control of such District Judge any of the proceedings next hereinafter mentioned, or any class of such proceedings mentioned in such order, and then pending, or thereafter instituted, before such District Judge, *viz.*:—

(1) Proceedings under Beng. Reg. V of 1799 *(to limit the interference of the Zillah and City Courts of Dewanny Adawlut in the execution of wills and administration to the estates of persons dying intestate)*.

(2) Proceedings under Act XL of 1858 *(for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal)*, or Act IX of 1861 *(to amend the law relating to minors)*.

(3) Claims to attached property under the Code of Civil Procedure, s. 246 (see s. 278 of the Code of 1877).

(4) Applications by judgment-debtors under s. 273 or 280 of the same Code, see ss. 344, 345, and 346 of the Code of 1877).

(5) Applications to file awards under s. 327 of the same Code (see s. 525 of the Code of 1877).

(6) Applications for permission to sue or appeal as a pauper.

(7) Applications for certificates under Act XXVII of 1860 *(for facilitating the collection of debts on successions, and for the security of parties paying debts to the representatives of deceased persons)*.

The District Judge may withdraw any proceedings so transferred, and may either himself dispose of them or, with the sanction of the High Court, transfer them to any other Subordinate Judge or Moonsiff under his control (s. 27).

Subject to the provisions of the last clause of s. 27, all proceedings transferred under the second clause of the same section shall be disposed of by the Subordinate Judge or Moonsiff (as the case may be) according to the rules prescribed for the guidance of District Judges in like cases: Provided that an appeal from the order of the Subordinate Judge or Moonsiff in such cases shall lie to the District Judge.

An appeal from his order thence shall lie to the High Court, if an appeal from the decision of the Judge in such proceedings is allowed by the law in force for the time being (s. 29).

Subordinate Judges may be invested by the Local Government with the powers of Small Cause Court Judges (see Act XI of 1865) up to the amount of Rs. 500 and Moonsiffs up to Rs. 50, and the Local Government may withdraw such powers (s. 29).

Provision is made for the suspension and removal of Judges for misconduct, &c., and for the appointment, removal, and transfer of the ministerial officers of the Courts.

CIVIL COURTS IN MADRAS.

Similar provisions for the Courts in the districts in the Madras Presidency are contained in Act III of 1873, which came into force on the 1st of March, 1873, and extends to all the territories for the time being under the government of the Governor of Fort St. George in Council, except the tracts respectively under the Agents for Ganjam and Vizagapatam The Courts in the Madras Presidency subordinate to the High Court are the Courts of the District Judge, the Subordinate Judge, and the District Moonsiff. The two former have jurisdiction in all civil suits, and the District Moonsiff in suits which do not exceed Rs. 2,500 in value.

Regular or special appeals, or appeals under Madras Reg XI of 1832, s. 9, when such appeals are allowed by law, lie from the decrees and orders of the District Court to the High Court. Appeals from the decrees and orders of Subordinate Judges and District Moonsiffs, when such appeals are allowed by law, lie to the District Court, except where the value or amount of the subject-matter of the suit exceeds Rs. 5,000, in which case the appeal lies to the High Court. But when any Subordinate Judge's Court is established in any district at a place remote from the station of the District Court, the High Court may, with the previous sanction of the Local Government, direct that appeals from the decrees and orders of District Moonsiffs within the local limits of the jurisdiction of such Subordinate Judge be preferred in the Court of the latter: Provided also, that the District Judge may remove to his own Court, from time to time, appeals so preferred, and dispose of them himself, or may, subject to the orders of the High Court, refer any appeals from the decrees and orders of District Moonsiffs, preferred in the District Court, to any Subordinate Judge within the district (s. 13). Provision is made for the administering of oaths (s. 15); and for the application of Muhammadan or Hindú law, where the parties are Muhammadans or Hindus or any custom (if such there be) having the force of law and governing the parties or property concerned, unless such law or custom has been, by legislative enactment, altered or abolished; and in cases where no specific rule exists, the Court shall act according to justice, equity, and good conscience (s. 16). And there are provisions similar to those in force in Bengal for the trial of cases in which the Judge is interested, and of appeals in which the Judge of Appeal in another capacity passed the decree or the order appealed against.

CIVIL COURTS IN BOMBAY.

In the mofussil in the Presidency of Bombay, the Courts are regulated by Act XIV of 1869, which extends (s. 1) to the territories (other than Sind under the Governor of Bombay in Council, in which the Code of Civil Procedure was, on the day of the passing of the Act (March 19th, 1869), in force; and may be extended by the Governor of Bombay in Council, by notification in the *Gazette* to any other of the territories under such Government in which the said Code is not in force, or to Sind.

The Governor of Bombay in Council is empowered (s. 2) to fix the limits of districts, and (s. 3) the position of the sudder station in each district. Each district is to have a District Court presided over by a *District Judge* (s. 5) appointed and removeable by the Governor of Bombay in Council, to hold his Court (s. 6) at the sudder station or, with the sanction

of the High Court, elsewhere; his Court is to be (s. 7) the principal Court of original jurisdiction in the district within the meaning of the Code of Civil Procedure, and to be the Court of Appeal from the decrees and orders of the subordinate Courts in cases in which the amount involved does not exceed Rs. 5,000 (see ss. 16, 17, 26). The District Judge is vested (s. 9) with the control and inspection of the Civil Courts and their establishments within his district, and he may inspect them himself or by an assistant, and give such direction in matters not provided by law as may be necessary. He may also refer points to the High Court where a rule of Court appears necessary. He is to obey (s. 10) the writs and orders of the High Court, and furnish reports and returns as may be required by the High Court, or by the Governor of Bombay in Council. The Governor of Bombay in Council may (s. 12), with the sanction of the Governor-General in Council, appoint in any district a *Joint Judge* with the power and with concurrent jurisdiction with a District Judge, and may appoint a successor, and transfer such Joint Judge from one district to another; and similarly (ss. 14 and 15) he may appoint *Assistant Judges*, to whom the District Judge may refer original suits up to Rs. 10,000 in amount, but not appeals. Appeals from the Assistant Judge, in cases up to Rs. 5,000 in amount, lie to the District Judge, and he may, when directed by the District Judge, take evidence under Bombay Reg. VIII of 1827, Act XXVII of 1860, and Act XX of 1864, and he is to forward the evidence and his opinion to the District Judge. The Assistant Judges may try appeals triable by the District Judge, if empowered (s. 17) by the Governor of Bombay in Council so to do, and their power is to continue (s. 18) until withdrawn. In like manner he may be (s. 19) invested with and deprived of all powers of a District Judge, and in such case the District Judge's jurisdiction shall *pro tanto* be excluded.

Subordinate Judges, in number (s. 21) as settled by the Governor in Council, subject to the general control of the Governor-General, are to be appointed (s. 22) by the Governor in Council, and must be subjects of the Queen who have practised as advocates for five years in any High Court in India or as vakeels of the High Court in Bombay, or who have qualified, according to tests to be settled by the High Court in Bombay, and published in the *Gazette*, or who are Bachelors of Laws of the University of Bombay. These Subordinate Judges are to be (s. 24) of two classes: those of the first class having jurisdiction in all original suits and proceedings of a civil nature; those of the second class, in like cases where the amount involved does not exceed Rs 5,000. In suits arising within the jurisdiction of a Subordinate Judge of the second class, in which the amount involved exceeds Rs. 5,000, the Subordinate Judge of the first class has (s. 25) special jurisdiction; and (s. 26) in cases tried by him in which the amount exceeds that sum there is an appeal to the High Court. The Subordinate Judge of the first class may be invested by the Governor in Council (s. 27) with power to hear appeals from such decrees and orders of subordinate Courts as they may be referred to him by the Judge of the district, and he may withdraw such jurisdiction, and may also invest Subordinate Judges of the first class with the powers of a Small Cause Court Judge in suits up to Rs. 500 in value, and a Subordinate Judge of the second class with like powers in suits up to Rs. 50 in value, and he may withdraw such powers. The Act further provides for the removal or suspension of Subordinate Judges, for temporary vacancies, for the ministerial officers attached to the Courts, &c.

The jurisdiction of the Civil Courts in Bombay is limited, with regard to matters relating to the land-revenue, by Act X of 1876, s. 4 of which enactment provides that, subject to the exceptions hereinafter appearing, no Civil Court shall exercise jurisdiction as to any of the following matters:—

(*a*) claims against Government relating to any property appertaining to the office of any hereditary officer appointed or recognized under Bombay Act No. III of 1874, or any other law for the time being in force, or of any other village-officer or servant, or

claims to perform the duties of any such officer or servant, or in respect of any injury caused by exclusion from such office or service, or

suits to set aside or avoid any order under the same Act or any other law

relating to the same subject for the time being in force passed by Government or any officer duly authorized in that behalf, or

claims against Government relating to lands held under treaty, or to lands granted or held as saranjam, or on other political tenure, or to lands declared by Government or any officer duly authorized in that behalf to be held for service;

(*b*) objections—

to the amount or incidence of any assessment of land-revenue authorized by Government, or

to the mode of assessment, or to the principle on which such assessment is fixed, or

to the validity or effect of the notification of survey or settlement or of any notification determining the period of settlement;

(*c*) claims connected with or arising out of any proceedings for the realization of land-revenue or the rendering of assistance by Government or any officer duly authorized in that behalf to superior holders or occupants for the recovery of their dues from inferior holders or tenants;

claims to set aside on account of irregularity, mistake, or any other ground except fraud, sales for arrears of land-revenue;

(*d*) claims against Government—

(1) to be entered in the revenue survey or settlement records or village papers as liable for the land-revenue, or as superior holder, inferior holder, occupant or tenant, or

(2) to have any entry made in any record of a revenue survey or settlement, or

(3) to have any such entry either omitted or amended;

(*e*) the distribution of land or allotment of land-revenue on partition of any estate under Bombay Act IV of 1868, or any other law for the time being in force;

(*f*) claims against Government—

to hold land wholly or partially free from payment of land-revenue, or

to receive payments charged on or payable out of the land-revenue, or

to set aside any cess or rate authorized by Government under the provisions of any law for the time being in force, or

respecting the occupation of waste or vacant land belonging to Government;

(*g*) claims regarding boundaries fixed under Bombay Act No. I of 1865, or any other law for the time being in force, or to set aside any order passed by a competent officer under any such law with regard to boundary-marks:

Provided that if any person claim to hold land wholly or partially exempt from payment of land-revenue under—

(*h*) any enactment for the time being in force expressly creating an exemption not before existing in favour of an individual or of any class of persons, or expressly confirming such an exemption on the ground of its being shown in a public record, or of it having existed for a specified term of years, or

(*i*) an instrument or sanad given by or by order of the Governor of Bombay in Council under Bombay Act No. II of 1863, section one, clause first, or Bombay Act No. VII of 1863, section two, clause first, or

(*j*) any other written grant by the British Government expressly creating or confirming such exemption, or

(*k*) a judgment by a Court of law, or an adjudication duly passed by a competent officer under Bombay Reg. XVII of 1827, chap. x, or under Act No. XI of 1852, which declares the particular property in dispute to be exempt;

such claim shall be cognizable in the Civil Courts.

Illustrations to (*h*).

(1.) It is enacted that, in the event of the proprietary right in lands, the property of Government, being transferred to individuals, they shall be permitted to hold the lands for ever at the assessment at which they are transferred. The proprietary right in certain lands is transferred to A. at an assessment of Rs. 100. An exemption from higher assessment not before existing is expressly

created in favour of A. by enactment, and he may seek relief in the Civil Court against over-assessment.

(2.) It is enacted that when a specific limit to assessment has been established and preserved, the assessment shall not exceed such specific limit. A. is the owner of land worth Rs. 100 for assessment. He claims to be assessed at Rs. 50 only on the strength of a course of dealing with him and his predecessors under which his land has not been more highly assessed. There is no exemption not before existing created by enactment, and A.'s claim is not cognziable in a Civil Court.

(3.) It is enacted that land-revenue shall not be leviable from any land held and entered in the land-registers as exempt. A. claims to hold certain land as exempt on the ground that it has been so held by him, and is so entered in the land-register. This is an exemption expressly confirmed by enactment on the ground of its being shown in a public record, and A.'s claim is cognizable in a Civil Court.

(4.) It is enacted that the Collector shall confirm existing exemptions of all lands shown in certain maps to be exempt. A. claims exemption alleging that his land is shown in the maps to be exempt. A.'s claim is cognizable in a Civil Court.

(5.) It is enacted that assessment shall be fixed with reference to certain considerations, and not with reference to others. This is not an enactment creating an exemption in favour of any individual or class, and no objection to an assessment under such an enactment is cognizable in a Civil Court.

Section 5 enacts that nothing in section four shall be held to prevent the Civil Courts from entertaining the following suits:—

(*a*) suits against Government to contest the amount claimed, or paid under protest or recovered as land-revenue on the ground that such amount is in excess of the amount authorized in that behalf by Government, or that such amount had, previous to such claim, payment or recovery, been satisfied in whole or in part, or that the plaintiff, or the person whom he represents, is not the person liable for such amount;

(*b*) suits between private parties for the purpose of establishing any private right, although it may be affected by any entry in any record of a revenue survey or settlement or in any village papers;

(*c*) suits between superior holders or occupants and inferior holders or tenants regarding the dues claimed or recovered from the latter;

and nothing in section four, clause (*g*), shall be held to prevent the Civil Courts from entertaining suits, other than suits against Government, for possession of any land being a whole survey number or a recognized share of a survey number.

Section 6 bars certain suits against revenue officers.

Section 7 provides that the punishment or prosecution of reveuue officers is not to be a bar to civil remedies.

Section 8 provides that revenue officers are to answer in suits brought against them for acts done by superior authority.

Section 9 provides for appeals from the proceedings of the revenue officers.

Section 10 enables the Local Government to call for records for the purpose of satisfying itself as to the propriety or legality of any order passed by a revenue officer, and if need be, to correct it.

Section 11 provides that no Civil Court shall entertain any suit against Government on account of any act or omission of any revenue officer, unless the plaintiff first proves that, previously to bringing his suit, he has presented all such appeals allowed by the law for the time being in force as, within the period of limitation allowed for bringing such suit, it was possible to present.

Section 12 gives the Local Government, and s. 13 the Civil Judge, power to refer questions for the decision of the High Court, to be determined (s 14) by a Bench of three Judges:—

Section 15 enacts that for section thirty-two of the Bombay Civil Courts Act, No. XIV of 1869, the following shall be substituted (namely): "No Subordinate Judge or Court of Small Causes shall receive or register a suit in

which the Government or any officer of Government in his official capacity is a party, but in every such case such Judge or Court shall refer the plaintiff to the District Judge, in whose Court alone (subject to the provisions of section nineteen) such suit shall be instituted."

Section 16 enacts that whenever any suit is brought in any District Court against Government, or against any revenue officer, and the Local Government undertakes the defence thereof, it shall be lawful for the Local Government, by certificate signed by a Secretary thereto, to require—

(*a*) that such suit shall be tried by the District Judge himself, and shall not be transferred for trial to an Assistant Judge; and

(*b*) that the trial of any such suit shall have precedence over the trial of any other suit or other civil proceeding then pending in such Court;

and the Court shall give effect to every such requirement.

The privilege conferred on the Local Government by the clause (*b*) of this section shall, *mutatis mutandis*, apply to any appeal or special appeal against any decree in any such suit as is described in this section.

Section 17 enacts that, notwithstanding any repeal effected by the Land Improvement Act, 1871, arrears of land-revenue of former years shall be recoverable by the Collector in the same way as current land-revenue, except that the preference given to demands for current land-revenue, as specified in section five of Bombay Reg. XVII of 1827, shall not extend to demands on account of the arrears for former years. So much of the said Regulation as is for the time being in force in any part of the territories to which this Act extends shall be deemed to be in force and to have always been in force in the sites of all villages, towns, and cities in such part. All advances made by the Local Government for purposes other than those specified in the Land Improvement Act, 1871, section three, may be recovered from the persons to whom such advances are made as if they were arrears of land-revenue.

See also Reg. XVI of 1827 (Bombay), Act II of 1863 (Bombay), and Act VII of 1863 (Bombay).

See also Act I of 1865 (Bombay) as to boundary disputes, Act XVI of 1838 (Governor-General in Council) and Act V of 1864 (Bombay).

Act XI of 1852 (Governor-General in Council, summary suits for possession, under which Inam Commissioners are appointed to investigate the titles of persons holding or claiming against Government, the possession or enjoyment of inams or jagheers, or any interest therein, or claiming exemption from the payment of land revenue, &c. Cases of this description are not cognizable by the Civil Courts (s. 1), but the Inam Commmissioners have the same power (s. 5). An appeal from their decisions is now given by Act X of 1876, s. 9.

CIVIL COURTS IN THE PUNJAB.

Act XVII of 1877 now regulates the Civil Courts in the Punjab, of which under s. 4, there are eight grades, *viz*, the Courts of—

(1) The Tahsildar with ordinary powers.
(2) The Tahsildar with special powers.
(3) The Assistant Commissioner with ordinary powers.
(4) The Assistant Commissioner with special powers.
(5) The Assistant Commissioner with full powers.
(6) The Deputy Commissioner.
(7) The Commissioner.
(8) The Chief Court.

The Tahsildar with ordinary powers has jurisdiction in suits not exceeding Rs. 50 in value.

The Tahsildar with special powers has jurisdiction in suits not exceeding Rs. 300 in value.

The Assistant Commissioner with ordinary powers has jurisdiction in suits not exceeding 100 rupees in value.

The Assistant Commissioner with special powers has jurisdiction in suits not exceeding 500 rupees in value.

The Assistant Commissioner with full powers has jurisdiction in suits not exceeding 10,000 rupees in value.

The Deputy Commissioner has original jurisdiction without limit as to value, and appellate jurisdiction from the decisions and orders of the before-mentioned first three grades of Courts (s. 32).

The Commissioner has control over all Deputy Commissioners, over all persons invested under s. 9 with the powers of a Commissioner within his division, and the Courts controlled by the Deputy Commissioners within his division; and subject to the control of the Commissioner, every Deputy Commissioner shall control all the Courts of the first five grades, and all Courts of persons invested under s 9 with the power of a Deputy Commissioner within his district (s. 30).

The Commissioner and Deputy Commissioner have powers of withdrawal, trial, disposal, and transfer of suits in the same way as the Chief Court (s. 34); and may direct the distribution of the business of their own Courts and of the Courts under their control (s. 34).

When the decision of a Deputy Commissioner or of a Commissioner passed in appeal reverse or modify the decision of the Court of original jurisdiction on a point material to the merits of the case, and is not declared by any law for the time being in force to be final, the Commissioner, where the decision has been passed by the Deputy Commissioner, and the Chief Court, where the decision has been passed on regular appeal by the Commissioner, may receive a further appeal, if, on a perusal of the grounds of appeal and of copies of the judgments of the Courts below, a further consideration of the case appear to the Commissioner or the Chief Court (as the case may be) requisite for the ends of justice (s. 39).

In modification of s. 586 of the Code of Civil Procedure a further appeal may be heard in cases cognizable by Small Cause Courts, where the value lies above 50 rupees (s. 39).

The period of limitation for appeals is as follows:—That is to say, within sixty days if the appeal lie to the Court of a Deputy Commissioner or Commissioner, and within ninety days if the appeal lie to the Chief Court (s. 40).

Any Civil Court may, either on the agreement of the parties to that effect, or after giving notice to the parties, and hearing such of them as desire to be heard, remove and try any appeal falling within the jurisdiction of any Court subject to its superintendence (s. 41).

The Chief Court of the Punjab is to consist of three or more Judges, who shall be appointed by the Governor-General of India in Council, of whom one at least shall always be a Barrister of not less than five years' standing, and they shall hold their offices during the pleasure of the Governor-General of India in Council (s. 5).

The Judges of the Chief Court shall have rank and precedence in the Court according to the seniority of their appointments as such Judges, but a Judge permanently appointed shall be deemed senior to an Officiating Judge (s. 6).

The Chief Court is the highest Court of civil appeal in the Punjab (s. 14). It may, on its own motion, or on the application of any of the parties, after giving notice to the parties, and hearing such of them as desire to be heard, withdraw any suit or other civil proceeding instituted in any Court under its superintendence or control, and try or dispose of such suit or proceeding itself, or transfer the same for trial or disposal to any other Court under its superintendence or control, and competent to try or dispose of such suit or proceeding in respect of its nature and the amount or value of its subject-matter (s. 16).

There is an appeal from the Chief Court as a Court of original jurisdiction under the 16th section, or in the exercise of any other original jurisdiction of a civil nature which the Chief Court may by rule give itself. When the appeal is from a single Judge it lies to a Bench of two, or to a Full Bench of the Chief Court, or when from a Bench of Judges who differ in opinion, to a Full Bench (s. 17).

The Chief Court can delegate its powers to any of its members, but no single Judge can reverse any decision &c., of the Court (s. 19).

When there is a difference of opinion among the Judges on any question, the question is to be decided in accordance with the majority of the Court which hears the case, or if they are equally divided, if the case is before the Full Bench in the exercise of original jurisdiction, in accordance with the opinion of the senior Judge. In other cases, the Bench before which such question has arisen, shall refer it to a Full Bench, and the Bench which has referred the case shall decide it in accordance with the opinion of the Full Bench (s. 20).

Any single Judge or Bench of Judges may refer to a Full Bench any question of law or usage having the force of law, or the construction of any document, or the admissibility of evidence arising before such Judge or Bench (s 21).

Power is given to the Chief Court to make rules (s. 27), to appoint officers (s. 22), prescribe their duties (s. 23), suspend or dismiss them (s. 24), and superintend and control them (s. 25); to make rules as to petition-writers (s. 26), and to keep registers (s. 28).

The Chief Court is a High Court within the meaning of the Code of Civil Procedure, ss. 633 and 637 (s. 29). If can empower persons to plead or act on behalf of suitors in the Civil Courts (s 42), make rules regarding such persons (s. 43), suspend them, &c. (s. 44), and fix their fees (s. 45).

No Judge is to try any suit, &c., in which he is interested, unless by consent; if the parties do not consent, the record is to be sent to the Chief Court, which can dispose of the case under s. 25 of the Code of Civil Procedure (s. 46).

Rules made under ss. 26 and 27, cls. (*a*), (*b*), (*d*), and (*e*) are to be submitted to the Local Government, and have the force of law (s. 47).

The Local Government may transfer the power given by s 25 to a single Judge of the Chief Court, and take such power away from him (s 48).

The Local Government may invest the Settlement Officers with the powers of the Civil Courts (ss. 49 and 50).

CIVIL COURTS IN BRITISH BURMAH.

The Civil Courts in British Burmah are now regulated by Act XVII of 1875, and they administer—

In suits and proceedings regarding succession, inheritance, marriage or caste, or any religious usage or institution,

the Buddhist law in cases where the parties are Buddhists,

the Muhammadan law in cases where the parties are Muhammadans,

the Hindu law in cases where the parties are Hindus,

except in so far as such law has, by legislative enactment, been altered or abolished or is opposed to any custom having the force of law in British Burmah.

In cases not provided for as above, or by any part of this section or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience (s. 4).

And, except as above is provided, all questions arising in suits before the Recorder of Rangoon shall be dealt with and determined according to the law as administered by the High Court at Fort William in Bengal in the exercies of its ordinary original civil jurisdiction (s. 8).

Besides the Courts of Small Causes, the Court of the Recorder of Rangoon and the Special Court hereinafter mentioned, there are six grades of Courts in British Burmah, namely—

Name of Court.	Extent of Jurisdiction.
1. The Court of the Extra Assistant Commissioner, 3rd class.	Powers of a Civil Court where the amount or value of the subject-matter of the suit does not exceed Rs. 500.

Name of Court.	Extent of Jurisdiction.
2. Of the Extra Assistant Commissioner, 2nd and 1st class, and of the Assistant Commissioner.	Similar powers where the value or amount does not exceed Rs. 3,000.
3. Of the Deputy Commissioner.	Similar powers, whatever may be the stated value or amount. Powers of a District Judge. Power to hear appeals from decrees and orders in original suits and proceedings of the Courts of grades (1) and (2) where such appeal is allowed by law. Power to direct the business in the Courts of grades (1) and (2), to be distributed among such Courts in such way as it thinks fit.
4. Of the Judge of the Town of Moulmein.	Powers of a District Judge. Powers of a Civil Court, whatever may be the amount or value of the subject-matter in dispute. Powers of a Court of Small Causes, where the amount or value of the subject-matter of the suit does not exceed Rs. 1,000.
5. Of the Commissioner.	Power to withdraw any suit or appeal instituted in any Court within the local limits of his jurisdiction, except a Court of Small Causes, or the Court of the Judge of the Town of Moulmein, and try such suit or appeal himself or refer it for trial to any subordinate Court of competent jurisdiction as to the amount or value of the subject-matter thereof. Power to hear appeals from decrees and orders in original suits and proceedings of the Court of grade (3), where such appeal is allowed by law.
6. Of the Judicial Commissioner.	Powers of a High Court in relation to all Courts in British Burmah, including Small Cause Courts, except the Court of the Recorder of Rangoon and the Court of Small Causes at Rangoon. Power to receive and try any suit, appeal or other proceeding instituted in any subordinate Court, except a Court of Small Causes, or to refer it to any Court of competent juridiction as to the value or amount of the subject-matter thereof. Power to hear appeals from decrees and orders in original suits and proceedings of the Court of the Commissioner, where such appeal is allowed by law.

Provided that, where a Small Cause Court is established within the local limits of the jurisdiction of the Courts (1), (2), (3), the said Courts shall not take cognizance of any suit cognizable by such Court of Small Causes (s. 12).

The Judicial Commissioner has a general control over all Courts of the first five grades, and they are subordinate to him. Subject to this the Commissioner has control over the Courts of the Deputy Commissioners within his division, and the Deputy Commissioner over all Courts of the 1st and 2nd grades within his district (s. 11).

The Chief Commissioner may invest any Assistant Commissioner or Extra Assistant Commissioners of the first or second class with power to try suits of which the amount or value does not exceed Rs. 5,000 (s. 13).

The Chief Commissioner may invest any presiding officer of the Courts of grades (1) and (2) with the powers of a Judge of a Court of Small Causes to hear and determine suits of a nature cognizable by a Court of Small Causes, and of such value or amount as he thinks fit, not exceeding Rs. 500 (s. 14).

The Chief Commissioner may empower the presiding officer of any Court of the first five grades to exercise the powers which might be exercised by the presiding officer of any other Court of the same grade within the local limits of the jurisdiction of the latter Court (s. 16).

Section 19 makes provision for the hearing of suits and appeals where the Judge is personally interested or the appeal is from a decree or order passed by himself.

Section 38 and the following sections provide for the appointment and removal of the Judges and of the ministerial officers of the Courts.

There are some special provisions relating to the hearing of civil appeals in s. 21 and the following section.

The Court of the Recorder of Rangoon is continued by s. 45 of the same Act.

The Recorder is to be appointed by the Governor-General in Council, and is to be a barrister of not less than five years' standing. He is to hold his Court ordinarily in the Town of Rangoon, but may be directed by the Chief Commissioner to hold it on any particular occasion at Moulmein, Akyab or Bassein.

The limits of the jurisdiction of the Recorder are identical with the limits of the jurisdiction of the Recorder of Rangoon, as fixed originally by Act XXI of 1863, now repealed and continued by Act VII of 1872, which, with Act I of 1873, an amending Act, is also now repealed,—namely, as the Chief Commissioner may, with the sanction of the Governor General in Council, from time to time appoint (s. 47).

And the Recorder has jurisdiction in suits of every description, except those which are cognizable by a Court of Small Causes, if, in the case of immoveable property, the subject-matter of the suit is situate, or if, in all other cases, the cause of action or a material part thereof has arisen, or the defendant, at the time of the commencement of the suit, dwells, or either personally or by his servant or agent carries on business, or works for gain, within the limits of his jurisdiction (s. 48).

There is no appeal from the decree or order of the Recorder in cases where the amount or value, &c., is not over 3,000 rupees; when over 3,000 rupees, and under 10,000 rupees (the amount for which an appeal will lie to Her Majesty in Council), an appeal lies to the High Court at Fort William in Bengal, provided that the amount or value of the matter in dispute on appeal must exceed the former sum and be less than the latter (s. 49).

The Recorder may appoint assessors to attend and give their opinion on civil trials, but the decision rests with the Recorder. No officer of the Recorder's Court shall be an assessor (s. 50).

The Recorder has, within the local limits of his ordinary civil jurisdiction, the powers of a District Judge; and he has the powers of a District Judge under Act IV of 1869 (the Indian Divorce Act) throughout British Burma (s 51).

He has the powers of a High Court in respect of the Court of Small Causes in Rangoon (s. 52).

The Recorder may, if he thinks fit, grant a new trial in any suit tried by him if applied for within the time specified by this section. He can also, in the same manner as other Courts, allow reviews of judgment under the Code of Civil Procedure, and in either case he has power to call for security for the due performance by the applicant of the terms of the decree or order which it is sought to set aside or review (s. 53).

He may refer doubtful points of law to the High Court at Fort William (s. 54), and give judgment contingent upon its opinion, but not issue execution until the receipt of the decision of the High Court (s. 55). These references

are to be heard by two or more Judges (s. 56); the parties may appear or not on the reference as they think fit, and the decision of the High Court is to be transmitted to the Recorder, who is to give judgment accordingly, costs, if any, being costs of the suit (s. 57).

The Chief Commissioner may direct the transfer to the Recorder's Court of any suit or appeal which may have been instituted in any Court in British Burma other than the Recorder's Court. Every case so transferred shall be tried and determined by the Recorder in the same manner as if he had originally jurisdiction in the case, and as if it had been instituted in his Court (s. 58).

When the Recorder is a party to a suit or proceeding brought before him or personally interested in it, he shall report to the Chief Commissioner, who may either direct him to try it, or transfer it to the Court of the Judicial Commissioner, who shall then have the same jurisdiction in the case as the Recorder has in suits, &c., cognizable by him (s. 59).

The Recorder has jurisdiction in Admiralty and Vice-Admiralty cases similar to that exercised by, but with an appeal to, the High Court at Calcutta (s. 65); and Insolvency jurisdiction under 11 and 12 Vict., c. 21 (s. 66).

A Special Court, ordinarily constituted by the Judicial Commissioner and Recorder sitting together, is continued by this Act. But a Commissioner may be appointed by the Chief Commissioner to sit as an Additional Judge. In case of a difference of opinion, the opinion of the majority prevails. When the Judicial Commissioner and Recorder sit together as a Special Court, the senior officer, according to priority of appointment, takes precedence (s 72).

Appeals from the orders and decrees of the Judicial Commissioner in certain cases, and of the Judge of the Town of Maulmain in civil suits and proceedings, shall, when allowed by law, lie to the Special Court (s. 75).

Or the Judicial Commissioner and Recorder may sit together as a Special Court, at the request of either, to determine any question of fact or law on a memorandum to be recorded by either of them wishing to refer the case to the Special Court. In case of a difference of opinion, that of the Court which sought the opinion of the other shall prevail (s. 76).

The Chief Commissioner may also direct that any suit or appeal pending in the Court of either Judicial Commissioner or Recorder shall be tried by the Special Court (s. 77).

The decree passed by the Special Court on a reference under s. 76, or in a case tried under s. 77, shall be deemed to be a decree of the Court from which the case was referred to the Special Court (s. 78).

In case of a difference of opinion between the Judicial Commissioner and the Recorder sitting in appeal as a Special Court, and not being in a criminal case, if they do not concur in a judgment varying the decision of the Court below, the decision shall be upheld. If the difference arise as to some point of law, or custom having the force of law, or the admissibility of evidence or construction of a document affecting the merits of the case, and if either of them be of opinion that the point should be referred to the High Court at Fort William, they shall state the point as to which they differ, and forward the statement, with their respective opinions thereon, to the High Court (s. 80). The case shall be deemed to be pending in the Special Court until it is decided by the High Court (s. 81).

The High Court shall deal with the case as if it were an appeal instituted in the High Court, but the parties are not bound to appear. A copy of the decision is to be sent to the Court from which the case was referred to the Special Court, which Court shall dispose of the case accordingly. Costs are to be costs in the suit or appeal (s. 82).

CIVIL COURTS IN OUDH.

Act XXXII of 1871 consolidates and amends the law relating to the Civil Courts in Oudh. It came into force on the 30th of October, 1871, and applies to all Civil Courts in Oudh, except Small Cause Courts. It establishes five grades of Courts :—

1. *Of the Tehsildars*, with jurisdiction in all suits arising within the local limits of their jurisdiction, and not cognizable by a Court of Small Causes, where the amount or value of the subject-matter of the suit does not exceed 100 rupees.

2. *Of the Assistant Commissioner* or *Extra Assistant Commissioner*, with like jurisdiction up to 500 rupees.

3. *Of the Deputy Commissioner*, or *of the Civil Judge of Lucknow*, with like jurisdiction, whatever may be the value of the subject-matter of the suit. But the Chief Commissioner may invest any Tehsildar with power to try suits of which the amount or value of the subject-matter does not exceed 500 rupees, and may also empower any Assistant Commissioner or Extra Assistant Commissioner to try suits of which the amount or value of the subject-matter does not exceed 5,000 rupees (ss. 4 and 11).

4. *Of the Commissioner* (s 4)

5. *Of the Judicial Commissioner* (*ib.*)

Extra Assistant Commissioners and Tehsildars are appointed by the Chief Commissioner of Oudh, and the other Judges by the Governor-General in Council (s. 6).

The Court of the Deputy Commissioner shall be deemed to be the principal Civil Court of original jurisdiction in any district, and he may direct the business of the Courts of first and second grades to be distributed among such Courts in such way as he thinks fit; provided that no Court shall try any suit in which the amount or value of the claim shall exceed its proper jurisdiction (s. 12).

The Commissioner may withdraw any suit instituted in any Court subordinate to him and try such suit himself, or refer it for trial to any other Court competent in respect of value or amount of the suit to try the same (s. 13).

Section 12 of Act VIII of 1859 (see ss. 19, 23, and 24 of Act X of 1877) shall be read, as regards the trial of suits in Oudh, subject to the following modification, namely:—

(1) When the suit is for immoveable property situate within the local jurisdiction of different District Courts included in the same division, the application for authority to proceed with the suit shall be made to the Commissioner of such division.

(2) When the said Courts belong to different divisions, the application shall be made to the Commissioner of the division in which the district wherein the suit was instituted is included (s. 14).

Appeals from the decrees and orders in original suits and proceedings of the Courts of the first and second grade shall, when allowed by law, ordinarily lie to the Deputy Commissioner. But where the amount or value of the subject-matter in any such suit or proceeding exceeds 1,000 rupees, the appeal shall lie to the Commissioner.

(3) Appeals from such decrees and orders of the Court of the Deputy Commissioner, when such appeals are allowed by law, shall lie to the Commissioner.

(4) An appeal from any such decree or order passed by the Commissioner shall, when such appeal is allowed by law, lie to the Judicial Commissioner, whose Court shall be deemed to be the highest Court of appeal (s. 15).

The Commissioner may withdraw any appeal instituted in the Court of any Deputy Commissioner subordinate to him, and try the appeal himself, or refer it for trial to the Court of any other Deputy Commissioner in his division (s. 16).

If the decision of a Deputy Commissioner or a Commissioner, passed in appeal, reverse or modify the decision of the Court of original jurisdiction, the Judicial Commissioner may receive a second appeal, if, on a perusal of the grounds of appeal and of copies of the judgment of the subordinate Courts, a further consideration of the case appears to him to be requisite for the ends of justice (s. 17).

If the Court of first appeal confirms the decision of the Court of first instance, such decision shall be final: Provided that, where, in the trial of any appeal, such Appellate Court entertains any doubt in regard to a question of law or

usage having the force of law, or as to the construction of a document affecting the merits of the decision, the Court may, either of its own motion, or on the application of any of the parties to the case, draw up a statement of the case and refer it, with the Court's own opinion, for the decision of the Judicial Commissioner (s. 18).

The Judicial Commissioner, after hearing and considering the case so referred, shall send a copy of his judgment to the Court by which the reference was made, and such Court shall, on the receipt of the copy, proceed to dispose of the case in conformity with the decision of the Judicial Commissioner (s. 19).

Costs, if any, consequent on the reference of the case to the Judicial Commissioner, shall be costs in the appeal out of which the reference arose (s. 20).

The memorandum of appeal must, when the appeal lies to the Commissioner, be presented within six weeks, the period being reckoned from and exclusive of the day on which the decision or order appealed against was passed, and also exclusive of such time as may be requisite for obtaining a copy of such decision or order; and, in all other cases, within the periods fixed by the law of limitation relating to the presentation of appeals for the time being in force (s. 21).

Provision is made for the appointment of an additional Judicial Commissioner when the state of business requires it (s. 22); and for a reference of doubtful questions by the Judicial Commissioner to the High Court of the North-Western Provinces (ss. 23, 24, and 25).

In any district in which a settlement of the land-revenue is in progress, the Chief Commissioner, with the sanction of the Governor-General in Council, may invest any officer making or controlling such settlement with all or any of the powers of Civil Courts of the 1st, 2nd, 3rd, or 4th grade, for the purpose of trying suits and appeals relating to land assessed to revenue, or the rent, revenue or produce of such land arising in such district. Any district in which such officers have been so invested shall, for the purposes of this section, be deemed to be under settlement until the Governor-General in Council shall otherwise direct; and the jurisdiction of the ordinary Civil Courts shall be excluded in respect of such suits and appeals during that period: Provided that the Chief Commissioner may direct that any cases pending before the Settlement Officers invested with the powers mentioned in the former part of this section, shall be transferred to the ordinary Civil Courts of the district if the state of business in his opinion requires it (s. 26).

If, before any officer so invested, a suit relating both to such land and other property be instituted, the said officer shall make a reference regarding the disposal of such suit to the Commissioner of the division in which the district wherein the suit was instituted is included, who shall determine by what Court the suit shall be tried (s. 27).

No suit relating to any tenure which shall be cognizable by the Court of any Settlement Officer under this Act, shall be barred under the law for the time being in force relating to the limitation of suits, if the cause of action arose on or after the 13th day of February, 1844 (s. 28).

When a mortgagee shall, under or by virtue of a mortgage executed before the said day, have obtained possession of any land comprised in his mortgage, the mortgagor or any person claiming through him shall not bring a suit to redeem the mortgage of such land, any subsequent acknowledgment of the title or right to redeem of the mortgagor or of any person claiming through him notwithstanding (s. 29).

Nothing herein contained shall be taken to bar a suit for redemption in any case where, by the instrument of mortgage, a term was fixed within which the property comprised therein might be redeemed, and such term had not expired before the 13th day of February, 1856: Provided that, if any such term had expired before that day, the suit shall be barred, whatever may be the date on which the instrument was executed (s. 30).

Provision is made for the application of the Muhammadan and the Hindu law where the parties are Muhammadans or Hindus; and in other cases, of the rules of justice, equity, and good conscience (s. 31);

For the trial of suits in which the Judge is interested, or of appeals in cases which he may have decided in another capacity (s. 32);

For the suspension and removal of Judicial Officers for misconduct (s. 33);
And for the appointment and removal of ministerial officers (s. 34 *et seq.*)

Act XXVII of 1867 enabled the Deputy Commissioners to distribute the business in the Courts subordinate to them. See the note to Courts in Oudh.

CIVIL COURTS IN THE CENTRAL PROVINCES.

By Act XIV of 1865 (the Central Provinces Courts Act), s. 4, eight grades of Courts are established in the Central Provinces in addition to Courts of Small Causes and to any other Courts established under any Act to be thereafter passed, *viz.:*

1.—*The Courts of Tehsildars of the second class*, with jurisdiction in suits of every description up to Rs. 100 in value (s. 7).

2.—*Of the Tehsildars of the first class*, with the same jurisdiction up to Rs. 300 (s. 8).

3.—*Of the Assistant Commissioners of the third class*, with the same jurisdiction up to Rs. 500 (s. 9).

4.—*Of the Assistant Commissioners of the second class*, with the same jurisdiction up to Rs. 1,000 (s. 10).

5.—*Of the Assistant Commissioners of the first class*, with the same jurisdiction up to Rs. 5,000 (s. 11).

6.—*Of the Deputy Commissioners*, with power to try and determine suits of every description and of any amount, and to hear appeals from the original decisions in suits (where an appeal is allowed by the Code of Civil Procedure) from the orders of the Courts of the 1st, 2nd, 3rd, and 4th grades, and of *Naib Tehsildars* invested as before mentioned in the Act (*viz*, under s. 6, which empowers the Chief Commissioner to give them jurisdiction in suits for money due, whether on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage, or demand does not exceed Rs. 50) (s. 12).

7.—*Of the Commissioners*, with power to hear and determine appeals from the original decisions in suits and (where an appeal is allowed by the Code of Civil Procedure) from the orders of the Courts of the 5th and 6th grades (s. 13).

8.—*Of the Judicial Commissioners*, with power to hear and determine appeals from the original decisions in suits and (where an appeal is allowed by the Code of Civil Procedure) from the orders of the Commissioners, and also applications for a special appeal as provided in the said Code from the decisions passed in regular appeal by the Deputy Commissioners and by the Commissioners of Division (s. 14).

Every suit shall be instituted in the Court of the lowest grade competent to try it; provided that no suit cognizable by a Court of Small Causes shall be heard or determined in any other Court having any jurisdiction within the local limits of the jurisdiction of such Court of Small Causes (s. 17). The Deputy Commissioner may direct the business in the Courts subordinate to him (whether or not they hold their sittings in the same place—Act XXVII of 1867, s 1) to be distributed among such Courts in such way as he shall think fit: provided that no Court shall try any suit in which the amount or value of the claim shall exceed its proper jurisdiction (s. 19). The Commissioner of the Division or the Deputy Commissioner may withdraw any suit instituted in any Court subordinate to him, and try such suit himself or refer it for trial to any other such subordinate Court, and competent in respect of value or amount of the suit to try the same. The Commissioner of the Division may also withdraw any appeal instituted in the Court of any Deputy Commissioner subordinate to him, and try the appeal himself, or refer it for trial to the Court of any other Deputy Commissioner in his division (s. 20). The Judicial Commissioner may order that the cognizance of any suit or appeal which shall be instituted in any Court subordinate to him, not being a Court of Small Causes, shall be transferred to any other such subordinate Court competent in respect of the value of the subject-matter of the suit or appeal to try the same (s. 21).

If the suit be for any immoveable property situate within the limits of different District Courts within the same division, the suit may be brought in any Court otherwise competent to try it, within the jurisdiction of which any portion of such property is situate; but in such case the Court in which such suit is brought shall apply to the Commissioner of the Division for authority to proceed with the suit; and the Commissioner, after hearing the objections, if any, of the defendant, may give such authority. If the suit is brought in any Court subordinate to the Court of the Deputy Commissioner, the application shall be submitted to the Commissioner of the Division through the Deputy Commissioner to whom such Court is subordinate (s. 22). If the District Courts, within the limits of whose jurisdiction the immoveable property is situate, are subordinate to different Commissioners, the application shall be submitted to the Commissioner of the Division to whom the District Court in which the suit is brought is subordinate; and the Commissioner to whom such application is made may, after hearing the objections, if any, of the defendant, give authority to proceed with the suit (s. 23). The Act came into operation on the 1st of May, 1865 (s. 24).

By Act XXVII of 1867, s. 1, every Deputy Commissioner in Oudh, the Central Provinces, the Punjab and its dependencies, and the Jhansi Division, may direct the business of the Court subordinate to him, whether or not they hold their sittings in the same place, to be distributed among such Courts in such way as he shall think fit. By s. 2, this does not apply to Small Cause Courts. By s. 3, the Act shall, in the Central Provinces, be read as part of Act XIV of 1865; in the Punjab, as part of Act XIX of 1865; and in the Jhansi Division, as part of Act XVIII of 1867.

By Act XXXVII of 1867, s. 1, provision was made for the transfer of appeals from the Court of the Financial Commissioner to that of the Judicial Commissioner. Section 3 provided for the hearing of appeals before both the Judicial and Financial Commissioners sitting together, who (s. 4) could, if they differ in opinion, refer the point to the High Court of the North-Western Provinces, in which case they could (s. 5) give their decree contingent on the opinion of the High Court. Referred cases were to be (s. 6) heard by three Judges of the High Court; the parties might appear, &c. (s. 7), in person or by an advocate or vakeel of the High Court; and (s. 8) the costs of the reference were to be costs in the suit. This Act is repealed by Act XVII of 1877 (The Punjab Courts Act), s. 34 of which Act provides for the distribution of business; the Act applies only to the Punjab.

CIVIL COURTS IN JHANSI.

By Act XVIII of 1867 (the Jhansi Courts Act), s. 6, seven grades of Courts are established in the Jhansi Division of the North-Western Provinces, in addition to Courts of Small Causes and to any other Courts established under any Act to be thereafter passed, *viz.:*

1.—*The Court of the Tehsildar of the second class*, with power to try and determine suits of every description in which the subject-matter does not exceed Rs. 100 in value or amount (s. 8).

2.—*Of the Tehsildar of the first class*, with the same jurisdiction up to Rs. 300 (s. 9).

3.—*Of the Assistant Commissioner of the second class*, with the same jurisdiction up to Rs. 1,000 (s. 10).

4.—*Of the Assistant Commissioner of the first class*, with the same jurisdiction up to Rs. 5,000 (s. 11).

5.—*Of the Deputy Commissioner*, with power to try and determine suits of every description and of any amount, and to hear appeals from the original decisions in suits and (where an appeal is allowed by the Code of Civil Procedure) from the orders of the Courts of the 1st, 2nd, and 3rd grades (s. 12).

6.—*Of the Commissioner*, with power to hear and determine appeals from the original decisions in suits and (where an appeal is allowed by the Code of Civil Procedure) from the orders of the Courts of the 4th and 5th grades (s. 13).

7.—*The High Court*, which is however the High Court of the North-Western Provinces (s. 4) established by Charter, *ante*, with power to hear and determine appeals from original decisions in suits and (where an appeal is allowed by the Code of Civil Procedure) from the orders of the Commissioner, and also applications for a special appeal as provided in the said Code, from the decision passed in regular appeal by the Deputy Commissioner and Commissioner of the Division (s. 14).

The memorandum of appeal, prepared in the form and containing the particulars mentioned in the Code of Civil Procedure, shall be presented to the Court empowered to hear the appeal within the period specified, unless the appellant shall show sufficient cause to the satisfaction of the Court for not having presented the memorandun of appeal within the said period,—that is to say, thirty days, if the appeal lie to the Deputy Commissioner; six weeks, if the appeal lie to the Commissioner of the Division; and ninety days, if the appeal lie to the High Court. The period shall be reckoned from and exclusive of the day on which the decision or order appealed against was passed, and also exclusive of such time as may be requisite for obtaining a copy of the decree or order from which the appeal is made.

Memoranda of special appeals shall be presented to the High Court within the period hereinbefore fixed for appeals (s. 15).

The High Court shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court of the said Division, when the High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the High Court (s. 16). The High Court shall have superintendence over all Courts in the said Division, and shall have power to call for returns and to make and issue general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Courts for which it shall think necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the officers, and also to settle tables of fees to be allowed to the attorneys, vakeels, and all clerks and officers of such Courts, and from time to time to alter any such rule or form or table; and the rules so made, and the forms so framed, and tables so settled, shall be used and observed in the said Courts provided that such general rules and forms and tables be not inconsistent with the provision of any law in force, and shall, before they are issued, have received the sanction of the Lieutenant-Governor (s. 17). Whenever the state of public business requires it, the Lieutenant-Governor shall have power to invest any person with the powers of a Commissioner, or of a Deputy Commissioner, in any part of the Jhansi Division (s. 18).

Every suit shall be instituted in the Court of the lowest grade competent to try it, provided that no suit cognizable by a Court of Small Causes shall be heard or determined in any other Court having any jurisdiction within the local limits of the jurisdiction of such Court of Small Causes (s. 19). The Deputy Commissioner may direct the business in the Courts subordinate to him, whether holding their sittings at the same place or not (Act XXVII of 1867, s 1), to be distributed among such Courts in such way as he shall think fit; provided that no Court shall try any suit in which the amount or value of the claim shall exceed its proper jurisdiction (s. 21). The Commissioner of the Division or the Deputy Commissioner may withdraw any suit instituted in any Court subordinate to him, and try such suit himself or refer it for trial to any other such subordinate Court, and competent in respect of value or amount of the suit to try the same. The Commissioner of the Division may also withdraw any appeal instituted in the Court of any Deputy Commissioner subordinate to him, and try the appeal himself or refer it for trial to the Court of any other Deputy Commissioner in his division (s. 22). The High Court may order that the cognizance of any suit or appeal which shall be instituted in any Court subordinate to such High Court, not being a Court of Small Causes, shall be transferred to any other subordinate Court competent in respect of the value or amount of the subject-matter of the suit or appeal to the same (s. 23).

If the suit be for any immoveable property situate within the limits of different District Courts within the same division, the suit may be brought in any Court otherwise competent to try it, within the jurisdiction of which any portion of such property is situate; but in such case the Court in which the suit is brought shall apply to the Commissioner of the Division for authority to proceed with the suit; and the Commissioner, after hearing the objection, if any, of the defendant, may give such authority. If the suit is brought in any Court subordinate to that of the Deputy Commissioner, the application shall be submitted to the Commissioner of the Division through the Deputy Commissioner to whom such Court is subordinate (s. 24). If the District Courts within the limits of whose jurisdiction any moveable property sued for is situate, are subordinate to different Commissioners, application for authority to proceed with the suit shal lbe made to the Commissioner of the Division to whom the District Court in which the suit is brought is subordinate, and such Commissioner may, after hearing the objections of the defendant, if any, give authority to proceed with the suit (s. 25).

Act XXVII of 1867 is to be read as part of Act XVIII of 1867. See above and the note to Courts in Oudh.

CIVIL COURTS IN SCINDE.

The constitution of the Courts of civil judicature in the Province of Scinde, with the exception of the part of Scinde in charge of the Political Superintendent of Thurr and Parkur, is declared by Act XII of 1866 (Bombay Code). By s. 1, there shall be in the Province of Scinde a *Sudder Court*, which shall be the highest Court of Appeal in civil and criminal matters in the said province, within the meaning of the Codes of Civil and Criminal Procedure. The Sudder Court shall be presided over by a Judge appointed by the Governor of Bombay in Council, and such Judge may also be the Judicial Commissioner of the Province of Scinde. By s. 2, there shall be in each district in the Province of Scinde a *District Court;* and every such Court shall be presided over by a Judge appointed by the Governor of Bombay in Council, by whom only he shall be liable to be suspended or removed. By s. 3, the District Court shall, within the meaning of the Code of Civil Procedure, be the principal Court of original civil jurisdiction in the districts in which it is established, and shall also exercise the jurisdiction vested in the Court of Session by the Code of Criminal Procedure, or by any other law for the time being in force in the Province of Scinde. By s. 4, there shall be in each district in the Province of Scinde so many subordinate Civil Courts as the Governor of Bombay in Council, acting under the general control of the Governor-General in Council, shall from time to time direct. Every such Court shall be a *subordinate Court* of original civil jurisdiction within such limits as the Commissioner in Scinde, with the sanction of the Governor of Bombay in Council, shall from time to time determine, and shall be presided over by a Judge appointed by the Commissioner in Scinde. By s. 5, the subordinate Courts have jurisdiction in suits where the amount claimed does not exceed Rs. 5,000. By s. 6, a regular appeal lies from the decision of the Judges of the District Courts to the Sudder Court; and by s. 8, from the decisions of the Judges of the subordinate Courts to the District Court of their district. By s. 19, these Courts have exclusive jurisdiction in all civil suits.

CIVIL COURTS IN ADEN.

The administration of civil justice at Aden is vested by Act XI of 1864 in the Court of the *Resident* (s. 2), who may try all cases (s. 3), or distribute them to the *Assistant Residents* to try (s. 4). An appeal lies to the Resident from decisions of the Assistant Resident, in which the claim is over Rs. 500, or is in respect of land, and from their orders in execution of decrees

or other orders from which, had the order been passed by a Court subordinate to the Court of a District Judge in the Bombay Presidency, an appeal would have been allowed to the District Judge (s. 5). The Resident has the same powers in hearing appeals as a District Judge in the Bombay Presidency has with reference to the Courts subordinate to him (s. 6). No appeal lies from the Assistant Resident in other cases, but the Resident may call for the proceedings, and pass such orders upon them as he may think fit (s. 7). And no appeal lies from the decision or order of the Resident, whether in the exercise of his original jurisdiction, or in the exercise of his jurisdiction as a Court of appeal or of revision; but if in the trial of any suit, in which the claim shall not exceed Rs. 1,000 in value, any question of law, or usage having the force of law, or of the construction of a document affecting the merits of the decision, shall arise, on which the Resident shall entertain doubts, he may, either of his own motion, or on the application of any of the parties to the suit, draw up a statement of the case, and submit it, with his own opinion, for the decision of the High Court at Bombay; and in cases over Rs. 10,000, if any question of fact or law, or of usage having the force of law, or of the construction of a document affecting the merits of the decision, shall arise, he may draw up a case in like manner (s. 8). In cases so referred, the Resident may proceed to pass judgment contingent upon the opinion of the High Court, and no execution shall proceed pending the reference (s. 9); and the case shall be tried by two or more Judges of the High Court (s. 10). Except as otherwise provided in the Act, the Code of Civil Procedure shall regulate the proceedings (s. 16). The High Court at Bombay has power to frame rules for the Resident's Court (s. 31).

CIVIL COURTS IN COORG.

Act XXV of 1868 defines the jurisdiction of the Courts in Coorg, and provides for six grades of Courts, in addition to which the Commissioner may (s. 4) invest any Parbatiyagar and any Naib Subahdar with power to try and determine suits for money due, whether on bond or other contract, or for rent, or for moveable property, or for the value of such property, or for damages, when the debt, damage, or demand does not exceed in amount or value Rs. 50, and to prescribe the local limits within which the Parbatiyagar or Naib Subahdar so invested shall exercise such power. The Courts established by the Act are: (1) *Subahdar of the second class*, with (s. 5) civil jurisdiction in suits up to Rs. 100 in value; (2) the *Subahdar of the first class*, with (s. 6) the same up to Rs. 300; (3) the *Assistant Superintendent of the second class*, with (s. 7) the same up to Rs. 1,000, and with appellate jurisdiction subject to rules laid down in the Act, from Parbatiyagars or Naib Subahdars or Subahdars of the second and first classes; (4) the *Assistant Superintendent of the first class*, with the same original jurisdiction up to Rs. 3,000, and with appellate jurisdiction subject aforesaid from the Subahdar of the first and second classes, and from the Naib Subahdars and Parbatiyagars; (5) the *Superintendent*, with the same original jurisdiction up to any amount, and in appeal from the Assistant Superintendent and the Subahdars of both classes, the Parbatiyagars and Naib Subahdars; (6) the *Judicial Commissioner*, with power (s. 10) to hear appeals from the original decisions of the Superintendent in suits, &c., and special appeals from the decision passed by the Superintendent or by an Assistant Superintendent of either grade in regular appeal. The Judical Commissioner has also power to remove and to try and determine as a Court of extraordinary original civil jurisdiction any suit within the jurisdiction of any Court in the said province, when he thinks proper to do so, either on the agreement of parties to that effect, or for purposes of justice, the reason for so doing being recorded on the proceedings of his Court. By s. 13 he is to have general superintendence over all Courts in the province.

APPEALS TO THE QUEEN IN COUNCIL.

III & IV WILLIAM IV, CAP. 41.

An Act for the better administration of Justice in His Majesty's Privy Council.

[14th August, 1833.]

WHEREAS, by virtue of an Act passed in a Session of Parliament of the second and third years of the reign of His present Majesty, intituled "An Act for transfering the Powers of the High Court of Delegates, both in Ecclesiastical and Maritime Causes, to His Majesty in Council," it was enacted, that from and after the first day of February, one thousand eight hundred and thirty-three, it should be lawful for every person who might theretofore, by virtue either of an Act passed in the twenty-fifth year of the reign of King Henry the Eighth, intituled "The Submission of the Clergy and Restraint of Appeals," or of an Act passed in the eighth year of the reign of Queen Elizabeth, intituled "For the avoiding of tedious suits in Civil and Marine Causes," have appealed or made suit to His Majesty in his High Court of Chancery, to appeal or make suit to the King's Majesty, his heirs or successors, in Council, within such time, in such manner, and subject to such rules, orders, and regulations for the due and more convenient proceeding, as should seem meet and necessary, and upon such security, if any, as His Majesty, his heirs and successors, should, from time to time, by order in Council, direct: and whereas, by Letters Patent under the great seal of Great Britain, certain persons, members of His Majesty's Privy Council, together with others, being Judges and Barons of His Majesty's Courts of Record at Westminster, have been from time to time appointed to be His Majesty's Commissioners for receiving, hearing, and determining appeals from his Majesty's Courts of Admiralty in causes of prize: and whereas, from the decisions of various Courts of Judicature in the East Indies, and in the plantations, colonies, and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council: and whereas matters of appeal or petition to His Majesty in Council have usually been heard before a Committee of the whole of His Majesty's Privy Council, who have made a report to His Majesty in Council, whereupon the final judgment or determination hath been given by His Majesty: and whereas it is expedient to make certain provision for the more effectual hearing and reporting on appeals to His Majesty in Council and on other matters, and to give such powers and jurisdiction to His Majesty in Council as hereinafter mentioned; be it therefore enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the President for the time being of His Majesty's Privy Council, the Lord High Chancellor of Great Britain for the time being, and such of the members of His Majesty's Privy Council as shall from time to time hold any of the offices following, that is to say, the office of Lord Keeper or First Lord Commissioner of the Great Seal of Great Britain, Lord Chief Justice or Judge of the Court of King's Bench, Master of the Rolls, Vice-Chancellor of England, Lord Chief Justice or Judge of the Court of

2 & 3 Will. IV, c. 92.

25 Hen. VIII c. 19.
8 Eliz., c. 5.

Certain persons to form a Committee, to be styled "The Judicial Committee of the Privy Council."

Common Pleas, Lord Chief Baron or Baron of the Court of Exchequer, Judge of the Prerogative Court of the Lord Archbishop of Canterbury, Judge of the High Court of Admiralty, and Chief Judge of the Court in Bankruptcy, and also all persons, members of his Majesty's Privy Council, who shall have been President thereof, or held the office of Lord Chancellor of great Britain, or shall have held any of the other offices hereinbefore mentioned, shall form a Committee of His Majesty's said Privy Council, and shall be styled "The Judicial Committee of the Privy Council:" Provided, nevertheless, that it shall be lawful for His Majesty from time to time, as and when he shall think fit, by his sign manual, to appoint any two other persons, being Privy Councillors, to be members of the said Committee.

Appeals from Vice-Admiralty Courts abroad, &c, to be made to the King in Council.

II. And be it further enacted, that from and after the first day of June, one thousand eight hundred and thirty-three, all appeals or applications in prize suits, and in all other suits or proceedings in the Courts of Admiralty, or Vice-Admiralty Courts, or any other Court in the plantations in America, and other His Majesty's dominions or elsewhere abroad, which may now, by virtue of any law, statute, commission, or usage be made to the High Court of Admiralty in England, or to the Lords Commissioners in prize cases, shall be made to His Majesty in Council, and not to the said High Court of Admiralty in England or to such Commissioners as aforesaid; and such appeals shall be made in the same manner and from and within such time wherein such appeals might, if this Act had not been passed, have been made to the said High Court of Admiralty or to the Lords Commissioners in prize cases respectively; and that all laws or statutes now in force with respect to any such appeals or applications shall apply to any appeals to be made in pursuance of this Act to His Majesty in Council.

All appeals from sentence of any Judge, &c., to be referred by His Majesty to the Committee, to report thereon.

III. And be it further enacted, that all appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute, or custom, may be brought before His Majesty or His Majesty in Council from, or in respect of the determination, sentence, rule, or order of any Court, Judge or Judicial Officer, and all such appeals as are now pending unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of his Privy Council, and that such appeals, causes, and matters shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to His Majesty in Council for his decision thereon as theretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by His Majesty to the whole of his Privy Council or a Committee thereof (the nature of such report of recommendation being always stated in open Court).

His Majesty may refer any other matters to Committee.

IV. And be it further enacted, that it shall be lawful for His Majesty to refer to the said Judicial Committee for hearing or consideration any such other matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid.

No matter to be heard unless in presence of four members of the Committee.

V. And be it further enacted that no matter shall be heard, nor shall any order, report, or recommendation be made by the said Judicial Committee, in pursuance of this Act, unless in the presence of at least four members

of the said Committee; and that no report or recommendation shall be made to His Majesty unless a majority of the members of such Judicial Committee present at the hearing shall concur in such report or recommendation: Provided always, that nothing herein contained shall prevent His Majesty, if he shall think fit, from summoning any other of the members of his said Privy Council to attend the meetings of the said Committee.

In case the King directs the attendance of any Judge, a member of the Committee, the other Judges of the Court to which he belongs to make arrangements with regard to the business of the Court.

VI. And be it further enacted, that in case His Majesty shall be pleased, by directions under his sign manual, to require the attendance at the said Committee for the purposes of this Act of any members of the said Privy Council who shall be a Judge or Judges of the Court of King's Bench, or of the Court of Common Pleas, or of the Court of Exchequer, such arrangements for dispensing with the attendance of such Judge or Judges upon his or their ordinary duties during the time of such attendance at the Privy Council as aforesaid, shall be made by the Judges of the Court or Courts to which such Judge or Judges shall belong respectively, in regard to the business of the Court, and by the Judges of the said three Courts, or by any eight or more of such Judges, including the chiefs of the several Courts, in regard to all other duties, as may be necessary and consistent with the public service.

Evidence may be taken *vivâ voce*, or upon written depositions.

VII. And be it enacted, that it shall be lawful for the said Judicial Committee in any matter which shall be referred to such Committee, to examine witnesses by word of mouth (and either before or after examination by deposition), or to direct that the depositions of any witness shall be taken in writing by the Registrar of the said Privy Council, to be appointed by His Majesty as hereinafter mentioned, or by such other person or persons, and in such manner, order, and course as His Majesty in Council or the said Judicial Committee shall appoint and direct: and that the said Registrar and such other person or persons so to be appointed shall have the same powers as are now possessed by an Examiner of the High Court of Chancery or of any Court Eclesiastical.

Committee may order any particular witnesses to be examined, and as to any particular facts, and may remit causes for re-hearing.

VIII. And be it enacted, that in any matter which shall come before the said Judicial Committee, it shall be lawful for the said Committee to direct that such witnesses shall be examined or re-examined, and as to such facts as to the said Committee shall seem fit, notwithstanding any such witness may not have been examined, or no evidence may have been given on any such facts in a previous stage of the matter; and it shall also be lawful for His Majesty in Council, on the recommendation of the said Committee, upon any appeal to remit the matter which shall be the subject of such appeal to the Court from the decision of which such appeal shall have been made, and at the same time to direct that such Court shall re-hear such matter, in such form, and either generally or upon certain points only, and upon such re-hearing take such additional evidence, though before rejected, or reject such evidence before admitted, as His Majesty in Council shall direct; and further, on any such remitting or otherwise, it shall be lawful for His Majesty in Council to direct that one or more feigned issue or issues shall be tried in any Court in any of His Majesty's dominions abroad, for any purpose for which such issue or issues shall to His Majesty in Council seem proper.

Witnesses to be examined on oath and to be liable to punishment for perjury.

IX. And be it enacted, that every witness who shall be examined in pursuance of this Act shall give his or her evidence upon oath, or if a Quaker or Moravian upon solemn affirmation, which oath and affirmation, respectively, shall be administered by the said Judicial Committee and Registrar, and by such other person or persons as His Majesty in Council or the said Judicial Committee shall appoint; and that every such witness who shall wilfully swear or affirm falsely shall be deemed guilty of perjury and shall be punished accordingly.

Committee may direct an issue to try any fact.

X. And be it enacted, that it shall be lawful for the said Judicial Committee to direct one or more feigned issue or issues to be tried in any Court of Common Law, and either at bar, before a Judge of Assize, or at the sittings for the trial of issues in London or Middlesex, and either by a special or common jury, in like manner and for the same purpose as is now done by the High Court of Chancery.

May, in certain cases, direct depositions to be read at the trial of the issue.

XI. And be it enacted, that it shall be in the discretion of the said Judicial Committee to direct that, on the trial of any such issue, the depositions already taken of any witness who shall have died, or who shall be incapable to give oral testimony, shall be received in evidence; and further, that such deeds, evidences, and writings shall be produced, and that such facts shall be admitted, as to the said Committee shall seem fit.

May make such orders as to the admission of evidence as are made by the Court of Chancery.

XII. And be it enacted, that it shall be lawful for the said Judicial Committee to make such and the like orders respecting the admission of persons, whether parties or others, to be examined as witnesses upon the trial of any such issues as aforesaid, as the Lord High Chancellor or the Court of Chancery has been used to make respecting the admission of witnesses upon the trial of issues directed by the Lord Chancellor or the Court of Chancery.

And may direct new trials of issues.

XIII. And be it enacted, that it shall be lawful for the said Judicial Committee to direct one or more new trial or new trials of any issue, either generally or upon certain points only; and that in case any witness examined at a former trial of the same issue shall have died, or have, through bodily or mental disease or infirmity, become incapable to repeat his testimony, it shall be lawful for the said Committee to direct that parol evidence of the testimony of such witness shall be received.

Powers, &c., of 13 Geo. III, c. 63; and 1 Will. IV, c. 22, with regard to examination of witnesses, applied to the Judicial Committee.

XIV. And whereas, by An Act passed in the thirteenth year of His late Majesty King George the Third, and intituled "An Act for establishing certain Regulations for the better management of the affairs of the East India Company, as well in India as in Europe," and by an Act passed in the first year of the reign of His present Majesty, and intituled "An Act to enable the Courts of Law to order the examination of witnesses upon interrogatories and otherwise," certain powers are given to certain Courts therein mentioned to enforce, and provisions are made for the examination of witnesses by commission, upon interrogatories and otherwise; be it therefore further enacted that all the powers and provisions contained in the two last-mentioned Acts, or either of them, shall extend to and be exercised by the said Judicial Committee in all respects as if such Committee had been therein named as one of His Majesty's Court of Law at Westminster.

Costs to be in the discretion of the Committee.

XV. And be it enacted, that the costs incurred in the prosecution of any appeal or matter referred to the said Judicial Committee, and of such issues as the same Committee shall under this Act direct, shall be paid by such party or parties, person or persons, and be taxed by the aforesaid Registrar, or such other person or persons, to be appointed by His Majesty in Council or the said Judicial Committee, and in such manner as the said Committee shall direct.

Decrees to be enrolled.

XVI. And be it further enacted, that the orders or decrees of His Majesty in Council made in pursuance of any recommendation of the said Judicial Committee in any matter of appeal from the judgment or order of any Court or Judge shall be enrolled, for safe custody, in such manner, and the same may be inspected and copies thereof taken under such regulations, as His Majesty in Council shall direct.

Committee may refer matters to Registrar in the same manner as matters are by Court of Chancery referred to a Master.

XVII. And be it further enacted, that it shall be lawful for the said Committee to refer any matters to be examined and reported on to the aforesaid Registrar, or to such other person or persons as shall be appointed by His Majesty in Council or by the said Judicial Committee, in the same manner and for the like purposes as matters are referred by the Court of Chancery to a Master of the said Court; and that for the purposes of this Act the said Registrar and the said person or persons so to be appointed shall have the same powers and authorities as are now possessed by a Master in Chancery.

The King may appoint Registrar.

XVIII. And be it further enacted, that it shall be lawful for His Majesty, under his sign manual, to appoint any person to be the Registrar of the said Privy Council as regards the purposes of this Act, and to direct what duties shall be performed by the said Registrar.

Attendance of witnesses, and production of papers, &c., may be compelled by *subpœna*.

XIX. And be it further enacted, that it shall be lawful for the President for the time being of the said Privy Council to require the attendance of any witnesses, and the production of any deeds, evidences, or writings by writ to be issued by such President in such and the same form, or as nearly as may be, as that in which a writ of *subpœna ad testificandum* or of *subpœna duces tecum* is now issued by His Majesty's Court of King's Bench at Westminister: and that every person disobeying any such writ so to be issued by the said President shall be considered as in contempt of the said Judicial Committee, and shall also be liable to such and the same penalties and consequences as if such writ had issued out of the said Court of King's Bench, and may be sued for such penalties in the said Court.

Time of appealing.

XX. And be it further enacted, that all appeals to His Majesty in Council shall be made within such times respectively within which the same may now be made, where such time shall be fixed by any law or usage, and where no such law or usage shall exist, then within such time as shall be ordered by His Majesty in Council; and that subject to any right subsisting under any Charter or Constitution of any colony or plantation, it shall be lawful for His Majesty in Council to alter any usage as to the time of making appeals, and to make any order respecting the time of appealing to His Majesty in Council.

Decrees for Courts abroad to be carried into effect as the King in Council shall direct.

XXI. And be it further enacted, that the order of decree of His Majesty in Council on any appeal from the order, sentence, or decree of any Court of Justice in the East Indies, or of any colony, plantation, or other His Majesty's dominions abroad, shall be carried into effect in such manner, and subject to such limitations and conditions as His Majesty in Council shall on the recommendation of the said Judicial Committee direct; and it shall be lawful for His Majesty in Council, on such recommendation, by order, to direct that such Court of Justice shall carry the same into effect accordingly, and thereupon such Court of Justice shall have the same powers of carrying into effect and enforcing such order or decree as are possessed by, or are hereby given to, His Majesty in Council: Provided always, that nothing in this Act contained shall impeach or abridge the powers, jurisdiction, or authority of His Majesty's Privy Council as heretofore exercised by such Council, or in anywise alter the constitution or duties of the said Privy Council, except so far as the same are expressly altered by this Act, and for the purposes aforesaid.

Act not to abridge powers of Privy Council.

His Majesty may direct the East India Company to bring on appeals from the Sudder Dewanny Adawlut Courts to a hearing.

XXII. And whereas various appeals to His Majesty in Council from the Courts of Sudder Dewanny Adawlut at the several Presidencies of Calcutta Madras, and Bombay in the East Indies have been admitted by the said Courts, and the transcripts of the proceedings in appeal have been from time to time transmitted under the seal of the said Courts through the United Company of Merchants in England trading to the East Indies to the office of His Majesty's said Privy Council, but the suitors in the causes so appealed have not taken the necessary measures to bring on the same to a hearing; be it therefore further enacted by the authority aforesaid, that it shall be lawful for His Majesty in Council to give such directions to the said United Company and other persons for the purpose of bringing to a hearing before the said Committee the several cases appealed or hereafter to be appealed to His Majesty in Council from the several Courts of Sudder Dewanny Adawlut in the East Indies, and for appointing agents and counsel for the different parties in such appeals, and to make such orders for security and payment of the costs thereof as His said Majesty in Council shall think fit; and thereupon such appeals shall be heard and reported on to His Majesty in Council, and shall be by His Majesty in Council determined in the same manner, and judgments, orders, and decrees of His Majesty in Council thereon shall be of the same force and effect as if the same had been brought to a hearing by the direction of the parties appealing in the usual course of proceeding: Provided always, that such last mentioned powers shall not extend to any appeals from the said Courts of Sudder Dewanny Adawlut other than appeals in which no proceedings have been or shall hereafter be taken in England on either side for a period of two years subsequent to the admission of the appeal by such Court of Sudder Dewanny Adawlut.

Orders made on such appeals to have effect notwithstanding death of parties, &c.

XXIII. And be it enacted, that in any case where any order shall have been made on any such appeal as last aforesaid, the same shall have full force and effect notwithstanding the death of any of the parties interested therein; but that in all cases where any such appeal may have been withdrawn or discon-

tinued, or any compromise made, in respect of the matter in dispute, before the hearing thereof, then the determination of His Majesty in Council in respect of such appeal shall have no effect.

His Majesty empowered to make orders for regulating the mode, &c., of such appeals.

XXIV. And be it further enacted, that it shall be lawful for His Majesty in Council from time to time to make any such rules and orders as may be thought fit for the regulating the mode, form, and time of appeal to be made from the decisions of the said Courts of Sudder Dewanny Adawlut or any other Courts of Judicature in India or elsewhere to the eastward of the Cape of Good Hope (from the decisions of which an appeal lies to His Majesty in Council), and in like manner from time to time to make such other regulations for the preventing delays in the making or hearing such appeals, and as to the expenses attending the said appeals, and as to the amount or value of the property in respect of which any such appeal may be made.

His Majesty empowered to appoint one of the Barons of the Court of Exchequer to sit in Equity in the absence of the Chief Baron.

XXV. And whereas by an Act of Parliament passed in the fifty-seventh year of the reign of His Majesty King George the Third, intituled "An Act to facilitate the hearing and determining of suits in Equity in His Majesty's Court of Exchequer at Westminster," it was enacted that the Lord Chief Baron of the said Court for the time being should have power to hear and determine all causes, matters, and things which should be at any time depending in the said Court of Exchequer as a Court of Equity, and that if the said Lord Chief Baron of the Court of Exchequer should by sickness or any other unavoidable cause be prevented from sitting on the Equity Side of the said Court for the purposes in the said Act mentioned, then it should and might be lawful for His Majesty and his successors to nominate and appoint from time to time by warrant under the royal sign manual, revocable at pleasure, any one other of the Barons of the degree of the coif of the said Court for the time being to hear and determine the causes, matters, and things in the said Act mentioned: And whereas by reason of the great increase of business on the Common Law or Plea Side of the said Court of Exchequer, the Lord Chief Baron is prevented from giving so much time as heretofore to the sittings on the Equity Side of the said Court, and the sittings on such Equity Side of the said Court being necessarily suspended during the absence of the Lord Chief Baron, great inconvenience is hereby sustained by the suitors and practitioners on the Equity Side of the said Court: And whereas the Lord Chief Baron may by this Act become liable to the performance of other additional duties unconnected with the said Court of Exchequer, and it is desirable that the said Court of Exchequer should sit as a Court of Equity without any unnecessary interruption, for the purpose of hearing and determining causes, matters, and things depending in the said Court as a Court of Equity: And whereas doubts have arisen whether or not the above recited Act extends to cases of the Lord Chief Baron being prevented from sitting by the performance of judicial duties elsewhere;—be it therefore declared and enacted that it shall and may be lawful for His Majesty and his successors to nominate and appoint from time to time by warrant under the royal sign manual, revocable at pleasure, any one of the Barons of the degree of the coif of said Court for the time being to hear and determine (on such days as the Lord Chief

Baron of the said Court shall sit on the Common Law Side of the said Court during the term, or shall preside at the sittings at *nisi prius* in London or Middlesex after the the term, or shall attend at the Judicial Committee of His Majesty's Privy Council under the provisions of this Act) all causes, matters, and things which shall at any time be depending in the said Court of Exchequer as a Court of Equity.

Two Judges of the Court of Bankruptcy to act for the Chief Judge of the Court of Review during his attendance at the said Judicial Committee.

XXVI. And be it further enacted, that during the absence of the Chief Judge in Bankruptcy from the Court of Review established by virtue of an Act passed in the first and second years of His present Majesty, intituled "An Act to establish a Court in Bankruptcy," by reason of his attendance at the said Judicial Committee by virtue of this Act, any two Judges of the said Court shall and may form a Court of Review in Bankruptcy, and shall and may make, do, and execute all orders, acts, matters, powers, and things whatsoever which by virtue of the said Act the Judges of the said Court or any three of them are authorized to make, do, or execute, and in all respects whatsover as if three of the Judges were present, except that nothing herein contained shall authorize any two Judges of the said Court to hear and determine any matter brought under the review of the said Court by way of appeal from the determination or decision of any Commissioner or sub-division Court appointed by virtue of of the said Act.

Powers of Act 53 Geo. III extended to this Act.

XXVII. And be it further enacted, that all the clauses and provisions contained in the said Act of Parliament which relate to the Baron nominated and appointed under that Act, shall apply and be extended to the Baron nominated and appointed under the authority of this Act.

Power of enforcing decrees.

XXVIII. And be it enacted, that the said Judicial Committee shall have and enjoy in all respects such and the same power of punishing contempts and of compelling appearances, and that His Majesty in Council shall have and enjoy in all respects such and the same powers of enforcing judgments, decrees, and orders as are now exercised by the High Court of Chancery or the Court of King's Bench (and both *in personam* and *in rem)*, or as are given to any Court Ecclesiastical by an Act of Parliament passed in a Session of Parliament of the second and third years of the reign of His present Majesty, intituled "An Act for enforcing the process upon contempts in the Courts Ecclesiastical of England and Ireland;" and that all such powers as are given to Courts Ecclesiastical, if of punishing contempts or of compelling appearances, shall be exercised by the said Judicial Committee, and if of enforcing decrees and orders, shall be exercised by His Majesty in Council, in such and the same manner as the powers in and by such Act of Parliament given, and shall be of as much force and effect as if the same had been thereby expressly given to the said Committee or to His Majesty in Council.

2 & 3 Will. IV, c. 93,

Registrar of Court of Admiralty may attend the said Judicial Committee.

XXIX. And be it further enacted, that, subject to such orders as His Majesty in Council shall from time to time make, it shall be lawful for the present Registrar of the High Court of Admiralty, if he shall so think fit, either in person or by deputy, to attend the

hearing by the said Judicial Committee of all causes and appeals which, but for this Act or the said last-mentioned Act, would have been heard by any Court or Commission which such Registrar was entitled to attend, in person or by deputy, by virtue of his offices of Registrar of High Courts of Admiralty, Delegates and Appeals for Prizes, and likewise, subject to any order of His Majesty in Council, to transact, perform, and do all acts, matters and things that shall be found necessary, or have heretofore been done by the said Registrar or his deputies in respect of such causes and appeals.

Retired Judges attending the Judicial Committee to receive an allowance.

XXX. And be it enacted, that two members of His Majesty's Privy Council who shall have held the office of Judge in the East Indies or any of His Majesty's dominions beyond the seas, and who, being appointed for that purpose by His Majesty shall attend the sittings of the Judicial Committee of the Privy Council, shall severally be entitled to receive over and above any annuity granted to them in respect of having held such office as aforesaid, the sum of four hundred pounds for every year during which they shall so attend as aforesaid, as an indemnity for the expense which they may thereby incur, and such sum of four hundred pounds shall be chargeable upon and paid out of the consolidated fund of the United Kingdom of Great Britain and Ireland.

Nothing herein shall prevent the King's acceding to treaties appointing certain persons to hear prize appeals.

XXXI. Provided always, and be it enacted, that nothing herein contained shall be held to impeach or render void any treaty or engagement already entered into by or on behalf of His Majesty, or be taken to restrain His Majesty from acceding to any treaty with any foreign prince, potentate, or power, in which treaty it shall be stipulated that any person or persons other than the said Judicial Committee shall hear and finally adjudicate appeals from His Majesty's Court of Admiralty in causes of prize, but that the judgments, decrees, and orders of such other person or persons so appointed by treaty shall be of the same force and effect of which they would respectively have been if this Act had not been passed.

VI & VII VICTORIA, CAP. 38.

An Act to make further regulations for facilitating the hearing Appeals and other Matters by the Judicial Committee of the Privy Council.

[28th July, 1843.]

WHEREAS it has been found expedient to make further regulations for hearing and making report to Her Majesty in appeals and other matters referred to the Judicial Committee of the Privy Council, and for the more effectual appointment of Surrogates in ecclesiastical and maritime causes of appeal, and for making orders or decrees incidental to such causes of appeal, and for the punishment of contempts, and compelling appearances and enforcement of judgments, orders, and decrees of Her Majesty in Council, or of the said Judicial Committee, or their Surrogates, in such causes of appeal; be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, that in any appeal, application for prolongation or

confirmation of Letters Patent, or other matter referred or hereafter to be referred by Her Majesty in Council to the Judicial Committee of the Privy Council, it shall be lawful for Her Majesty by order in Council or special direction under Her royal sign manual, having regard to the nature of the said appeal or other matter, and in respect of the same not requiring the presence of more than three members of the said Committee, to order that the same be heard, and when so ordered it shall be lawful that the same shall be accordingly heard by not less than three of the members of the said Judicial Committee, subject to such other rules as are applicable, or under this Act may be applicable, to the hearing and making report on appeals and other matters by four or more of the members of the said Judicial Committee.

Appeals, &c., may be heard by not less than three members of the Judicial Committee of the Privy Council under a special order of Her Majesty.

II. And be it enacted, that in respect of all incidents, emergents, dependents, and things adjoined to, arising out of, or connected with appeals from any Ecclesiastical Court, or from any Admiralty or Vice-Admiralty Court (save in giving a definitive sentence, or any interlocutory decree having the force and effect of a definitive sentence), the said Judicial Committee and their Surrogates shall have full power, subject to such rules, orders, and regulations as shall from time to time be made by the said Judicial Committee (with the approval of Her Majesty in Council), to make all such interlocutory orders and decrees, and to administer all such oaths and affirmations, and to do all such things as may be necessary, or the Judges of the Courts below appealed from or their Surrogates in the cases appealed, or the Judges of Courts appealed to or their Surrogates, or the Lords Commissioners of Appeals in prize causes or their Surrogates, and the Judges delegate or their condelegates under commissions of appeal under the Great Seal in ecclesiastical and maritime causes of appeal, would respectively have had before an Act passed in the third year of the reign of His late Majesty, intituled "An Act for transferring the powers of the High Court of Delegates, both in ecclesiastical and maritime causes, to His Majesty in Council," another Act passed in the following Session of Parliament, intituled "An Act for the better administration of justice in His Majesty's Privy Council," were passed.

Powers of the Judicial Committe and their Surrogates in respect to appeals from Ecclesiastical and Admiralty Courts.

2 & 3 Will. IV, c. 92.

3 & 4 Will. IV, c. 41.

III. And be it enacted that the Surrogates and Examiners of the Arches Court of Canterbury and the High Court of Admiralty of England, and such persons as shall from time to time be appointed Surrogates or Examiners of the said Courts, shall be by virtue of this Act Surrogates and Examiners respectively of the Judicial Committee of the Privy Council in all causes of appeal from Ecclesiastical Courts and from any Admiralty or Vice-Admiralty Court.

Who to be Surrogates and Examiners of the Judicial Committee in Ecclesiastical and Admiralty appeals.

IV. And be it enacted, that all orders, decrees, and things heretofore done and expedited in such causes of appeal by the Surrogates appointed by the said Judicial Committee of the Privy Council shall be deemed to be valid and effectual, if otherwise lawfully done and expedited, notwithstanding any informality or want of authority in respect to the same in the orders of His late Majesty

Past proceedings of Surrogates of the Judicial Committee valid notwithstanding certain informalities.

in Council of the fourth day of February, one thousand eight hundred and thirty-three, of the said Judicial Committee of the fifth day of February, one thousand eight hundred and thirty-three, of the order of His late Majesty in Council of the ninth day of December, one thousand eight hundred and thirty-three, of an order of said Judicial Committee of the tenth day of December, one thousand eight hundred and thirty-three, and an order of His late Majesty in Council of the twelfth day of August, one thousand eight hundred and thirty-five.

Manner of conducting appeals before the Judicial Committee.

V. And be it enacted, that, subject to such rules and regulations as may from time to time be made by the said Judicial Committee with the approval of Her Majesty in Council, and save and in so much as the practice thereof may be varied by the said Acts of the reign of His late Majesty or by this Act, the said causes of appeal to Her Majesty in Council shall be commenced within the same times, and conducted in the same form and manner, and by the same persons and officers, as if appeals in the same causes had been made to the Queen in Chancery, the High Court of Admiralty of England, of the Lords Commissioners of Appeals in Prize Causes respectively; and all things otherwise lawfully done and expedited in the said causes of appeal by the Registrar of the High Court of Admiralty of England, his deputy or deputies, in consequence of the passing of said Acts of the reign of His late Majesty, shall be deemed to be valid to all intents whatsoever.

So much of 2 and 3 Will. IV, c. 93, as empowers the Judicial Committee and His Majesty in Council to punish contempts, &c., repealed.

VI. And whereas by the provisions of the hereinbefore secondly recited Act it was enacted that the said Judicial Committee should have and enjoy in all respects such and the same power of punishing contempts and of compelling appearances, and that His Majesty in Council should have and enjoy in all respects such and the same powers of enforcing judgments, decrees, and orders (both *in personam* and *in rem*), as are given to any Court Ecclesiastical by an Act of Parliament passed in a Session of Parliament of the second and third years of the reign of His Majesty King William the Fourth, intituled "An Act for enforcing the Process upon contempts in the Courts Ecclesiastical of England and Ireland," and that all such powers as are given to Courts Ecclesiastical if of punishing contempts or of compelling appearances, should be exercised by the said Judicial Committee, and if of enforcing decrees and orders, should be exercised by His Majesty in Council, in such and the same manner as the powers in and by such Act of Parliament given, and should be of as much force and effect as if the same had been thereby expressly given to the said Committee or to His Majesty in Council; be it enacted, that so much of the said Act as relates to the powers thereby given to the said Judicial Committee and to His Majesty in Council under the last recited Act, shall be repealed.

Punishing contempts, compelling appearances, enforcing judgments, &c., in causes of appeal.

VII. And be it enacted, that for better punishing contempts, compelling appearances, and enforcing judgments of Her Majesty in Council, and all orders and decrees of the said Judicial Committee or their Surrogates, in all causes of appeal from Ecclesiastical Courts and from Admiralty or Vice-Admiralty Courts, Her Majesty in Council and the said Judicial Committee and their Surrogates shall have the same powers by attachment and committal of the person to any of Her Majesty's

gaols and subsequent discharge of any person so committed, as by any statute, custom, or usage belong to the Judge of the High Court of Admiralty of England; and the said Judicial Committee shall have the same immunities and privileges as are conferred on the Judge of the High Court of Admiralty of England under an Act passed in the fourth year of the reign of Her Majesty, intituled "An Act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England," as fully as if the same had been thereby expressly given to the said Judicial Committee.

3 & 4 Vict., c. 65.

VIII. And be it enacted, that in all causes of appeal to Her Majesty in Council from Ecclesiastical Courts, and from Admiralty or Vice-Admiralty Courts in which any person duly monished or cited or required to comply with any lawful order or decree of Her Majesty in Council, or of the said Judicial Committee or their Surrogates, and neglecting or refusing to pay obedience to such lawful order or decree, or committing any contempt of the process under the seal of Her Majesty in ecclesiastical and maritime causes, shall reside out of the dominions of Her Majesty, or shall have privilege of peerage, or shall be a Lord of Parliament or a Member of the House of Commons, it shall be lawful for the said Judicial Committee or their Surrogates to pronounce such person to be contumacious and in contempt, and after he shall have been so pronounced contumacious and in contempt, to cause process of sequestration to issue under the said seal of Her Majesty against the real and personal estate, goods, chattels, and effects, wheresoever lying within the dominions of Her Majesty, of the person against or upon whom such order or decree shall have been made, in order to enforce obedience to the same, and payment of the expenses attending such sequestration, and all proceedings consequent thereon, and to make such further order in respect of or consequent on such sequestration, and in respect to such real and personal estate, goods, chattels, and effects sequestrated thereby, as may be necessary, or for payment of monies arising from the same to the person to whom the same may be due, or into the Registry of the High Court of Admiralty and Appeals for the benefit of these who may be ultimately entitled thereto.

Orders, &c., may be enforced by sequestration against certain persons pronounced contumacious and in contempt.

IX. And be it enacted, that all inhibitions, citations, monitions, and other instruments incidental to or arising out of such causes of appeal shall be issued in the name of Her Majesty, and under seal of Her Majesty in ecclesiastical and maritime causes, and shall be of full authority in all places throughout the dominions of Her Majesty.

Inhibitions, &c., to be in Her Majesty's name, and of force throughout the British dominions.

X. And be it enacted, that in all appeals in ecclesiastical and maritime causes to Her Majesty in Council, it shall be lawful for Her Majesty in Council and the said Judicial Committee or their Surrogates, at the petition of any person interested in the same, to decree monitions for the transmission of any sum or sums of money, respecting which any order or decree may be made or any questions may be depending arising out of such causes, and the proceeds of all ships or vessels, goods, and cargoes, respecting which any appeals may be depending into the registry of the High Court of Admiralty and Appeals, for the benefit of the person or persons who may be ultimately entitled thereto, or for payment thereof to the person to whom the same may be lawfully due.

Monitions for payments into the registry of the Admiralty Court under orders, &c.

All appeals from Ecclesiastical and Admiralty Courts may be referred to the Judicial Committee by an order in Council.

XI. And be it enacted, that it shall be lawful for Her Majesty, by order in Council, to direct that all causes of appeal from Ecclesiastical Courts, and from the Vice-Admiralty Court of the Cape of Good Hope, and all Vice-Admiralty Courts to the westward thereof, in which the appeal and petition of reference to Her Majesty shall have been lodged in the registry of the High Court of Admiralty and Appeals within twelve calendar months from the giving or pronouncing of any order, decree, or sentence appealed from, and all causes of appeal from Vice-Admiralty Courts to the eastward of the Cape of Good Hope, in which the appeal and petition of reference to Her Majesty shall have been lodged in the registry of the High Court of Admiralty and Appeals within eighteen calendar months from the giving or pronouncing any order, decree, or sentence appealed from, shall be referred to the Judicial Committee of the Privy Council, and the said Judicial Committee and their Surrogates shall have full power forthwith to proceed in the said appeals, and the usual inhibition and citation shall be decreed and issued, and all usual proceedings taken as if the same had been referred to the said Judicial Committee by a special order of Her Majesty in Council in each cause respectively.

Costs may be awarded by the Judicial Committee and taxed.

XII. And be it declared and enacted, that as well the costs of defending any decree or sentence appealed from as of prosecuting any appeal, or in any manner intervening in any cause of appeal, and the costs on either side, or of any party, in the Court below, and the costs of opposing any matter which shall be referred to the said Judicial Committee, and the costs of all such issues as shall be tried by direction of the said Judicial Committee respecting any such appeal or matter, shall be paid by such party or parties, person or persons as the said Judicial Committee shall order, and that such costs shall be taxed as in and by the said Act for the better administration of justice in the Privy Council is directed respecting the costs of prosecuting any appeal or matter referred by Her Majesty under the authority of the said Act, save the costs arising out of any ecclesiastical or maritime cause of appeal, which shall be taxed by the Registrar hereinafter named, or his Assistant Registrar.

Appointment of Registrar and Assistant Registrar in ecclesiastical and maritime causes.
3 & 4 Vict., c. 66.

XIII. And be it enacted, that the Registrar of the High Court of Admiralty of England for the time being may be appointed by Her Majesty to be Registrar of Her Majesty in ecclesiastical and maritime causes, and shall have powers to appoint an Assistant Registrar as provided by an Act passed in the fourth year of the reign of Her Majesty, intituled "An Act to make provision for the Judge, Registrar, and Marshal of the High Court of Admiralty of England," and shall during his good behaviour, and while he shall be Registrar of the said High Court of Admiralty, hold his office of Registrar of Her Majesty in ecclesiastical and maritime causes, and shall do all such things, and shall have the same powers and privileges in respect to the same as belong to his predecessors in the office of Registrar of Her Majesty in ecclesiastical and maritime causes.

Custody of records, &c., of the Court of Delegates and Appeals.

XIV. And be it enacted, that all records, muniments, books, papers, wills, and other documents remaining in the registry of the High Court of Admiralty and Appeals, appertaining to the late High Court of

Delegates and Appeals for Prizes, shall be and remain in the custody and possession of the said Registrar of Her Majesty in ecclesiastical and maritime causes.

Judicial Committee empowered to make rules, &c., respecting practice and mode of proceeding in appeals, &c.

XV. And be it enacted, that it shall be lawful for the said Judicial Committee from time to time to make such rules, orders, and regulations respecting the practice and mode of proceeding in all appeals from Ecclesiastical and Admiralty and Vice-Admiralty Courts, and the conduct and duties of the officers and practitioners therein, and to appoint such officer or officers as may be necessary for the execution of processes under the said seal of Her Majesty, and in respect to all appeals and other matters referred to them, as to them shall seem fit, and from time to time to repeal or alter such rules, orders, or regulations: Provided always, that no such rules, orders, or regulations shall be of any force or effect until the same shall have been approved by Her Majesty in Council.

Proviso.

Judicial Committee of Privy Council to proceed with causes depending before late High Court of Delegates.

XVI. And whereas in certain causes which were depending before the late High Court of Delegates, certain decrees or orders were made and interposed, and are not yet fully carried into effect: and whereas, in consequence of the death of the Judges Delegate, or some of them named in the several commissions under the Great Seal, such decrees or orders cannot be carried into effect; be it enacted that all such causes of appeal and complaint which were depending before the High Court of Delegates, and in which any decree, order, or thing, for the reason lastly hereinbefore mentioned, is outstanding, and not fully ended and determined, shall be transferred to the Judicial Committee of the Privy Council; and the said Judicial Committee shall take up and proceed with the said causes in the same manner as if the same had been originally causes of appeal and complaint depending before the said Judicial Committee.

Definition of terms.

XVII. And be it enacted, that in this Act all words denoting a male person shall be taken to include a female also, and all words denoting one person or thing shall be taken to include also several persons or things, unless a contrary sense shall clearly appear from the context; and that the words "Arches Court of Canterbury," used in this Act, shall be construed to extend to such Court as shall exercise the jurisdiction of the said Court or be substituted for the same; and that wherever the words "Ecclesiastical Court" have been used in this Act, the same shall be construed to extend to such Court as shall exercise the jurisdiction or any part of the jurisdiction exercised by any Ecclesiastical Court or be substituted for the same; and the words "ecclesiastical and maritime cause of appeal" shall be construed to extend to causes appealed from Ecclesiastical Courts and such Courts as shall exercise the jurisdiction or any part of the jurisdiction exercised by any Ecclesiastical Court or be substituted for the same.

VII & VIII VICTORIA, CAP. 69.

An Act for amending an Act passed in the fourth year of the reign of His late Majesty, intituled "An Act for the better administration of Justice in His Majesty's Privy Council; and to extend its Jurisdiction and Powers."

[6th August, 1844.]

WHEREAS the Act passed in the fourth year of the reign of His late Majesty, intituled "An Act for the better administration of Justice in His Majesty's Privy Council," hath been found beneficial to the due administration of justice: and whereas another Act passed in the sixth year of the said reign, intituled "An Act to amend the law touching Letters Patent for Inventions," hath been also found advantageous to inventors and to the public: and whereas the Judicial Committee acting under the authority of the said Acts hath been found to answer well the purposes for which it was so established by Parliament, but it is found necessary to improve its proceedings in some respects for the better despatch of business, and expedient also to extend its jurisdiction and powers: and whereas by the laws now in force in certain of Her Majesty's colonies and possessions abroad no appeals can be brought to Her Majesty in Council for the reversal of the judgments, sentences, decrees, and orders of any Courts of Justice within such colonies save only of the Courts of Error or Courts of Appeal within the same, and it is expedient that Her Majesty in Council should be authorized to provide for the admission of appeals from other Courts of Justice within such colonies or possessions: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, that it shall be competent to Her Majesty, by any order or orders to be from time to time for that purpose made with the advice of her Privy Council, to provide for the admission of any appeal or appeals to Her Majesty Council, from any judgments, sentences, decrees, or orders of any Court of Justice within any British colony or possession abroad, although such Court shall not be a Court of Error or a Court of Appeal within such colony or possession; and it shall also be competent to Her Majesty, by any such order or orders as aforesaid, to make all such provisions as to Her Majesty in Council shall seem meet for the instituting and prosecuting any such appeals, and for carrying into effect any such decisions or sentences as Her Majesty in Council shall pronounce thereon: Provided always, that it shall be competent to Her Majesty in Council to revoke, alter, and amend any such order or orders as aforesaid as to Her Majesty in Council shall seem meet: Provided also, that any such order as aforesaid may be either general and extending to all appeals to be brought from any such Court of Justice as aforesaid, or special, and extending only to any appeal to be brought in any particular case: Provided also that every such general order in Council as aforesaid shall be published in the

3 & 4 Will. IV, c. 41.

5 & 6 Will. IV, c. 83.

Her Majesty, by order in Council, may provide for the admission of an appeal from any colony, although there shall not be a Court of Error or of Appeal in such colony; and may revoke such orders.

Orders may be either general or special.

General orders to be published.

Nothing herein to affect the present powers for regulating appeals from the colonies.

London Gazette within one calendar month next after the making thereof: Provided also, that nothing herein contained shall be construed to extend to take away or diminish any power now by law vested in Her Majesty for regulating appeals to Her Majesty in Council from the judgments, sentences, decrees, or orders of any Courts of Justice within any of Her Majesty's colonies or possessions abroad.

On petition, Her Majesty may grant an extension of patent term in certain cases.

II. And whereas it is expedient, for the further encouragement of inventions in the useful arts, to enable the time of monopoly in patents to be extended in cases in which it can be satisfactorily shown that the expense of the invention hath been greater than the time now limited by law will suffice to reimburse; be it enacted, that if any person, having obtained a patent for any invention, shall, before the expiration thereof, present a petition to Her Majesty in Council setting forth that he has been unable to obtain a due remuneration for his expense and labour in perfecting such invention, and that an exclusive right of using and vending the same for the further period of seven years, in addition to the term in such patent mentioned, will not suffice for his reimbursement and remuneration, then, if the matter of such petition shall be by Her Majesty referred to the Judicial Committee of the Privy Council, the said Committee shall proceed to consider the same after the manner and in the usual course of its proceedings touching patents, and if the said Committee shall be of opinion, and shall so report to Her Majesty, that a further period greater than seven years' extension of the patent term ought to be granted to the petitioner, it shall be lawful for Her Majesty, if shes hall so think fit, to grant an extension thereof for any time not exceeding fourteen years, in like manner and subject to the same rules as the extension for a term not exceeding seven years is now granted under the powers of the said Act of the sixth year of the reign of His late Majesty.

Her Majesty may grant extension of a lesser term than that prayed.

III. Provided always, and be it enacted, that nothing herein contained shall prevent the said Judicial Committee from reporting that an extension for any period not exceeding seven years should be granted, or prevent Her Majesty from granting an extension for such lesser term than the petition shall have prayed.

As to extension of term where patentees have assigned their patent rights.

IV. And whereas doubts have arisen touching the power given by the said recited Act of the sixth year of the reign of His late Majesty in cases where the patentees have wholly or in part assigned their right; be it enacted, that it shall be lawful for Her Majesty, on the report of the Judicial Committee, to grant such extension as is authorized by the said Act and by this Act, either to an assignee or assignees, or to the original patentee or patentees or to an assignee or assignees and original patentee or patentees conjointly.

Disclaimer and memorandum of alteration under 5 & 6 Will. IV, c. 83, may be made notwithstanding original patentee may have assigned his patent right.

V. And be it enacted, that in case the original patentee or patentees hath or have departed with his or their whole or any part of his or their interest by assignment to any other person or persons, it shall be lawful for such patentee, together with such assignee or assignees if part only hath been assigned, and for the assignee or assignees if the whole

hath been assigned, to enter a disclaimer and memorandum of alteration under the powers of the said recited Act; and such disclaimer and memorandum of such alteration, having been so entered and filed as in the said recited Act mentioned, shall be valid and effectual in favour of any person or persons in whom the rights under the said Letters Patent may then be or thereafter become legally vested; and no objection shall be made in any proceeding whatsoever on the ground that the party making such disclaimer or memorandum of such alteration had not sufficient authority in that behalf.

Disclaimer and memorandum of alteration already made to be deemed valid.

VI. And be it enacted, that any disclaimer or memorandum of alteration before the passing of this Act, or by virtue of the said recited Act, by such patentee with such assignee or by such assignee as aforesaid, shall be valid and effectual to bind any person or persons in whom the said Letters Patent might then be or have since become vested; and no objection shall be made in any proceeding whatsoever that the party making such disclaimer or memorandum of alteration had not authority in that behalf.

New Letters Patent granted, under 5 and 6 Will. IV, to assignees before passing of this Act, declared valid.

VII. And be it enacted, that any new Letters Patent which before the passing of this Act may have been granted, under the provisions of the above-recited Act of the sixth year of the reign of His late Majesty, to an assignee or assignees, shall be as valid and effectual as if the said Letters Patent had been made after the passing of this Act, and the title of any party to such new Letters Patent shall not be invalidated by reason of the same having been granted to an assignee or assignees: Provided always, that nothing herein contained shall give any validity or effect to any Letters Patent heretofore granted to any assignee or assignees where any action or proceeding in *scire facias* or suit in equity shall have been commenced at any time before the passing of this Act, wherein the validity of such Letters Patent shall have been or may be questioned.

Proviso.

Judicial Committee may appoint clerk of Privy Council to take proofs in matters referred to them.

VIII. Provided always, and be it enacted, that in the case of any matter or thing being referred to the Judicial Committee, it shall be lawful for the said Committee to appoint one or other of the clerks of the Privy Council to take any formal proofs required to be taken in dealing with the matter or thing so referred, and shall, if they so think fit, proceed upon such clerk's report to them as if such formal proofs had been taken by and before the said Judicial Committee.

Judicial Committee may proceed to hearing of appeals without special order of reference.

IX. And be it enacted that in case any petition of appeal whatever shall be presented, addressed to Her Majesty in Council, and such petition shall be duly lodged with the Clerk of the Privy Council, it shall be lawful for the said Judicial Committee to proceed in hearing and reporting upon such appeal, without any special order in Council referring the same to them, provided that Her Majesty in Council shall have, by an order in Council in the month of November, directed that all appeals shall be referred to the said Judicial Committee on which petitions may be presented to her Majesty in Council during the twelve months next after the making of such order; and that the said Judicial Committee shall proceed to hear and report upon all such appeals

in like manner as if each such appeal had been referred to the said Judicial Committee by a special order of her Majesty in Council: Provided always, that it shall be lawful for Her Majesty in Council at any time to rescind any general order so made; and in case of such order being so rescinded, all petitions of appeal shall in the first instance be preferred to Her Majesty in Council, and shall not be proceeded with by the said Judicial Committee without a special order of reference.

Proviso.

X. And be it enacted, that it shall be lawful for the said Judicial Committee to make an order or orders on any Court in any colony or foreign settlement, or foreign dominion of the Crown, requiring the Judge or Judges of such Court to transmit to the Clerk of the Privy Council a copy of the notes of evidence in any cause tried before such Court, and of the reasons given by the Judge or Judges for the judgment pronounced in any case brought by appeal or by writ of error before the said Judicial Committee.

Judicial Commitee may require notes of evidence taken in the Courts of any colony, &c., of the Crown.

XI. And be it enacted, that it shall and may be lawful for the said Judicial Committee to make any general rule or regulation, to be binding upon all Courts in the colonies and other foreign settlements of the Crown, requiring the Judges' notes of the evidence taken before such Court on any cause appealed, and of the reasons given by the Judges of such Court, or by any of them, for or against the judgment pronounced by such Court, which notes of evidence and reasons shall by such Court be transmitted to the Clerk of the Privy Council within one calender month next after the leave given by such Court to prosecute any appeal to her Majesty in Council; and such order of the said Committee shall be binding upon all Judges of such Courts in the colonies or foreign settlements of the Crown.

Judicial Committee may make rules to be binding upon such Courts requiring Judges' notes of evidence, &c.

XII. And be it enacted, that in all causes of appeal to her Majesty in Council from Ecclesiastical Courts, and from Admiralty or Vice-Admiralty Courts, which now are or may hereafter be depending, in which any person duly monished or cited or requested to comply with any lawful order or decree of Her Majesty in Council, or of the Judicial Committee of the Privy Council, or their surrogates, made before or after the passing of this Act, shall neglect or refuse to pay obedience to such lawful order or decree, or shall commit any contempt of the process under the seal of Her Majesty in ecclesiastical and maritime causes, it shall be lawful for the said Judicial Committee, or their surrogates, to pronounce such person to be contumacious and in contempt, and, after he or she shall have been so pronounced contumacious and in contempt, to cause process of sequestration to issue under the said seal of Her Majesty against the real and personal estate, goods, chattels, and effects, wheresoever lying within the dominions of Her Majesty, of the person against or upon whom such order or decree shall have been made, in order to enforce obedience to the same and payment of the expenses, attending such sequestration, and all proceedings consequent thereon, and to make such further order in respect of, or consequent on, such sequestration, and in respect to such real and personal estates, goods, chattels, and effects, sequestrated thereby, as may be necessary, or for payment of monies arising from the same to the person to whom the

In cases of neglect to comply with order of Council, persons so neglecting may be punished as for contempt.

same may be due, or into the registry of the High Court of Admiralty and Appeals, for the benefit of those who may be ultimately entitled thereto.

Act may be repealed, &c., this session.

XIII. And be it enacted, that this Act may be repealed or amended during this session of Parliament.

VIII & IX VICTORIA, CAP. 30.

An Act to amend an Act passed in the Third and Fourth Years of the Reign of His late Majesty King William the Fourth, intituled "An Act for the better administration of Justice in His Majesty's Privy Council."

[30th June, 1845.]

3 & 4 Will. IV, c. 41.

WHEREAS by an Act passed in the session held in the third and fourth years of the reign of His late Majesty King William the Fourth, intituled "An Act for the better Administration of Justice in His Majesty's Privy Council," after reciting that various appeals to His Majesty in Council from the Courts of Sudder Dewanny Adawlut at the several Presidencies of Calcutta, Madras, and Bombay, in the East Indies, had been admitted by the said Courts, and the transcripts of the proceedings in appeal had been from time to time transmitted under the seal of the said Courts through the East India Company, then called the United Company of Merchants of England trading to the East Indies, to the office of His Majesty's said Privy Council, but that the suitors in the causes so appealed had not taken the necessary measures to bring on the same to a hearing, it was enacted that it should be lawful for his Majesty in Council to give such directions to the said Company and other persons, for the purpose of bringing to a hearing before the Judicial Committee of the Privy Council the several cases appealed or thereafter to be appealed to His Majesty in Council from the several Courts of Sudder Dewanny Adawlut in the East Indies, and for appointing agents and council for the different parties in such appeals and to make such orders for the security and payment of the costs thereof as his said Majesty in Council should think fit, and thereupon such appeals should be heard and reported on to His Majesty in Council, and should be by His Majesty in Council determined, in the same manner, and the judgments, orders, and decrees of His Majesty in Council thereon should be of the same force and effect as if the same had been brought to a hearing by the direction of the parties appealing in the usual course of proceeding: Provided always, that such last mentioned powers should not extend to any appeals from the said Courts of Sudder Dewanny Adawlut other than appeals in which no proceedings than had been or should thereafter be taken in England on either side for a period of two years subsequent to the admission of the appeal by such Court of Sudder Dewanny Adawlut; and whereas by certain orders in Council made under certain powers contained in the said Act, provision is made for registering in the Council office the arrival in this country of the transcripts of the proceedings in appeals from the said Courts; and whereas it is considered advisable that the said Act should be amended in manner hereinafter mentioned; Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and

Recited provisions of 3 & 4 Will. IV, c. 41, not to apply to appeals admitted by Sudder Courts after 1st January, 1846.

Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the hereinbefore recited provisions of the said Act shall not apply to the case of any appeal which shall be admitted by any of the said Courts of Sudder Dewanny Adawlut after the first day of January, one thousand eight hundred and forty-six.

Appeals admitted after 1st January, 1846, to be considered as abandoned by consent unless, &c.

II. And be it enacted, that any appeal to be admitted by any of the said Courts of Sudder Dewanny Adawlut after the said first day of January, one thousand eight hundred and forty-six, shall be considered and be held to be abandoned and withdrawn by consent of the parties thereto, unless some proceedings shall be taken in England in the same by one or more of the parties thereto within two years after registration at the Council office of the arrival of the transcript; and any such appeal as aforesaid shall be held to be abandoned and withdrawn in like manner under any other circumstances which Her Majesty in Council may from time to time by any orders or rules in that behalf direct to be taken and considered as a withdrawal thereof; and the East India Company are hereby required from time to time to ascertain and certify to the proper Courts in the East Indies all appeals which may from time to time become abandoned and dropped under the provisions of this clause.

XIV & XV VICTORIA, CAP. 83.

An Act to improve the Administration of Justice in the Court of Chancery and in the Judicial Committee of the Privy Council.

[7th August, 1851.]

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Judges of Court of Appeal, if Privy Councillors, to be of the Judicial Committee.

XV. Every person holding or who has held the office of a Judge of the Court of Appeal in Chancery shall, if a member of Her Majesty's Privy Council, be a member of the Judicial Committee of the Privy Council.

No matter to be heard, &c., by Judicial Committee unless three members are present, exclusive of Lord President.

XVI. So much of the Act of the session holden in the third and fourth years of King William the Fourth, chapter forty-one, as provides that no matter shall be heard, nor shall any order, report, or recommendation be made by the Judicial Committee of the Privy Council, in pursuance of that Act, unless in the presence of at least four members of the said Committee, shall be repealed; and no matter shall be heard, nor shall any order, report, or recommendation be made by the said Judicial Committee, in pursuance of the said Act or any other Act, unless in the presence of at least there members of the said Committee, exclusive of the Lord President of Her Majesty's Privy Council for the time being.

The Judicial Committee Act, 1871 (34 and 35 Vict., c. 91) enabled Her Majesty to make, within twelve months of the passing of the Act, certain appointments of persons qualified as in the Act was mentioned, and to fill vacancies occurring within two years of the passing of the Act.

The Supreme Court of Judicature Act, 1873, 36 and 37 Vict., c. 66, provides that the business of the Judicial Committee may (after the 1st of November, 1876, see 38 and 39 Vict., c. 77, s. 2) be transferred by order in Council to the Court of Appeal constituted by that Act.

Order in Council at the Court at Buckingham Palace, 10th April, 1838.

Present: THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

Whereas, by an Act passed in the fourth year of the reign of His late Majesty King William the Fourth, intituled "An Act for the better administration of Justice in His Majesty's Privy Council," it is, amongst other things, enacted that "it shall be lawful for His Majesty in Council from time to time to make any such rules and orders as may be thought fit for the regulating the mode, form, and time of appeal to be made from the decisions of the Courts of Sudder Dewanny Adawlut, or any other Courts of Judicature in India or elsewhere to the eastward of the Cape of Good Hope from the decisions of which an appeal lies to His Majesty in Council, and in like manner from time to time to make such other regulations for the preventing delays in the making or hearing such appeals and as to the expenses attending the said appeals, and as to the amount or value of property in respect of which any such appeal may be made:" And whereas His said late Majesty did, by his order in Council, on the 16th day of January, 1836, approve certain rules and orders for regulating the mode, form, and time of appeal from the decisions of the said Courts of Sudder Dewanny Adawlut, and also certain regulations for the preventing delays in the making or hearing of such appeals, and as to the expenses attending such appeals; and the said rules and orders and regulations were set forth in certain Schedules, A. and B., to and by the said order in Council of the 16th of January annexed and approved: And whereas His said late Majesty did by his further order in Council, made on the 10th day of August, 1836, alter and amend the said Schedule B., by cancelling the Rule No. 5 of the said Schedule B., so approved as aforesaid, and ordering that in lieu of the said fifth rule thereof, a certain other rule in such last-mentioned order set forth should be substituted; and whereas the Queen's Most Excellent Majesty in Council hath deemed it expedient to cancel and rescind all the said rules, orders, and regulations, and to make and substitute others in lieu thereof;—

Her Majesty is therefore pleased, by and with the advice of her Privy Council, to cancel and rescind all the said rules, orders, and regulations in the said recited orders in Council of the 16th day of January, 1836, and 10th day of August, 1836, respectively contained, and thereby or by either of them approved, and to approve of the several rules, orders, and regulations contained in the schedule hereunder written or hereunto annexed, and to order, as it is hereby ordered, that the same be respectively observed by Her Majesty's Supreme Courts of Judicature at Fort William in Bengal, Fort St. George, and Bombay, respectively; by the Court of Judicature of Prince of Wales' Island, Singapore, and Malacca, and by the said several Courts of Sudder Dewanny Adawlut, and all other Courts of Judicature in the territories under the Government of the East India Company, and by all persons whom it shall or may concern. Whereof the Governor-General and the Council of India, the Governor of Fort William in Bengal,

the Governor in Council at Fort St. George, the Governor in Council at Bombay, the Governor of Agra, the Chief Justice and the Judges of Her Majesty's Supreme Court of Judicature at Fort William aforesaid, the Chief Justice and Judges of Her Majesty's Supreme Court of Judicature at Fort St. George, the Chief Justice and Judges of Her Majesty's Supreme Court of Judicature at Bombay, the Court of Judicature of Prince of Wales' Island, Singapore, and Malacca, the Judges of the several Courts of Sudder Dewanny Adawlut in the East Indies, and the Judges of all other Courts of the Judicature in the territories under the Government of the East India Company, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

(Signed) C. C. GREVILLE.

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1. That from and after the 31st day of December next, no appeal to Her Majesty, her heirs and successors, in Council shall be allowed by any of Her Majesty's Supreme Courts of Judicature at Fort William in Bengal, Fort St. George, Bombay, or the Court of Judicature of Prince of Wales' Island, Singapore, and Malacca, or by any of the Courts of Sudder Dewanny Adawlut, or any other Courts of Judicature in the territories under the Government of the East India Company, unless the petition for that purpose be presented within six calendar months from the day of the date of the judgment, decree, or decretal order complained of, *and unless the value of the matter in dispute in such appeal shall amount to the sum of ten thousand Company's rupees at least;* and that, from and after the said 31st day of December next, the limitation of five thousand pounds sterling, heretofore existing in respect of appeals from the Presidency of Fort William in Bengal, shall wholly cease and determine.

It has been held that the High Court has no power to allow an appeal to Her Majesty in Council when the petition is not presented within six months from the date of the decree complained of. When the six months expired in the vacation, it was held that the petition presented on the first day of sittings after vacation came too late (*a*). This was a decision founded on the strict construction of this clause. The effect of the new Limitation Act, XV of 1877, s. 5, and article No. 180 of the 2nd schedule with the 20th section of 3 and 4 Wm. IV, c. 41, would be to admit of the admission of an appeal under such circumstances. On the other hand it has been held, that the Court has a discretion to admit an appeal to the Privy Council dismissed for default, notwithstanding the six months have expired (*b*). An application to appeal to the Privy Council *in formâ pauperis* must be accompanied by a certificate of counsel that there is reasonable ground of appeal, the usual security for costs being given, and the costs of translations deposited (*c*).

2. That in all cases in which any of such Courts shall admit an appeal to Her Majesty, her heirs and successors, in Council, it shall specially certify on the proceedings that the value of the matter in dispute in such appeal amounts to the sum of ten thousand Company's rupees or

(*a*) Prannath Roy Chowdhree *v.* Kasheenath Chowdhree, 2 Suth. W. R., Mis., 26; Tamvaco *v.* Skinner, 1 B. L. R., O. J., 39, Macpherson, J. (1868).

(*b*) Radha Benode Misser, petitioner, 4 Wym. Rep., 20, Peacock, C. J., Trevor, Loch, Kemp, and Macpherson, JJ. (1867).

(*c*) Jawud Ali, appellant, 8 Suth. W. R., 48.

upwards, which certificate shall be deemed conclusive of the fact, and not be liable to be questioned on such appeal by any party to the suit appealed.

With reference to these two rules, 1 and 2, see chap. xlv of the Code of Civil Procedure, Act X of 1877.

3. Provided, nevertheless, that nothing herein contained shall extend, or be construed to extend, to take away, diminish, or derogate from the undoubted power and authority of Her Majesty, her heirs and successors, in Council, upon the petition at any time of any party aggrieved by any judgment, decree, or decretal order of any of the aforesaid Courts, to admit an appeal therefrom upon such other terms, and upon and subject to such other limitations, restrictions, and regulations, as Her Majesty, her heirs, and successors, shall in any such special case think fit to prescribe.

The Schedule above referred to.

Leave to appeal was granted by the Judicial Committee, on payment of costs, from an order of the Sudder Dewanny Adawlut at Bombay decreeing interest upon the amount awarded by the judgment of the Court, the appellant having failed to apply to the Court in India within six months as required by this order (*a*).

The Supreme Court, in overruling objections to the jurisdiction of the Court in an action of trespass against a Collector of Revenue, refused leave to appeal, the subject-matter of the action being trifling, and under the amount required by the rules of the Privy Council. Upon petition, the Judicial Committee granted leave to appeal, but on the terms of the appellant paying the respondent's costs of the appeal to enable him to appear, to prevent the question being argued *ex parte* (*b*).

A suit valued at Rs. 14,325 was appealed to the Sudder Dewanny Adwalut; the decree was reversed for two appellants, leaving Rs. 8,000, the value of the interest of the other appellants, to whom the Sudder Dewanny Adawlut refused leave to appeal. Leave given by the Judicial Committee on security being lodged (*c*).

Upon special petition leave to appeal was allowed, the suit originally instituted at over Rs. 10,000 but decreed below that sum, the appellant claiming to open the question of the value calculated by the Judge below (*d*).

A party applying for special leave to appeal should set out in his petition a full statement of the facts and legal grounds, to show that there is a substantial case on the merits, and the point of law involved proper to be determined by the Court of Appeal (*e*).

An important point of law being involved, an appeal was allowed on special motion though the damages awarded were under Rs. 10,000; this appears to have been done as a matter almost of course (*f*). By a decree of the Sudder Court the principal sum decreed was under Rs. 10,000, but Court also decreed interest. *Held*, that in calculating the value, interest was to be added to the principal (*g*); but whether interest subsequent to the decree is to be added is a question for the discretion of the Judicial Committee and High

(*a*) Kirkland *v.* Modee Pertonjee Khoorsedjee, 2 Dec., 1843, 3 Moo. I. A., 220; cited Morley. See also *In re* Musadee Mahomed Cazum Sherazee, 5 Moo. I. A., 196.

(*b*) Spooner *v.* Juddow, 4 Moo. I. A., 353; cited Morley.

(*c*) Musst. Ameena Thakoor *v.* Radhabund Misser, 7 Moo. I. A., 261.

(*d*) Prannath Roy Chowdhry *v.* Ranee Surnomoyee, 7 Moo. I. A., 353.

(*e*) Goree Monee Dossee *v.* Juggut Indro Narain Chowdhry, 11 Moo. I. A., 1.

(*f*) Rogers *v.* Dutt, 8 Moo. I. A., 103.

(*g*) Maharajah Suttesh Chunder Roy *v.* Gunes Chunder, 8 Moo. I. A., 164.

Courts (*a*). See s. 596 of the Code of Civil Procedure Act X of 1877. In a suit for enhancement of rent, the value should be calculated at the enhanced rent allowed (*b*).

4. That on the arrival of the transcripts of proceedings in an appeal to Her Majesty, her heirs and successors, in Council, from any of the said Courts of Sudder Dewanny Adawlut, or any other Courts in the East Indies constituted by the East India Company, or any of their Governments, from which an appeal lies to Her Majesty in Council, such officer of the East India Company as the Court of Directors of the said Company shall from time to time appoint shall forthwith give notice to the Clerk of the Council thereof, stating at the same time the names of the parties to the appeal, and the date of the decree appealed from, and that such notice shall be duly registered in the Council Office.

5. That the said transcripts of proceedings shall be kept at the East India House, or at such other convenient place within the cities of London or Westminster as the said Court of Directors shall from time to time appoint, the agents respectively conducting and defending such appeals in this country being at liberty to take all the necessary copies and extracts from the said proceedings, and to examine the same from time to time; and it shall be the duty of such officer, by himself or his sufficient deputy, to produce the original transcripts before the Judicial Committee, upon the hearing of such appeal, upon due notice for that purpose previously given, and upon all other occasions when thereunto required by the Privy Council or the Judicial Committee.

6. That in default of the petition of appeal of the appellants being lodged in the Council Office within three calendar months from the registration of the arrival of such transcripts, or in default of the appellant's case being carried in within one year from the time of such registration, the respondent shall be entitled in either case to move to dismiss the appeal for want of prosecution; and in the event of the respondent's not bringing in his case within one year from the time of such registration, the appellant shall be entitled to apply to have the case heard *ex parte*.

(Signed) C. C. GREVILLE.

Order issued by the Judicial Committee respecting the Printing of a Joint Appendix in all Cases of Appeal, dated 3rd July, 1838.

The Lords of the Judicial Committee were this day pleased to order that all printed cases of appeals lodged at the Council Office, which have an appendix annexed, shall be accompanied with a joint appendix of the documents or other papers referred to in the cases of the parties; and that no party shall be entitled to set down his case for hearing upon lodging a separate appendix, unless it be accompanied by an affidavit of the refusal of the opposite party to unite in a joint appendix.

Order in Council, dated the 11th of August, 1842.

Whereas there was this day read at the Board a representation from the Judicial Committee of the Privy Council, dated the 10th of

(*a*) Gooroopersad Khoon *v.* Juggut Chunder, 8 Moo. I. A., 166.
(*b*) S. M. Ranee Surnomoyee *v.* Maharajah Suttesh Chunder Roy, 8 Moo. I. A., 165.

August instant, in the words following, *viz.*:—"The Lords of the Judicial Committee, having taken into consideration the scale on which costs of appeals and other matters referred by your Majesty to this Committee are usually taxed by the Masters of the Court of Queen's Bench or other persons to whom your Lordships have from time to time referred the same, their Lordships agree humbly to represent to your Majesty that it is expedient that the scale of costs hitherto allowed in the said proceedings this Committee should be reduced; and their Lordships recommend that, provisionally, and until further consideration, such costs, in all appeals or matters not being appeals from the Courts of Ecclesiastical or Admiralty jurisdiction, should be taxed and allowed by all such taxing officers as shall hereafter be directed to ascertain and report the same to the Board, according to the schedule hereunto annexed; and that this rate of charges should be observed by solicitors conducting business before this Committee."

Her Majesty having taken this representation into consideration was pleased, by and with the advice of her Privy Council, to approve thereof, and of what is therein recommended, and to order, as it is hereby ordered, that the same be duly and punctually observed, complied with, and carried into execution. Whereof all persons whom it may concern are to take notice and govern themselves accordingly.

SCHEDULE OF FEES ABOVE REFERRED TO.

	£	s.	d.
Retaining fee	0	13	4
Perusing official copy of proceedings	2	2	0

(This fee to be raised at the discretion of the Clerk of Appeals.)

Attendance at the Council Office or elsewhere, on ordinary business, such as to enter an appeal on an appearance, to make a search, to lodge a petition or affidavit, or to retain counsel	0	10	0
Instructions for petition of appeal	0	10	0
Drawing petition or case, per folio	0	2	0
Drawing appendix, per folio	0	1	0
Copying, per folio	0	0	6
Attendance on order of reference		*Nil.*	
Drawing small petitions for orders, &c.	0	10	0
Instructions for case	1	0	0
Attending consultation	1	0	0
Correcting proof sheets, per printed sheet	0	10	6
Correcting foreign or Indian proof sheets, per printed sheet ...	1	1	0
Attending on setting down for hearing		*Nil.*	
Attending Clerk of Council for order		*Nil.*	
Attending at Council Chamber on a petition	1	6	8
Attending Council Chamber all day on an appeal not called on	2	6	8
Attending a hearing	3	6	8
Attending a judgment	1	6	8
Sessions fee (for the legal year) equal to four term fees ..	3	3	0

The fees chargeable in the Privy Council are taken from Moore's Privy Council Appeals, Vol. III. The following additional fees are given by Macpherson, in his work on Appeals to the Privy Council:—

SCHEDULE OF FEES ALLOWED TO SOLICITORS, &c.

	£	s.	d.
Attending taxation	2	2	0
Attending at Council Office on the drawing up of minutes for Committee Report	1	1	0

II. COUNCIL OFFICE FEES ON APPEALS AND PETITIONS TO THE QUEEN IN COUNCIL.

	£	s.	d.
Lodging petition of appeal	1	1	0
Entering	1	1	0
Lodging case	1	1	0
Entering appearance	0	10	0
Setting down case	0	10	0
Summons	0	10	0
Committee Report	1	10	0
Order of Her Majesty in Council...	3	2	6
Committee Orders...	1	12	6
Lodging Affidavit	1	1	0
Ditto petition	1	1	0
Notice to attend	0	10	0
Searching books for information for parties	0	10	0
Certificate delivered to parties	0	10	0
Copies of papers (each side)	0	5	0
Committee references	2	2	0
Lodging caveat	1	1	0
Subpœna to witnesses	0	10	0
Fee for taxation (appeals)	3	3	0
Ditto (petitions)	1	1	0

III. FEES ON HEARING APPEALS IN PRIZE CAUSES.

Hearing a cause.

	£	s.	d.
To the successful party	5	15	6
To the unsuccessful party	2	2	0
When both parties may succeed, although the sentence may have been in part reversed	3	18	9
Desertion of appeal	2	17	9

Sentence taken by consent or in pœnam.

	£	s.	d.
To the successful party to whom the fees of interlocutory are charged by Registrar	4	15	0
Where counsel is heard, cause not determined, each party ...	2	2	0
Motion by counsel, gaining party	1	1	0
Hearing an admission of allegations, or an act on petition, gaining party	2	2	0
If part admitted and part rejected, each party	1	1	0

Rule issued by the Judicial Committee at the Council Chamber, Whitehall, the 12th February, 1845.

Whereas, by an Act passed in the eighth year of Her Majesty's reign, intituled, &c. [*here follows a recital of* 7 & 8 *Vic., c.* 69, *s.* 11.]

Now, therefore, the Lords of the said Judicial Committee of the Privy Council are pleased to order, as it is hereby ordered, that when any appeal shall be prosecuted from any judgment of any Court in the colonies or foreign settlements of the Crown, the reasons given by the Judges of such Court, or by any of such Judges, for or against such judgment, shall be by the Judge or Judges of such Court communicated in writing to the Registrar of such Court or other officer whose duty it is to prepare and certify the transcript record of the proceedings in the cause, and that the same be by him transmitted in original to the Clerk of Her Majesty's Privy Council at the same time when the documents and proceedings proper to be laid before Her Majesty in Council upon the hearing of the appeal are transmitted.

Whereof the Judges of all such Courts in the colonies or foreign settlements of the Crown are to take notice, and govern themselves accordingly.

(Signed) C. C. GREVILLE.

Order in Council at the Court at Buckingham Palace, the 13th June, 1853.

Whereas there was this day read at the Board a report from the Right Honorable the Lords of the Judicial Committee of the Privy Council, dated the 30th May last past, humbly setting forth that the Lords of the Judicial Committee have taken into consideration the practice of the Committee with a view to greater economy, despatch, and efficiency in the appellate jurisdiction of Her Majesty in Council, and that their Lordships have agreed humbly to report to Her Majesty that it is expedient that certain changes should be made in the existing practice in appeals, and recommending that certain rules and regulations therein set forth should henceforth be observed, obeyed, and carried into execution, provided Her Majesty is pleased to approve the same.

Her Majesty having taken the said report into consideration, was pleased, by and with the advice of her Privy Council, to approve thereof, and of the rules and regulations set forth therein, in the words following, *videlicet*:—

Appellant, when successful, may recover costs of appeal.

1. That, any former usage or practice of Her Majesty's Privy Council notwithstanding, an appellant who shall succeed in obtaining a reversal or material alteration of any judgment, decree, or order appealed from shall be entitled to recover the costs of the appeal from the respondent, except in cases in which the Lords of the Judicial Committee may think fit otherwise to direct.

Transcripts to be sent to Registrar of Privy Council.

2. That the Registrar or other proper officer having the custody of records in any Court of special jurisdiction from which an appeal is brought to Her Majesty in Council, be directed to send by post, with all possible despatch, one certified copy of the transcript record in each cause to the Registrar of Her Majesty's Privy Council, Whitehall; and that all

such transcripts be registered in the Privy Council Office, with the date of their arrival, the names of the parties, and the date of sentence appealed from, and that such transcript be accompanied by a correct and complete index of all the papers, documents, and exhibits in the cause; and that the Registrar of the Court appealed from, or other proper officer of such Court, be directed to omit from such transcript all merely formal documents, provided such omission be stated and certified in the said index of papers; and that special care be taken not to allow any document to be set forth more than once in such transcript; and that no other certified copies of the record be transmitted to agents in England by or on behalf of the parties in the suit; and that the fees and expenses incurred and paid for the preparation of such transcript be stated and certified upon it by the Registrar or other officer preparing the same.

Transcripts may be printed abroad.

3. That when the record of proceedings or evidence in the cause appealed has been printed or partly printed abroad, the Registrar or other proper officer of the Court from which the appeal is brought, shall be bound to send home the same in a printed form, either wholly or so far as the same may have been printed, and that he do certify the same to be correct, on two copies, by signing his name on every printed sheet, and by affixing the seal, if any, of the Court appealed from to these copies, with the sanction of the Court.

And that in all cases in which the parties in appeals shall think fit to have the proceedings printed abroad, they shall be at liberty to do so, provided they cause fifty copies of the same to be printed in folio and transmitted, at their expense, to the Registrar of the Privy Council, two of which printed copies shall be certified as above by the officers of the Court appealed from; and in this case, no further expense for copying or printing the record will be incurred or allowed in England.

Written transcripts to be printed by Her Majesty's printer.

4. That on the arrival of a written transcript of appeal at the Privy Council Office, Whitehall, the appellant, or the agent of the appellant prosecuting the same, shall be at liberty to call on the Registrar of the Privy Council to cause it, or such part thereof as may be necessary for the hearing of the case, and likewise all such parts thereof as the respondent or his agent may require, to be printed by Her Majesty's printer, or by any other printer on the same terms, the appellant or his agent engaging to pay the cost of preparing a copy for the printer, at a rate not exceeding one shilling per brief sheet, and likewise the cost of printing such record or appendix, and that one hundred copies of the same be struck off, whereof thirty copies are to be delivered to the agents on each side, and forty kept for the use of the Judicial Committee; and that no other fees for solicitors' copies of the transcript, or for drawing the joint appendix, be henceforth allowed, the solicitors on both sides being allowed to have access to the original papers at the Council Office, and to extract or cause to be extracted and copied such parts thereof as are necessary for the preparation of the petition of appeal, at the stationer's charge, not exceeding one shilling per brief sheet.

Transcripts to be printed within a certain time.

5. That a certain time be fixed within which it shall be the duty of the appellant or his agent to make such application for the printing of the transcript, and that such time be within the space of six calendar months from the arrival of the transcript and the registration thereof in

all matters brought by appeal from Her Majesty's colonies and plantations east of the Cape of Good Hope or from the territories of the East India Company, and within the space of three months in all matters brought by appeal from any other part of Her Majesty's dominions abroad; and that in default of the appellant or his agent taking effectual steps for the prosecution of the appeal within such time or times respectively, the appeal shall stand dismissed without further order, and that a report of the same be made to the Judicial Committee by the Registrar of the Privy Council at their Lordships' next sitting.

Appeals may be heard in the form of a special case.

6. That whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the agents of the parties, with the sanction of the Registrar of the Privy Council, may submit such question of law to the Lords of the Judicial Committee in the form of a special case, and print such parts only of the transcript as may be necessary for the discussion of the same; provided that nothing herein contained shall in any way bar or prevent the Lords of the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit; and that, in order to promote such arrangements and simplification of the matter in dispute, the Registrar of the Privy Council may call the agents of the parties before him, and having heard them, and examined the transcript, may report to the Committee as to the nature of the proceedings.

And Her Majesty is further pleased to order, and it is hereby ordered, that the foregoing rules and regulations be punctually observed, obeyed, and carried into execution in all appeals or petitions and complaints in the nature of appeals brought to Her Majesty, or to her heirs and successors in Council, from Her Majesty's colonies and plantations abroad, and from the Channel Islands or the Isle of Man, and from the territories of the East India Company, whether the same be from Courts of Justice or from special jurisdictions, other than appeals from Her Majesty's Courts of Vice-Admiralty, to which the said rules are not to be applied.

Whereof the Judges and Officers of Her Majesty's Courts of Justice abroad, and the Judges and Officers of the superior Court of the East India Company, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

(Sd.) W. L. BATHURST.

Order in Council at the Court at Buckingham Palace, the 31st of March, 1855.

Present: THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

Whereas doubts have arisen with reference to the power of the Judicial Committee of the Privy Council to suspend or relax, under certain special circumstances, the regulations in appeal cases, established by Her Majesty's order in Council of the 30th of June, 1853;

Her Majesty, by and with the advice of Her Privy Council, is pleased to order, and it is hereby ordered, that in appeal cases in which a petition of appeal to Her Majesty shall have been lodged, and referred by Her Majesty to the Judicial Committee, the said regulations shall be subject to any order or direction which, in the opinion of the Lords of the Judicial Committee, the justice of any particular case may seem to require.

(Sd.) C. C. GREVILLE.

Order in Council for the establishment of certain rules to be observed by Proctors, Solicitors, Agents, and other persons admitted to practise before Her Majesty's most Hon'ble Privy Council, dated the 31st March, 1870.

I. Every proctor, solicitor, or agent, admitted to practise before Her Majesty's most Hon'ble Privy Council, or any of the Committees thereof, shall subscribe a declaration, to be enrolled in the Privy Council office, engaging to observe and obey the rules, regulations, orders, and practice of the Privy Council, and also to pay and discharge from time to time, when the same shall be demanded, all fees or charges due and payable upon any matter pending before Her Majesty in Council, and no person shall be admitted to practise, or allowed to continue to practise, before the Privy Council, without having subscribed such declaration in the following terms :

Form of Declaration.

We, the undersigned, do hereby declare that we desire and intend to practise as solicitors or agents in appeals and other matters pending before Her Majesty in Council, and we severally and respectively do hereby engage to observe, submit to, perform and abide by, all and every the orders, rules, regulations, and practice of Her Majesty's most Hon'ble Privy Council and the Committees thereof now in force, or hereafter from time to time to be made, and also to pay and discharge from time to time, when the same shall be demanded, all fees, charges, and sums of money due and payable in respect of any appeals, petitions, or other matters in and upon which we shall severally and respectively appear as such solicitors or agents.

II. Every proctor, solicitor or attorney practising in London, and duly admitted in any of the Courts in Westminster, shall be allowed to subscribe the foregoing declaration, and to practise in the Privy Council upon the production of his certificate for the current year, and no fee shall be payable by him on the enrolment of his signature to the foregoing declaration.

III. Persons not being certificated London Solicitors, but having been only admitted to practise as solicitors by the High Courts of Judicature in India, or in the Colonies respectively, may apply by petition to the Lords of the Judicial Committee of the Privy Council, for leave to be admitted to practise in the Privy Council ; and such persons, if admitted to practise by an order of their Lordships, shall pay annually, on the 15th of November, a fee of five guineas to the fee-fund of the Council office.

IV. Any proctor, solicitor, agent, or other person practising before the Privy Council, who shall wilfully act in violation of the rules and practice of the Privy Council, or of any rules prescribed by the authority of Her Majesty or of the Lords of the Council, or who shall wilfully misconduct himself in prosecuting proceedings before the Privy Council or any Committee thereof, on who shall refuse, or omit to pay, the Council office fees or charges payable from him when demanded, shall be liable to an absolute or temporary prohibition to practise before the Privy Council, by the authority of the Lords of the Judicial Committee of the Privy Council upon cause shown at their Lordships' bar.

High Court of Judicature, Fort William, 2nd June, 1870.

With reference to the above order in Council, suitors in appeal to England are cautioned not to send powers-of-attorney, or to make remittances to any person not being authorized and enrolled practitioners before Her Majesty's most Hon'ble Privy Council or any of the Committees thereof.—*Calcutta Gazette, 15th June,* 1870, *p.* 1233.

Order dated 26th June, 1873.

Whereas in many appeals now pending before Her Majesty in Council no effectual steps have been taken by the parties or their agents to set down their cases for hearing, although more than twelve months have elapsed since the arrival and registration of the transcript of appeal in this country; and it is expedient to make further provision in that behalf, Her Majesty, by and with the advice of Her Privy Council, and upon a recommendation of the Lords of the Judicial Committee of the Privy Council, is pleased to order, and it is hereby ordered, that the solicitors or agents for the party, appellant, in all such appeals now pending before Her Majesty in Council, are hereby required to take effectual steps to set down their cases for hearing within six months from the date of this order, and in all other appeals to Her Majesty in Council within a period not exceeding twelve months from the date of the arrival and registration of the transcript in this country.

And Her Majesty is further pleased to order, and it is hereby ordered, that it shall be the duty of the Registrar of the Privy Council to report to the Lords of the Judicial Committee the names of the parties and the dates of the decrees in appeal in which no effectual steps have been taken within the aforesaid periods of time to set down the case for hearing, and the Lords of the Judicial Committee of the Privy Council shall be at liberty to call upon the appellant or his agent in such cases to show cause why the said appeal or appeals should not be dismissed for non-prosecution, and (if they shall so think fit) to recommend to Her Majesty the dismissal of any such appeal or to give such directions therein as the justice of the case may require.

And Her Majesty is further pleased to order, that nothing in the present order shall prevent the dismissal of an appeal under the fifth of the rules approved by Her Majesty on the 13th of June, 1853, in cases to which that rule is applicable.

Whereof the Governors of Her Majesty's plantations and dominions abroad, and the Judges and officers of Her Majesty's Courts of Justice from which an appeal lies to Her Majesty in Council, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

Order in Council for the regulation of the Form and Type to be used in the printing of the Cases, Records, and Proceedings in Appeals and other matters pending before the Lords of the Judicial Committee of the Privy Council at the Court at Windsor Castle, the 24th day of March, 1871.

Present: THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

Whereas there was this day read at the Board a representation from the Lords of the Judicial Committee of the Privy Council, dated

the 20th January, 1871, humbly recommending to Her Majesty in Council that certain Rules be established by the authority of Her Majesty by and with the advice of Her Privy Council, to be observed in the form and type used in the printing of all cases, records, and other proceedings in appeals and other matters pending before the Judicial Committee of the Privy Council, Her Majesty having taken the said representation into consideration, and the schedule of Rules hereunto annexed, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, and it is hereby ordered, that the same be punctually observed, obeyed, and carried into execution. Whereof the Judges and Officers of all the Courts of Justice in Her Majesty's dominions from which an appeal lies to Her Majesty in Council, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

ARTHUR HELPS.

Schedule annexed to the foregoing order.

1. All cases, records, and other proceedings in appeals or other matters pending before the Judicial Committee of the Privy Council, are henceforth to be printed in the form known as demy quarto, and not in demy folio, as hath heretofore been used.

2. The size of the paper used is to be such that the sheet, when folded, will be eleven inches in height and eight inches and-a-half in width.

3. The type to be used in the text is pica type, but long primer is to be used in printing accounts, tabular matter, and notes.

4. The number of lines in each page of pica type is to be forty-seven, each line being five inches and three quarters, or 146 millimeters in length.

5. The foregoing Rules do not apply to cases now pending in which the printing of the record is begun before the printing of this Order, but in all cases printed after the receipt of this Order the form and type herein prescribed are to be used exclusively.

6. The price in England for printing 75 copies in the form established is to be thirty-eight shillings per sheet (eight pages) of pica, with marginal notes, not including corrections, tabular matter, and other extras.

7. The form of paper and type of the present Order in Council with the pages hereinto annexed, are to serve as a specimen sheet or pattern for the printing of the proceedings before the Judicial Committee of the Privy Council.

This pattern is to be seen at the Council office.

From the Registrar of the Privy Council, to the Solicitors and Agents conducting Appeals before Her Majesty in Council,—dated Council Office, Whitehall, 22nd December, 1873.

GENTLEMEN,—I am directed by the Lord President of the Council to state, for your information, that it appears from a communication made by the Incorporated Law Society to the Lords of the Judicial Committee of the Privy Council that a practice exists among some of the solicitors or agents conducting appeals from India before the Privy Council, of allowing a payment or commission of 10 to 15 per. cent on the remittances made to defray the expenses in England to the vakeel, mookhtear, or other

person in India by whom the appeal is transmitted to this country; and in one instance their Lordships are informed that a direct solicitation of business accompanied an offer of these terms.

Their Lordships have taken these statements into their most serious consideration. It appears to their Lordships that a deduction of a commission from remittances made for the expenses of an appeal cannot justly be assimilated to the division of profits which prevails in this country under the name of agency; it is immaterial to a suitor in what manner the lawful costs he has to pay are divided between a town and country solicitor, but he has a right to require that remittances made for expenses of an appeal to England should be exclusively applied without deduction to that purpose. The payment to the native vakeel, or other adviser of the client in India, of a commission upon the remittances, not only tends to increase the expense of appeals, but gives to such persons a direct personal interest in advising frivolous appeals, and in making them as expensive as possible. Their Lordships are therefore of opinion that, if such a practice exists in India or elsewhere, it is wrong, and open to grave abuse, which might, if continued, call for the direct interposition of their Lordships' authority to check it.

But their Lordships prefer to address themselves to the sense of professional duty and propriety which exists amongst the gentlemen carrying on the business of appeals before Her Majesty in Council, to put an end to this system; and their Lordships trust that after this intimation of their opinion, measures will be taken by the members of the profession practising in the Privy Council to prevent the continuance of any such practice, which has doubtless only prevailed in some exceptional cases, and should now be entirely abandoned.

I have, &c.,

HENRY REEVE,

Registrar, Privy Council.

RULES, APPELLATE SIDE, HIGH COURT, CALCUTTA.

Notification, dated the 10*th January*, 1878.

All rules of practice under Act VIII of 1859 and Act XXIII of 1861, issued by the late Sudder Court or by the High Court at Fort William in Bengal, which were in force on the 30th September last, shall, so far as the same are applicable, be continued as the rules of the said High Court under Act X of 1877 except so far as the same may be contrary to the provisions of that Act, or as the same shall hereafter be altered or modified by the Court. All rules thus continued, which refer to "regular appeals," shall be held to apply to appeals from original decrees, under the new Code, and all those which refer to "special appeals" shall be held similarly to apply to appeals from appellate decrees under that Code.

Rules of Practice adopted by the late Sudder Court, under Act VIII of 1859, *for the guidance of the Deputy Registrar and Pleaders of the Court.*

SECTION I.—REGULAR APPEALS.

Sec. 332, corresponding with s. 575 of the new Code.

1. Every appeal to the Sudder Court to be heard by two or more Judges, under the new Bill.

Sec. 333, corresponding with s. 541 of the new Code.

2. Every appeal to the Sudder Court shall be presented in the Court to the Deputy Registrar by the appellant in person or his recognized agent, or by a pleader appointed under the provisions of s. 18, Act VIII of 1859 [s. 39 of Act X of 1877], or by some person appointed in writing in each case by such pleader to present the same (vide *Resolution dated* 11*th August*, 1870).

Sec. 335, corresponding with s. 541 of the new Code.

3. With every petition of appeal there is to be presented also an authenticated copy of the decree appealed against.

Sec. 334 and 335, corresponding with ss. 541 and 542 of the new Code.

4. The appeal petition must be in the form of the memorandum prescribed by s. 335, Act VIII, 1859, and, without any detail of the circumstances of the case, shall state under consecutively numbered heads the grounds of objection to the decision appealed against.

It is ordered that on and from the 1st day of April, 1864, the following rules and orders shall take effect in this Court.

4*a*. All petitions of appeals, whether regular or special, which are not filed within the limited period of ninety days,* or which are not accompanied by the copies of decrees or of judgments and decrees as directed by law, or in respect of which any indulgence is asked, shall be in future presented by way of motion in open Court to the Court, and not to any officer of the Court, and such Court (or Judge) will at once proceed to pass thereon such order as the case may require, provided that the party, or his advocate or vakeel presenting such appeal, shall be prepared at the same time to satisfy the Court that there is ground for granting the indulgence asked for.

* See Limitation Act, XV of 1877, Schedule, No. 156.

5. It will be the duty of the Deputy Registrar to examine whether the petition be correct with regard to stamp, whether it be in the prescribed form, also whether copy of the decree appealed against accompanies; and whether, according to the date of decision therein recorded, the appeal has been preferred within the prescribed terms,—*i.e.*, within ninety days from the date of judgment, *exclusive of that date and of the time necessary for procuring of the copy.* Where all these particulars have been correctly observed, the Deputy Registrar shall admit and file the appeal.

Secs. 333—336, corresponding with ss. 541—3 of the new Code.

Note.—In this time the date of application for a copy and the date of delivery are now both included instead of being excluded (June, 1867).

6. The time "necessary for procuring a copy of the decree appealed against" shall be considered to be the time elapsed between date of presentation of petition in the lower Court for copy thereof and date of delivery of the same, or of certificate that it was ready for delivery to the petitioner, *exclusive of those two dates*; and a Circular Order will issue accordingly to all civil authorities with a view to their recording and attesting these particulars upon the back of every copy of decree granted to any party under s. 198 of the Act [s. 217 of Act X of 1877].

Note.—See note to Rule 5.

7. If no copy of the decree appealed against be tendered along with an appeal, or if the appeal be not in prescribed form, or if it be presented beyond time, *without any cause being stated by the presenter*, the Deputy Registrar shall summarily reject the appeal, recording the fact in a book to be kept for the purpose. *If the appeal be beyond time, but cause for the delay be shown, the Deputy Registrar shall submit the case to the Judge or Judges sitting in the Miscellaneous Department, to determine whether it shall be admitted.*

Sec. 336, corresponding with s. 543 of the new Code.

Note.—The words "without any cause being stated by the presenter" are now omitted, and the other clause in italics is superseded by the new rules, 4th June, 1867, *post*, p. cix.

8. On admission of any appeal, the Deputy Registrar shall cause the same to be endorsed and registered, in a Register C, in the manner ordained by s. 341 of the Act.

Sec. 341, corresponding with s. 548 of the new Code.

9. He shall then send a notice of the appeal without delay to the lower Court and call for transmission, as quickly as possible, of the material papers and copies of exhibits, on account of the several parties to the cause. The Courts to be instructed to do this, ordinarily, *within six weeks*, reporting and asking for further time whenever necessary.

Sec. 343, corresponding with s. 550 of the new Code.

See the rules as to time, 25th May, 1869, *post*, p. cxii.

10. It will be the duty of the Deputy Registrar, at the same time, to prepare and transmit to the lower Court a notice of appeal for service on the respondent, unless the respondent shall have already appointed a pleader or recognized agent in his behalf in this Court, in which case the service of the said notice upon such pleader shall be sufficient. It will also be the duty of the Deputy Registrar to keep a book showing the date of institu-

Sec. 345, corresponding with ss. 553 and 554 of the new Code.

tion of suit, of issue of notice under ss. 9 and 10, and of the return of such notices, and to report to the Court all instances of delay in replying to returns on the part of the lower Court.

Note.—See Circular Order No. 25 of 21st September, 1863.

Sec. 344, corresponding with s. 552 of the new Code.

11. In the notice of appeal to the lower Court, and in the notice to be served on the respondent or his pleader, shall be mentioned the day fixed for hearing of the appeal, calculated according to a table of distances for each zillah, and the time necessary for service of notice on the respondent.

Note.—See note to Rule No. 9.

Sec. 347, corresponding with s. 558 of the new Code.

12. If an appeal be struck off the file by order of the Court, for default, the Deputy Registrar shall summarily reject any petition for its restoration on the file not submitted within thirty days after the said order. Petitions preferred within thirty days shall be laid as soon as possible before the Judges in the Miscellaneous Department.

Note.—See Rules, 4th June, 1867, *post.* These petitions will now be presented to the Court which made the order to strike off the case.

Rules 13 and 14, relative to paper-books are now superseded by the rules of the 15th of September, 1875, *post.*

Sec. 346, corresponding with s. 556 of the new Code.

15. If, on the day fixed for hearing, the appellant does not appear in person or by pleader, the Deputy Registrar shall lay the case before the Judge in the Miscellaneous Department, in order that it may be struck off the file.

Secs. 367, 371, corresponding with ss. 592 and 593 of the new Code.

16. Petitions of appeal *in formâ pauperis* shall be received and treated by the Deputy Registrar, if presented in the manner enjoined by ss. 367 to 371, and laid before the Judges in the Miscellaneous Department. When conveniently to be done, inquiries into the truth of alleged pauperism shall be made in this Court by the Deputy Registrar, under s. 370, otherwise the enquiry shall be referred by him to the lower Court.

Sec. 361, corresponding with s. 581 of the new Code.

17. Of every order passed by this Court disposing of an appeal, the Deputy Registrar shall cause a certified and sealed copy to be transmitted to the Court which passed the first decree in the suit.

Sec. 362, corresponding with s. 583 of the new Code.

18. On applications being preferred for execution of this Court's decrees, the Deputy Registrar is to refer the applicants to the Court which passed the first decree in each suit.

Note.—Under Act XXV of 1852, and now Act X of 1877, s. 583.

Sec. 342, corresponding with s. 549 of the new Code.

19. Whenever it shall appear to the Deputy Registrar, or when a respondent or his pleader shall represent to the Deputy Registrar, that before issue of notice on the respondent or his pleader, or to the lower Court, there are reasons to demand security for costs from the appellant, he shall lay the papers as soon as possible before the Judge in the Miscellaneous Department for orders.

Rule 20 relating to paper-books is now superseded by the Rules of the 15th of September, 1875, *post.*

SECTION II.—SPECIAL APPEALS.

21. "From and after the opening of the Court, on the 4th day of January, 1871, all applications for the admission of special appeals shall be presented in open Court.

Note.—By rule of February 27, 1873, this rule is rescinded; thus applications need not be made now in open Court.

Parties are required to file copies of the judgments in the language in which they were delivered, and not of the translation made under s. 185 of Act VIII.

Sec. 375, see s. 587 of the new Code.

22. Special appeal petitions admitted to be filed are to be registered in a Register D, as enjoined by the Act.

Note.—See Form No. 177 of Act X of 1877.

Sec. 375, corresponding with s. 537 of the new Code.

23. The rules applying to regular appeals generally shall be applicable to special appeals *after admission.*

See the rules of the 27th of January, 1872, as to the admission; and of the 1st July, 1877, as to paper-books in special appeals, *post.*

SECTION III.—MISCELLANEOUS APPEALS.

Note.—See rules of 4th June, 1867, *post*, page cxii, as to miscellaneous appeals and the Miscellaneous Department.

Sec. 366, corresponding with s. 590 of the new Code.

24. The rules applying to regular appeals generally shall be applicable to miscellaneous appeals.

25. All urgent cases, such as have been hitherto heard summarily, and all appeals under ss. 36, 76, 85, 94, and 119, shall be entered in a separate file, and a list of such as are ready for hearing shall be stuck up every Saturday for general information, with notice that they will be brought up for hearing on that day fortnight.

Appeals lay by s. 36 of Act VIII against orders rejecting plaints; Act X of 1877, s. 588 (*e*), preserves this appeal.

Appeals lay by s. 76 against orders directing a defendant to find bail in lieu of being arrested before judgment; Act X of 1877, s. 588 (*r*), preserves this appeal.

Appeals lay by s. 85 against an order for attachment before judgment. No appeal is given by s. 588 of Act X of 1877.

Appeals lay by s. 94 against order, for injunction and the appointment of managers. Appeals now lie under Act X of 1877, s. 588 (*r*), and ss. 492, 493, and 504.

By s. 119 an appeal lay from an order rejecting an application to set aside a judgment passed *ex parte*. There is now no appeal; but a decree made *ex parte* is appealable like any other decree, which was not the case under Act VIII of 1859, s. 119.

26. The Deputy Registrar is to prepare and submit to the senior Judge of the Full Bench, on the first of each month, a list of the miscellaneous cases which have been reserved for hearing by a Full Bench, and have not been disposed of prior to the close of the preceding month.

27. Such cases shall be laid before two Judges.

See rules as to appeals from orders of the lower Appellate Courts, remanding cases, and from orders of lower Courts made on remand, dated 18th April, 1877, *post.*

Rule dated the 24th June, 1873.—It is ordered that henceforth, and till further order, the special appeals before each Bench, wherein the valuation of the appeal does not exceed Rs. 50, be entered in a separate list to be heard before a single Judge at such times as the Benches severally may appoint. Provided that it shall be competent to any Judge so sitting singly to reserve any case for determination by the Division Court.

Rule dated 12th March, 1874.—On receipt of the finding of a lower Court in a case remanded under s. 354 of Act VIII of 1859,* the Deputy Registrar shall notify to the pleaders of the parties that any objections to such finding must be filed within fourteen days from the date of the notice.

SECTION IV.—REVIEWS.

The following rule relating to reviews was issued on the 6th of December, 1873, in lieu of the rules 28 to 40 contained in Section IV :—

Every application for review of judgment shall be submitted in the first instance within the period prescribed by law to the Deputy Registrar or other proper officer of the Court, who will certify thereon whether the petition is within time and properly stamped and within seven days from the date of such certificate, it shall be presented either by the party in person or by counsel or vakeel, by way of motion in open Court, to the Judges whose judgment it is proposed to review, or if such Judges should not be sitting together, to the senior of them who may then be attached to the Court and present.

SECTION V.—GENERAL INSTRUCTIONS.

41. If there be any clerical error in the petition of appeal, the Deputy Registrar is authorized, without reference to the Registrar, to permit such inaccuracies to be corrected in the presence of both parties, or their pleaders, if appearance has been made for both.

42. On the return of the District Judge to the notice or notices issued to his Court, the Deputy Registrar will place the case on the list of cases ready for distribution, and lay it before the Judges of the Full Bench for adjudication.

43. A list of regular appeals to be heard by the Court, to the amount of twelve in each week, will be prepared by the Native Deputy Registrar, and affixed in the Court-house for at least three weeks previously to the week of hearing, so that the pleaders may be enabled duly to prepare and examine the issues to be proposed for trial on those appeals.

Note.—This rule is obsolete. See rules, 4th June, 1867, *post.*

44. Notice is to be served on the Government pleader in all cases in which Government is a party.

45. The Deputy Registrar is empowered to sign the list of papers for translations in appeals to the Privy Council.

46. The Deputy Registrar shall prepare weekly lists of applications which have been filed during the week for the admission of special appeals and the dates on which such applications are likely to be brought on for hearing, and shall transmit extracts from such lists to the Court in which the decisions appealed against were passed, with a view to such extracts being affixed to the respective Court-houses, to enable the holders of the decrees in question to be present personally or by vakeel at the hearing, should they desire to do so. The time to be fixed for the hearing

* Sec. 566 of the Code of 1877.

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shall, ordinarily, be not less than six weeks from the date of the despatch of the lists by the Deputy Registrar from this Court. The Deputy Registrar shall, on every Saturday, affix in the Court-house a list of the applications for special appeal, which, as having been filed for more than six weeks from the date of despatch of the lists, as above provided, will be ready for hearing during the weeks following.

[Extracts of the above lists of special appeals, which are to be forwarded to the Tenasserim Provinces, are to be translated into the English language.]

Note.—This rule is to apply to Assam, Arracan, and Tenasserim only. It is partially obsolete. These provinces, except Assam, being now part of British Burmah.

47. The duty of attesting mooktearnamahs for appointing vakeels in cases in the Sudder Court, will be performed by the Native Deputy Registrar, and a list will be kept by him of the recognised agents of parties appointed under s. 17 of the Code (ss. 37 and 38 of Act X of 1877).

48. According to a letter from the Officiating Junior Secretary to the Board of Revenue, requesting to be furnished, monthly, with a statement of the amount due to Government on account of stamp fees of pauper suits decided by the Court, the Deputy Registrar is directed to furnish, monthly, a statement containing the above information, in the form annexed to Circular Order No. 127, dated the 24th April and 2nd October, 1846, and lay the same before the Registrar for his signature.

49. It will be the duty of the Deputy Registrar to note any irregularity committed by the lower Courts in the preparation and endorsement of the copies of decrees of their Courts, and submit his reports of such irregularity to the Judge presiding in the Miscellaneous Department.

Secs. 100-102, corresponding with ss. 362—6 of the new Code.

50. It is not necessary that the Registrar should take any steps, in future in consequence of the death of a plaintiff or defendant, unless moved thereto by one or other of the parties.

51. If the legal representative of a deceased plaintiff, in a case in which there is more than one plaintiff, should apply to have his name entered in the place of the deceased, and no objections are preferred by any party, the Deputy Registrar shall make the entry required. If no application is made, the suit shall go on at the instance of the surviving plaintiff.

52. In cases where there is only one plaintiff, and no application is made by his representative or representatives, or by the defendants in the suit, within three months from the date of such plaintiff's death, the Deputy Registrar shall lay the case before the Bench sitting for the disposal of miscellaneous business, in order that it may be struck off the file.

53. If the defendant apply to have the legal representative of the deceased plaintiff brought in, or if there be any dispute as to who is entitled to represent the plaintiff, the Deputy Registrar shall lay the case for orders before the Miscellaneous Bench.

54. If a defendant in a suit should die, and the plaintiff should make an application specifying the name, description, and place of abode of the person whom he alleges to be the representative of the deceased, the Deputy Registrar shall enter the name of such person in the register of the suit, in place of the original defendant, and shall issue a summons to him, through the Zillah Court, requiring him to appear and answer on

a fixed day to be determined on the principle laid down in s. 11. (See now Act X of 1877, ss. 19 and 22.)

55. In the event of any delay on the part of the Zillah Courts in the execution of the requisitions made to them by the Deputy Registrar, that officer shall bring the same to the notice of the Court to which the requisition has been made. Any continued delay after such second requisition, he will report to the Judge presiding in the Miscellaneous Department.

56. If a regular case be compromised by the parties, the Deputy Registrar shall lay it, accompanied with the razeenamah and safeenamah and the nuthee of the case, for orders before the Judges of the Full Bench.

57. Wilful neglect on the part of any pleader or mooktear attached to the Court to attend the office of the Deputy Registrar, will be brought by that officer to the notice of the Judge presiding in the Miscellaneous Department.

58. The Deputy Registrar shall address the Zillah authorities by roobacaree, without precept.

59. The Deputy Registrar shall also pass orders upon the kyfeuts submitted by the Naib Mohafiz regarding the state of the records of cases when received from the Zillah Courts. In cases of doubt or difficulty, the Deputy Registrar will refer to the Judge or Judges presiding in the Miscellaneous Department for the time being.

60. Returns to precepts requiring no special orders also to be disposed of by the Deputy Registrar.

61. He is specially enjoined to see that the precepts and other processes of the Court are issued without delay, and that reminders and calls for explanation are despatched, whenever the return of the lower Court is not made within the prescribed period.

Rules relating to the Attendance of Vakeels.

1. The rule of the 26th of November, 1862, as to the attendance of vakeels, and striking out a case for non-attendance, is hereby repealed.

2. Every vakeel engaged in any case shall be entitled to obtain from the Court, office copies of the whole or any part of the proceedings and evidence in the case on depositing the estimated cost of such copies.

3. Every such copy shall be examined and certified as correct before it is issued from the office of the Court.

4. The charge for such copies shall be one rupee per 1,440 English words, and one rupee for 2,000 words in Bengali or Urdoo.

5. When a vakeel retained to appear and plead for any party to a suit or appeal is prevented by sickness or engagement in another Court from appearing and conducting the case of his client, he may appoint another vakeel to appear in his place, so that his client may not be unrepresented at the hearing; and the Court, if it see no reason to the contrary, may allow the arguments to proceed in the absence of the vakeel or vakeels originally engaged.

6. In any case in which the party employing a vakeel or his agent, after due notice, fails to pay the amount of the estimated costs for preparing briefs containing the papers connected with the case on appeal necessary to enable the vakeel to conduct the case properly, the vakeel or vakeels, after notice to such party or his agent, and by leave of the Court, may withdraw from the case.

7. A vakeel may also, for any other sufficient cause, or after such notice to his client as may enable him to appoint another vakeel, by leave of the Court, but not otherwise, and on such terms as the Court shall order as to refunding any fees he may have received, withdraw from the further conduct of the case.

8. A list of all appeals filed shall be made out weekly, and a copy thereof hung up in the Library.

In such list the No. of the appeal, the names of the parties, and of the vakeel who filed the appeal, shall be given.

Rules for the Admission and Enrolment of Mooktears on the Appellate Side of the High Court.

I. Persons who have hitherto practised as mooktears on the Appellate Side of the High Court, and also persons desiring so to practise, may apply to be admitted and enrolled as mooktears in the High Court.

II. No person so applying shall be admitted, except he shall satisfy the Court as to his character and competency.

III. Every person so applying on being approved by the Court shall, before he is admitted and enrolled as a mooktear, be required to give security in the sum of Rs. 2,000 for his honesty and good conduct; for his compliance with the rules and orders of the High Court, and for the faithful discharge of his duties towards the Court and towards his employers.

IV. Every person admitted and enrolled as a mooktear of the High Court shall be at liberty—

(1) To instruct counsel or vakeel;

(2) To inspect the records of any civil or criminal case in which he is engaged as mooktear, and, if necessary, to obtain copies of any papers or documents in order to the preparation of a brief or instructions for the counsel or vakeel employed or to be employed in the case;

(3) To deposit in the office money or securities on behalf of his clients;

(4) To withdraw money or securities deposited on account of his clients;

(5) To receive back original or other documents filed in any case after the case shall have been completely disposed of;

(6) And, generally, to do all other such duties on behalf of his clients as mooktears are now, according to the existing practice in the Court, empowered to do.

Provided that no money, securities, or documents shall be handed out to any mooktear except on production of a special or general Power of Attorney under the hand of his client, and duly registered, authorizing him to receive the same.

Mooktears within the first fortnight in January in every year, or on the occasion of taking out or renewing their certificates, shall be required to satisfy the Registrar as to the state of their securities.

Note.—See the rules for the admission, qualification, and examination of Vakeels and Mookhtears, published in the 12th volume of the Bengal Law Reports, High Court Circulars, pages 1 to 16; and with regard to Pleaders and Mookhtears in Mofussil Courts, see Vol. XIV, High Court Circulars, pages 1 to 9.

Rules of Practice adopted by the High Court on 1st May, 1863.

It is ordered that, on and from the first day of May, 1863, the following rules and orders shall take effect in this Court:—

1. In special appeals the grounds of appeal shall be stated in English, and the application shall be accompanied by a certificate signed by an advocate or vakeel, stating that in his judgment there are reasonable grounds for contending that the decision of the lower Court is erroneous upon a point of law.

2. In the case of a regular appeal, notice of the arrival of the record shall be given by fixing such notice in some conspicuous part of the Court-house.

3. The notice shall be dated and signed by the Registrar, or by the Deputy Registrar of the Court, or by such other officer as shall be appointed by the Chief Justice for that purpose.

Note.—Rules 4 to 10, inclusive, are obsolete in practice.

See the Rules as to paper-books, dated 15th September, 1875, and 1st July, 1877, *post.*

11. The paper-book in regular appeals shall contain the following papers, or translations of them when they are not in the English language:—

I. The plaint and the date on which it was filed.

II. The written statements and depositions (if any) of the parties in the lower Court.

III. The issues (if any) framed and recorded in the lower Court.

IV. The judgment of the lower Court.

V. The documents and depositions (if any) specified in the lists mentioned in Rules 4 and 7.

VI. The grounds of objection (if any) intended to be made by the respondent.

See the Rules as to paper-books, dated 15th September, 1875, and first July, 1877, *post.*

* * * * * *

18. In all special appeals which shall be admitted after these rules come into force, a Judge, or the Registrar, or such officer as shall be appointed for that purpose by the Chief Justice, shall peruse the grounds of appeal; and every case in which it shall appear that the grounds of appeal are frivolous, or such as can be readily decided by the Court, shall be inserted by him in a list to be called the List of Short Special Appeals.

19. If the Registrar, or such other officer as aforesaid, entertain a doubt as to whether any particular case ought to be inserted in the said list, he shall bring the same to the notice of the Judge sitting for the decision of miscellaneous cases, and act according to his orders.

20. One day in every week shall be fixed for the decision, by a Division Court consisting of two Judges, of cases inserted in such list, so long as any case inserted therein remains to be heard.

21. The Court may, if it think fit, order two or more days to be fixed in any week for the hearing of such cases.

22. Notice shall be given of the day or days fixed for that purpose, together with a list of the cases intended to be called on for hearing on such day or days.

23. The notice shall be fixed in a conspicuous part of the Court-house at least one week before the day appointed for the hearing.

24. Unless otherwise specially ordered, the paper-books for the Judges in cases inserted in the List of Short Special Appeals need not be printed, and shall consist of a written copy of the grounds of appeal and of the objections (if any) intended to be made by the respondent, and also of the decision of the lower Court of Appeal if in English, or, if not, a translation of such decision.

25. Rule 11 shall take effect as to all regular appeals admitted since the 1st day of January, 1862, in which it shall be practicable to have the paper-books printed. In cases preferred before the end of May, 1863, the papers mentioned in cl. 5 will necessarily be omitted. The paper books prepared under this rule shall be printed.

Rules, dated 21st June, 1865.

See rules as to applications, dated 15th May, 1871, *post.*

I. Upon motion, if the application be not rejected, notice to show cause shall be given, or if the application be granted, it shall be granted only subject to the condition that no cause be shown to the contrary within a certain time (to be fixed) after service of the order; the order will then be sent to the Mofussil Courts for service.

II. On appearing to make the motion, the Barrister or vakeel shall present a petition in English, engrossed on a stamp of the value of Rs. 2, containing—

1st.—A statement of the names of parties, and of the value of the suit or appeal involved in the motion.

2nd.—The grounds of the motion.

And when the motion is for an order on the lower Court for submission of documents or other papers not before the Court.

3rd.—A specific statement of the papers, their nature, and the custody under which they are, as per marginal exemplar; and

District or Court.	Date and nature of documents.	Language in which it is executed.	Whether copy or original.	In what case filed, and date of filing.	Remarks.

4th.—A certificate signed by the vakeel that such documents or other papers are relevant and material for the purposes of the appeal, or the answer to the appeal for which they may be required.

III. When a document is wanted, and it will not delay the hearing of the appeal to send for the document, a motion shall not be necessary, but a written requisition to the Deputy Registrar shall be sufficient, unless he shall endorse thereon that an application to the Court ought to be made.

IV. Whenever an application for a document is made to the Court by motion in a case in which the hearing of the appeal will be delayed by sending for the document, the petition shall state the reasons why the application was not made to the Deputy Registrar at an earlier period.

Rules, dated 10*th May*, 1866.

The Court having found that in many cases of special appeal, pleaders have certified that there are grounds of special appeal in cases in which no such grounds exist, and that frivolous grounds are inserted, it is ordered that, after the 1st day of June next, no petition of special appeal, presented by any pleader of this Court, shall be registered without an order of a Judge, unless the pleader by whom the petition is presented shall sign a certificate at the foot of the petition in the following form :—

I, *A. B.*. pleader for the abovenamed , do hereby certify that in my judgment the ground (or if there be several, each of the grounds) of appeal in the above petition presented by me on behalf of the said , is a good ground of special appeal.

Dated this day of

Note.—In the rule, "good" ground means "reasonable" ground. The only effect of the rule is to bind a vakeel specially to the ground which he includes in his certificate (*a*).

No petition of special appeal presented by any party to the appeal shall be registered without the order of a Judge before whom the party presenting the appeal shall appear.

Rules made by the High Court of Judicature at Fort William in Bengal in pursuance of Act XX of 1865 *(Pleaders and Mookhtears), Section* 37, *for fixing and regulating the Fees payable by the unsuccessful party in respect of the fees of his adversary's Pleader in proceedings in any Court of Civil Judicature subordinate to the said High Court.*

In pursuance of s. 37, Act XX of 1865, the High Court is pleased to direct that, from and after the 1st day of July, 1866, the sums which shall be payable by an unsuccessful party in any suit or proceeding in the subordinate Civil Courts in respect of the fees of his adversary's pleader, shall be calculated at the rates specified in the following scale, that is to say :—

1. In suits for the recovery of specific property, or a share of specific property, whether immoveable or moveable, or for the breach of any contract or for damages :

If the amount or value of the property, debt, or damages decreed shall not exceed Rs. 5,000, at 5 per cent. on the amount or value decreed :

If the amount or value shall exceed Rs. 5,000, and not exceed Rs. 20,000, on Rs. 5,000 at 5 per cent., and on the remainder at 2 per cent. :

If the amount or value shall exceed Rs. 20,000, and not exceed Rs. 50,000, on Rs. 20,000 as above, and on the remainder at 1 per cent. :

If the amount or value shall exceed Rs. 50,000, on Rs. 50,000 as above, and on the remainder at ½ per cent. :

Provided that in no case shall the amount of any fee exceed Rs. 3,000.

2. In suits for injuries to the person or character of the plaintiff, such as suits for assaults or defamation, or for injuries to property, or to enforce rights where the pecuniary value of such injury or right cannot be exactly defined, as in suits for interference with a right to light or

water, or to enforce a right of pre-emption, or suits for the partition of joint property, where partition is improperly resisted, if the plaintiff succeed, the Court may order the fee of the pleader for the plaintiff to be calculated with reference either to the amount decreed or according to the valuation of the suit, or according to such a sum, not exceeding the valuation, as the Court shall think reasonable, and shall fix with reference to the importance of the subject of the dispute. In any such case, the amount of the pleader's fee shall be calculated according to the scale in Rule 1.

3. If the suit be dismissed for default or upon the merits, or be decreed for the defendant, the defendant's pleader's fee shall be calculated according to the scale in Rule 1, on the whole value of the suit.

4. If the suit shall be decreed for the plaintiff as to part only of his claim, and as to the remainder shall be dismissed or decreed for the defendant, the fees allowed to each party's pleader shall be fixed with reference to the value of that part of the claim in respect of which he shall succeed, and shall be calculated according to the scale in Rule 1.

But the portion of the claim in respect of which judgment is given for the defendant is not hereby to be treated as if the defendant had got a decree from the plaintiff for the amount (*b*).

5. If in any suit for unliquidated damages, the plaintiff shall succeed as to the whole of his cause of action, but shall fail to recover the full amount of damages claimed, the defendant shall not be entitled to any allowance for a pleaders' fee in respect of the difference between the amount of damages claimed and the amount recovered, unless the Court shall be of opinion that the amount claimed for damages was unreasonable or excessive, and shall for that, or any other cause to be specified, direct that a fee for his plender shall be allowed to the defendant.

If specially allowed, the amount of such fees shall be fixed with reference to the amount of damages disallowed to the plaintiff, and shall be calculated according to the scale in Rule 1.

6. If several defendants who have a joint or common interest succeed upon a joint defence, or upon separate defences substantially the same, not more than one pleader's fee shall be allowed, unless the Court shall otherwise order for a reason which shall be recorded. If only one fee be allowed, the Court shall direct to which of the defendants it shall be paid, or shall apportion it among the several defendants in such manner as the Court shall think fit.

7. If several defendants who have separate interests set up separate and distinct defences, and succeed thereon, a fee for one pleader for each of the defendants who shall appear by separate pleader may be allowed in respect of his separate interest. Such fee, if allowed, shall be calculated with reference to the value of the separate interest of such defendant, according to the scale in Rule 1.

8. The amount in respect of the fee of an adversary's pleader when allowed in any miscellaneous proceeding, or for any other matter than that of appearing, acting, or pleading in a suit prior to decree, shall be fixed by the Court according to the following scale, *viz.*:—

Rs. 10 to Rs. 80 in the Court of a Judge or Principal Sudder Ameen.

Rs. 4 to Rs. 16 in the Court of a Sudder Ameen.

Re. 1 to Rs. 4 in the Court of a Moonsiff.

(*a*) Jumeenissa Khatoon *v.* Bungo Chunder Chuckerbutty, 5 Suth. W. R., Mis., 51, L. S. Jackson, J.

(*b*) Bama Soonduree Debia *v.* Rodgers, 8 Suth. W. R., 55, L. S., Jackson, J.

The above scale shall apply to applications under s. 53 or 54 of Act XX of 1865.

9. Whenever an allowance shall be made on account of an adversary's pleader's fee, in determining the amount of costs to be paid by the applicant for an adjournment under s. 146 of Act VIII of 1859 [s. 156 of Act X of 1877], the sum to be allowed for the pleader's fee shall be fixed by the Court at such an amount as it may consider reasonable under all the circumstances of the case within the limits of the scale in Rule 8.

10. In every suit in any Court of original jurisdiction, which shall be undefended, the amount to be paid as the fee of the adversary's pleader shall be calculated at one-half the sum at which it would have been charged had the suit been defended.

11. If a review be rejected after summoning the opposite party, or if after the admission of a review the former judgment be upheld, the pleader's fee, if allowed to the successful party in the review, shall be fixed by the Court at an amount which shall not in any case exceed one-half of the amount allowed by these Rules in case of an original decree.

12. If, after the admission of a review, the former judgment be reversed, the fee of the pleader in respect of the review, if allowed to the party who succeeds in the review, shall not exceed one-half the amount allowed by these Rules in case of an original decree. The fee allowed in respect of the review will be irrespective of any pleader's fee which may be included in any costs in respect of the original suit which may be adjudged to the successful party by the judgment in review.

13. The amount to be allowed on account of the fee of an adversary's pleader in appeals shall be calculated on the same scale as in original suits, and the principles of the above rules as to original suits shall be applied as nearly as may be to appeals.

14. When the interest of several appellants is joint, not more than one pleader's fee shall be allowed, unless the Court shall otherwise order for a reason to be recorded. If one fee only be allowed, the Court shall direct to which of the appellants it shall be paid, or shall apportion it amongst the several appellants in such proportions as it shall think fit.

15. If several respondents in one appeal appear by separate pleaders, in determining whether several pleaders' fees shall be allowed, the Court shall be guided by the principles laid down in Rules 6 and 7.

16. If in any instance the payment of fees, according to the preceding Rules, shall not appear to the Court to be just and equitable, the Court may exercise its discretion in charging the fee of the adversary's pleader in such manner as may appear just and equitable; but in every case when an allowance is made for a pleader's fee, the amount shall be calculated according to the scale in Rule 1, or according to Rule 8, as the case may be.

Provided that if, under the provisions of s. 351, Act VIII of 1859 [s. 562 of Act X of 1877], the decree of a lower Court be reversed on appeal, and the case be remanded to the lower Court to be tried upon the merits, the lower Court, on passing its decree, may allow to the successful party such a sum as the Court shall consider to be reasonable, not exceeding half the amount calculated according to the scale in Rule 1 on account of his pleader's fee in respect of the re-hearing, in addition to the full amount of his pleader's fee calculated according to that scale.

Provided also, that if an appeal be preferred against the decree passed on remand, the fee, if any, allowed by the Appellate Court to the party succeeding in that appeal, shall not, unless for a special reason to be recorded, be less than quarter, nor more than half, of the amount calculated at the rate mentioned in Rule 1, if, by decree of the Appellate Court remanding the case, the same party shall have been allowed a full pleader's fee in respect of the former appeal in the suit either absolutely or conditionally upon his succeeding upon the remand.

Provided also, that if, under s. 354, Act VIII of 1859 [s. 566 of Act X of 1877], an issue be framed and referred by the Appellate Court for trial by the lower Court, the Appellate Court may, if it think proper, allow to the party who shall succeed in the appeal such a sum as the Court shall consider reasonable, not exceeding half the amount calculated at the rate mentioned in Rule 1 for his pleader's fee in respect of the trial of the issue in the lower Court, in addition to a full fee, in respect of the appeal, calculated at that rate.

Rules passed 4th June, 1867, relating to the Distribution of Business in the High Court, Bengal, Appellate Side.

On reading a report from the Select Committee of the Judges (appointed for the purpose of drawing up a scheme for the conduct of the English business in the Court, and for the distribution of appeals to the several Benches), and after considering the same—

The Court resolves :—

English Committee.

That there shall continue to be an English Committee, composed, as heretofore, of five Judges of the Court, who shall exercise the powers and authority of the Court in the matters hereinafter specified.

Judge in English Department.

That one Judge shall continue to have executive charge of the English Department with the following powers and functions, and shall be always a member of the English Committee.

Powers of Judge in English Department.

The Judge in the English Department shall have submitted to him primarily all correspondence in the English language and all returns and statements (not being returns to precepts and judicial orders or explanations called for by particular Judges or Benches), except the periodical Sessions statements sent up by the Judges in the interior, which shall be submitted for revision to a Bench of the Court sitting for the despatch of criminal business.

Such correspondence and other matters shall either be disposed of by the Judge in the English Department under his own powers, hereinafter conferred, or laid by him before the English Committee, or the Court at large, according to the nature of the case, as hereinafter provided.

The Judge in the English Department is empowered singly to dispose of—

Revision of periodical Statements.

A. Matters arising out of the revision of all periodical returns and statements furnished by the subordinate Civil and Criminal Courts, except the Sessions statements above referred to, and the annual statements, for

which provision is made elsewhere; and the necessary resolutions shall be recorded and issued under his orders.

Note.—This rule has been modified by recent arrangements, under which each Bench revises all statements, civil and criminal, from districts within their respective groups.

Appointments, &c., of subordinate Civil Judges.

B. The appointment and transfer of Moonsiffs, subject to consultation with the Chief Justice, leave of absence of Moonsiffs, and correspondence with the Local Government touching the appointment, promotion, transfer, and leaves of Subordinate Judges, in respect of which the Court is consulted by the Government. As regards promotion and transfers, he will confer with the English Committee.

Admission, &c., of Pleaders and Mookhtears.

C. Applications and routine references connected with the admission and enrolment of pleaders and mookhtears under Act XX of 1865.

Other correspondence.

D. All other correspondence not relating to matters judicial, or to orders of other Judges, unless there be, as to any subject, an express rule to the contrary, or unless the importance of the subject may render it, in his opinion, fit to be laid before a greater number of Judges.

The English Committee are empowered to dispose of the following matters, which are to be laid before them by the Judge in the English Department; and the signatures of not less than three Judges of the English Committee shall be attached to all orders passed by the Committee:—

Circular orders.

E. The issue of Circular Orders to the Mofussil Courts.

Letters from Government.

F. Letters and communications from the Government.

Letters from other High Courts.

G. Letters from other High Courts, or authorities exercising similar powers.

Changes in law proposed.

H. Communications relating to proposed changes in the law subject to the rule hereinafter specified in letter L.

Resolutions on Annual Statements.

I. Resolutions on the annual returns and statements prepared under the direction of the Judge in the English Department.

References touching Penal and Procedure Codes.

K. References under the Circular Order No. 17, dated 17th June, 1863, regarding doubts in connection with the Penal Code and the Code of Criminal Procedure.

Provided that all questions in respect of which a requisition to that effect shall be made by two Judges of the English Committee, shall be referred to the Court at large.

On the following matters all the Judges are invariably to be consulted, and the decision shall be according to the opinion of the majority who shall be present at a meeting to consider the subject:

Specially proposed changes in the law.

L. Proposed changes in the law, where the proposition emanates from Government, or in other cases, where the English Committee or any Judge of the Court considers that action is called for.

Administration Reports.

M. The administration reports yearly submitted to Government when passed by the English Committee.

N. General rules of the High Court.

O. Subjects connected with the relations between the Privy Council and the High Court.

Meetings of English Committee.

There shall be meetings of the English Committee on the 1st Saturday of every month, or oftener, if necessary, at 2-30 P.M., unless another day and time shall be on any occasion specially appointed.

Record.

The proceedings of the English Committee at such meetings shall be recorded in a book to be kept by the Registrar.

Immediate circulation of all important papers.

All papers relating to matters of the kinds hereinbefore expressly reserved for the decision of all the Judges, shall be forthwith circulated to them by means of additional printed copies to be obtained for the purpose.

Meetings of Judges.

There shall be a meeting of all the Judges, or as many as can attend, on the last Saturday of each month, at 2-30 P. M., or oftener, if necessary, to be convened by a notice to be circulated two days previously, with a list of the subjects to be considered. If there be no subjects for consideration, notice shall be circulated by the Registrar on the day previous, stating that no meeting will be held.

[*Distribution af business, High Court, Appellate Side.*]

Record.

The proceedings of the Judges at all meetings shall be recorded in a book to be kept for that purpose by the Registrar, and shall be at all times open to inspection when called for by the Judges.

With a view to the better distribution of the appellate business of the Court, it is ordered by a majority of the Judges (the Chief Justice, Mr. Justice Seton-Karr, and Mr. Justice Sumbhoonath Pundit, dissenting) that from and after the first day of June next, and for the space of six months next ensuing, all appeals of a civil nature, except miscellaneous, from the decrees or orders of the Zillah or Subordinate Judges and the Collectors or Deputy Collectors of the several districts within the jurisdiction of the Court, be placed on the general register, but with the addition of a letter denoting the files of the several Benches of the Court, according to the scheme which follows :—

A.	B.	C.	D.
Assam (including Eastern Dooars).	Backergunge.	Bhaugulpore.	East Burdwan
Beerbhoom.	Cuttack	Monghyr.	Cooch Behar (including Western Dooars).
Chittagong.	Chota Nagpore.	Cachar.	Cossyah and Jynteah Hills.
Gya.	Hooghly.	Dacca.	Dinagepore.
Moulmein.	Nuddea.	Furreedpore.	Maldah.
Mymensing.	Sarun.	Jessore.	Moorshedabad.
Rungpore.	Tipperah.	Midnapore.	Patna.
Bogra.	Noakhally.	Purneah.	Rajshahye.
Shahabad.		Sylhet.	Pubna.
Tirhoot.		West Burdwan.	24-Pergunnahs.

As the cases are ready for hearing they are to be placed on the *lists* of the several Division Benches to which, according to the foregoing arrangement, the Chief Justice shall have assigned the cases belonging to the several groups of districts respectively.

One of the Benches of the Court shall take the miscellaneous appeals, and shall also undertake the revision of the Sessions statements, hear motions relating to, and take cases of, revisions under s. 434 of the Code of Criminal Procedure; and shall also, when practicable, hear criminal appeals or references, or, if need be, assist either of the other Benches in hearing regular or special appeals, on days to be previously fixed, provided that at least three days' notice shall be given of the transfer of any such regular or special appeals to be heard by such Bench.

Motions shall be taken every day at the sitting of the Court by one of the Benches. If on any day the particular Bench appointed to hear motions on that day shall not sit, then the motions shall be taken by the next Bench in seniority.

Each Division Court shall pass orders on the "Lowazima" or miscellaneous references, and all other matters arising out of, or connected with, the cases on its own file.

One Judge shall take the Miscellaneous Department, and shall dispose of matters relating to the following subjects:—

(1) Appeals to Her Majesty in Council.

(2) Appeals from Omlah.

(3) Applications to appeal *in formâ pauperis.*

(4) Applications for admission of special appeals uncertified by a vakeel.

References from the Small Cause Courts in the mofussil, and from the Recorders in British Burmah, shall be heard by such of the Bench as the Chief Justice shall appoint.

Rules for fixing the time allowed for service of, and mode of serving, Notices on Respondents in Appeals to the High Court, &c., passed on the 25th of May, 1869.

(1) That the Time Table A hereto annexed be adopted, and a copy sent for guidance to the several Zillah Courts.

(2) That, upon obtaining the sanction and approval of His Honor the Lieutenant-Governor of Bengal, it be ordered that, from and after the first day of May next, the cost of service of notice on the respondent in every appeal in a civil case preferred to the High Court shall be paid at the High Court at the time of presenting the appeal, by an adhesive stamp, of such description as shall be issued for that purpose, to be affixed to the petition of appeal. The amount to be so paid shall be rupees three if there be only one respondent, or two rupees for each respondent to be served, to which shall be added on account of boat hire, &c., in respect of respondents to be served in any district mentioned in the annexed Table B, in the months specified, the sums respectively set down, one such payment for each appeal.

(3) That separate account be kept of such stamp duty.

(4) It is further ordered that the precept of this Court calling for the record, and transmitting the notices of the appeal, shall direct that the notices be served; and it shall be the duty of the lower Court there-

upon to cause service of the notices without further payment of tullubana or action by the appellant: provided that the appellant, or any one employed by him, shall be at liberty to accompany the serving officer for the purpose of pointing out the residence of the respondent.

(5) That the lower Courts shall issue all notices received for service immediately on receipt thereof, and that in their return of service, in every instance, the lower Courts shall be required to insert the date of receipt by them of the notice, the date on which it was made over to the serving officer, and the date on which it was received back from him.

(6) That every return of service, or of failure to serve the notice, be accompanied by the affidavit or solemn declaration of the serving officer, specifying the fact and the mode of service, or the reason why service could not be effected in any of the modes allowed by law. It shall be the duty of the lower Court to cause the notice to be served in sufficient time before the date fixed, and, if such service be impracticable, to state the reasons for which service cannot be effected; and thereupon a fresh date shall be fixed by the High Court. In every case the Court making the return is to satisfy itself that a valid service has been made, or that there has been a failure of service, and shall certify such opinion to this Court, with the reasons, in case of a failure of service.

(7) That the time allowed for service of the notice shall be specified therein by the Deputy Registrar in accordance with the table of time now adopted, and shall commence from the date on which it is despatched, which shall in general be within three days at the latest from the date on which the appeal is filed.

(8) That the date to be fixed by the Deputy Registrar for the hearing of the appeal shall be the seventh day after that on which the time allowed for service of the notice expires, provided it be not a Sunday or holiday, and in that case the first business day afterwards.

(9) That if there be several respondents to be served, and they do not at all reside in the same district, the time for service of the notices and for hearing shall be fixed with reference to that district for which the longest time is allowed in Table A.

(10) That in every instance in which it shall appear that the respondent, or any one of the respondents, to be served resides in any district other than that from which the appeal comes, the Deputy Registrar, in fixing the time for service and for the hearing of the appeal, shall add a sufficient time for sending the notice from the district from which the appeal comes to the district in which any notice is to be served; and the Court which serves any notice sent through the lower Court shall make its return of service, or of the failure of service, as the case may be, direct to the High Court, and shall be guided by Rules 5 and 6.

(11) That the endorsement on every paper-book prepared hereafter for the use of the Court at the hearing of the appeal, shall, in addition to the other matters at present specified in such endorsemnnt, contain—

The date on which the appeal is filed;
The date on which the notice is sent out;
The date of service of notice;
The date on which the record is received from the lower Court; and
The date on which the appeal is ready for hearing and the paper-book prepared.

(12) That in appeals in which the respondent shall not have appointed a vakeel up to the date of the preparation of the paper-book, an

appendix containing the deposition of the serving officer, and the return, and the remarks of the lower Court as to the service, shall be added to the paper-book, either in transcript or translation according as they may be in English or in the vernacular.

That a copy, and where necessary, a translation of these rules be transmitted to each of the Zillah and other subordinate Courts for information and guidance; and that their attention be drawn to the Circular Order of this Court, No. 10, dated the 26th of April, 1864; and that they be required in every instance in which the instructions contained in the Circular Order are not complied with, to specify the reasons of such non-compliance.

That a copy of these rules be hung up in each of the two libraries, and at the main entrance of the Court-house, for general information.

A

Time Table.

District.	Number of days allowed for service of Notice of Appeal on the Respondent.	District	Number of days allowed for service of Notice of Appeal on the Respondent.
Akyab	50	Gyah	33
Arracan	50	Hooghly	25
Assam (including Eastern Dooars) ...	50	Jessore...	29
Backergunge	35	Midnapore	27
Beerbhoom	23	Moorshedabad ...	23
Bhaugulpore	31	Moulmein	50
Burdwan, East ...	23	Mymensing	35
Burdwan, West	25	Nuddea	29
Cachar	50	Patna	31
Cherrapoonjee	50	Purneah	33
Chittagong	35	Rajshahye	31
Chota Nagpore	40	Rungpore	33
Cooch Behar (including Western Dooars) ..	50	Sarun	31
Cossyah and Jynteeah Hills	50	Shahabad	31
Cuttack...	35	Sylhet	35
Dacca	29	Tipperah	37
Dinagepore...	31	Tirhoot	33
		Twenty-four Pergunnahs...	25

B.

Tables of Charges for Boat-hire and Ferry-toll.

DISTRICT.	Amount to be charged.			The period during which the charge is to be made.
	Rs.	A.	P.	
Backergunge (whole district) ...	3	0	0	All the year.
Bhaugulpore	1	0	0	June to October inclusive.
Chittagong	0	8	0	All the year.
Cuttack	0	4	0	June to November inclusive.
Dacca	3	0	0	All the year.
Dinagepore	1	8	0	June to October inclusive.
Jessore	3	0	0	All the year.
Moorshedabad	1	0	0	June to October inclusive.
Mymensingh	3	0	0	Ditto.
Purneah	2	0	0	Ditto.
Rajshahye	1	8	0	Ditto.
Rungpore	3	0	0	All the year.
Sylhet	3	0	0	Ditto.
Tipperah	2	0	0	June to October inclusive.
Kamroop	1	8	0	All the year.
Nowgong	1	8	0	June to October inclusive.
Luckimpore	1	0	0	All the year.

The practice reported from several districts of exempting from toll peons wearing their badges, and engaged in executing processes, should be made general.

Rule passed, July, 1867.

Whenever one Division Court shall differ from any other Division Court upon a point of law, or usage having the force of law, the case shall be referred for decision to a Full Bench. If the question arise in a special appeal, the Court referring the case shall state the point or points upon which they differ from the decision of a former Division Court, and shall refer the appeal for the final decision of a Full Bench.

If the question arise in a regular appeal, the question of law shall alone be referred, and the Full Bench shall return the case with an expression of its opinion upon the points of law, for final adjudication by the Division Court which referred it; and in case of necessity, in consequence of the absence of any or either of the referring Judges, for the ultimate decision of another Division Court.

Every decision of a Full Bench shall be treated as a conclusive authority upon the point of law, or usage having the force of law, determined by the Full Bench, unless it be (subsequently) reversed, or a

contrary rule be laid down, by the Judicial Committee of the Privy Council. A Full Bench shall consist of not less than five Judges.

Rules of practice adopted by the High Court on 5th August, 1867, *regarding the admission of Appeals under Section* 15 *of the Letters Patent.*

I. Appeals to the High Court under s. 15 of the Letters Patent, from the judgments of a Division Court on the Appellate Side of the High Court, shall be presented to the Deputy Registrar within thirty days after the date of the judgments appealed from, unless the Court, in its discretion, on good cause shown, shall grant further time.

II. Such appeals shall be written on stamp paper prescribed for plaints. See Act VII of 1870, *post,* for amount of fee payable on filing appeals.

III. The petition of appeal shall be in the English language, and shall contain the grounds of appeal numbered *seriatim,* and shall be subscribed by an advocate or vakeel of the Court.

IV. The appellant shall not be required, as in ordinary appeals, to file with such petition of appeal a copy of the judgment appealed from.

V. (Prescribes the form of a separate register to be opened for the entry of such appeals.)

VI. Immediately after such an appeal is filed and registered, the Deputy Registrar shall prepare a notice of the appeal (form given) for service on the respondent, and shall cause the notice to be served on the vakeel who appeared for the respondent in the appeal in which the judgment was given. If two or more vakeels shall have appeared on behalf of the respondent, such notice may be served on any one of such vakeels; but in any case in which the respondent may not have entered appearance in the appeal in which the judgment was given, the notice shall be served in the mode provided by law for the service of a notice in ordinary appeals,—that is to say, through the local Court from whose judgment the case shall have been originally appealed.

VII. Such appeals shall be heard before a Division Court, which shall consist of at least three Judges other than the Judges of the Division Courts from whose judgments the appeals are preferred; and the Deputy Registrar shall, as soon after such appeals are filed and registered as possible, submit the papers to the Chief Justice for the necessary orders for their hearing.

Rules passed by the High Court of Judicature at Fort William in Bengal, which took effect from the 15*th day of July,* 1868.

I. Every moonshee of the Court shall make a declaration to the effect that he will truly and correctly, to the best of his ability, read such documents as he may be called upon to read for the purpose of translation.

II. Documents which are sent to the Translator's office for translations, and which require to be transcribed in the Bengalee character before they can be translated into English by the translators of the Court, shall be read by a moonshee of the Court to, and transcribed by one of the sworn translators, who shall sign the transcript made by him after the words "transcribed by me." Such transcripts shall be attached to, and produced in Court with, the translation.

III. When a moonshee of the Court is unable to read a document without assistance, the document may be read to the sworn translator by any other person competent to read the same who may be available, and who shall, previously to his reading the same, sign a declaration which shall be filed, that he will truly and correctly, and to the best of his ability, read the same. In all such cases the translator shall add to the transcript a statement of the name, description, or occupation, and place of abode of any person who may have read, or given assistance in reading, the documents. Thus, "Read to me by A. B., of No. Street (occupation)." "Assistance was given to the moonshee in reading this document by of ."

IV. No translator of any document, transcribed by the sworn translator from the dictation of any person other than a moonshee of the Court, shall be read in evidence, at the trial of any defended cause, unless before such trial notice shall have been given to the opposite party, or his attorney, in order to enable such party to attend before the sworn translator, and verify the correctness of the transcript. If the transcript is found to be incorrect, and a fresh translation is rendered necessary, all costs of, and incidental to, such fresh translation, shall be borne by the party filing the document.

V. In all undefended cases, the correctness of any transcript of any document read to a sworn translator by any person other than a moonshee of the Court, shall be proved at the trial by calling a witness for that purpose.

Note.—These Rules are also applicable to the Original Side of the High Court.

Rules as to the Fees chargeable for serving and executing Processes issued by the High Court in its Appellate Jurisdiction, and by the other Civil and Revenue Courts established within the limits of such jurisdiction, made by the High Court pursuant to Act VII of 1870.

RULE I.—The fees exhibited in the following table shall be charged for serving and executing the several processes against which they are respectively ranged :—

Table of Fees.

	Proper Fee. Rs.	A.	P.
PART I.—In the High Court, Appellate Jurisdiction—			
Article 1.—Every summons, subpœna, rule, notice, proclamation, injunction, or other order not elsewhere specified in this Table, Part I ...	3	0	0
Article 2.—Every commission to make a local investigation or to take evidence, or for any other purpose—			
(*a*) in respect of the commission	3	0	0
(*b*) in respect of the remuneration of the commissioner, *i. e.*, person who is to execute the commission, *per diem*	Such sum as the Court may direct.		

Note.—A sum sufficient to cover the daily fee (*b*) for such period as may be fixed by the Court for the purpose of executing the commission must be paid in addition to the

fee (*a*) at the time when the commission is issued; and if the commission is not completely executed within the period so fixed, a further sum, sufficient to cover the daily fee (*b*) for the excess period extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the commissioner's report or other return to the commission is used.

	Proper Fee. Rs.	A.	P.
Article 3.—Every warrant for arrest of the person ...	3	0	0.

PART II.—In the Courts of Judges and Subordinate Judges and in the Revenue Courts, when the suit in which the process is issued is valued at a sum exceeding Rs. 1,000—

	Rs.	A.	P.
Article 1.—Every summons, subpœna, notice, proclamation, injunction or other order not elsewhere specified in this Table, Part II	2	0	0
Article 2.—Every commission to take a local investigation, or to take evidence, or for any other purpose,			
(*a*) in respect of the commission	2	0	0
(*b*) in respect of the remuneration of the commissioner, *i. e.*, person who is to execute the commission, *per diem*	3	0	0

Note.—A sum sufficient to cover the daily fee (*b*) for such period as may be fixed by the Court for the purpose of executing the commission must be paid in addition to the fee (*a*) at the time when the commission is issued; and if the commission is not completely executed within the period so fixed, a further sum, sufficient to cover the daily fee (*b*) for the excess period extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the commissioner's report or other return to the commission is used.

	Rs.	A.	P.
Article 3.—Every process of attachment of property by notice or proclamation	2	0	0
Article 4.—Every process of attachment of property by actual seizure—			
(*c*) in respect of the warrant of attachment ...	2	0	0
(*d*) in respect of each man necessary to ensure safe custody, who is left in possession, *per diem*	0	6	0

Note.—A sum sufficient to cover the daily fee (*d*) for a period of at least one month must be paid in addition to the fee (*c*) at the time when the process is obtained; and if the attachment is continued beyond the month, a further like sum for the next month must be paid two clear days before the expiration of the month which has been already paid for, and so on for each ensuing month, otherwise the man or men in possession will be removed.

	Proper Fee. Rs. A. P.
Article 5.—Every process of attachment by the arrest of the person	15 0 0
Article 6.—Every order for the sale of property—	
(*e*) in respect of the order of sale	2 0 0
(*f*) by way of poundage on the gross amount realized by the sale up to Rs. 1,000	2 per cent.
together with a further fee on all excess of gross proceeds beyond Rs. 1,000, of ...	1 per cent.

Note.—The portion (*e*) of this fee must be paid when the process is obtained, and the poundage (*f*) must be paid at the time of making the application for payment of the proceeds of sale out of Court, as hereinafter provided.

PART III.—In the Courts of Moonsiffs and of Small Causes, and in the Revenue Courts, when Part II does not apply—

	Rs. A. P.
Article 1.—Every summons, subpœna, notice, proclamation, injunction or other order not elsewhere specified in this Table, Part III	1 0 0
Article 2.—Every commission to make a local investigation or to take evidence, or for any other purpose—	
(*a*) in respect of the commission ...	1 0 0
(*b*) in respect of the remuneration of the commissioner, *i. e.*, person who is to execute the commission, *per diem* ...	3 0 0

Note.—A sum sufficient to cover the daily fee (*b*) for such period as may be fixed by the Court for the purpose of executing the commission must be paid in addition to the fee (*a*) at the time when the commission is issued; and if the commission is not completely executed within the period so fixed, a further sum sufficient to cover the daily fee (*b*) for the excess period extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the commisioner's report or other return to the commission is used.

	Rs. A. P.
Article 3.—Every process of attachment of property by notice or proclamation ...	1 0 0
Article 4.—Every process of attachment of property by actual seizure—	
(*c*) in respect of the warrant of attachment ...	1 0 0
(*d*) in respect of each man necessary to ensure safe custody, who is left in possession, *per diem* ..	0 4 0

Note.—A sum sufficient to cover the daily fee (*d*) for a period of at least one month must be paid in addition to the fee (*c*) at the time when the process is obtained; and if the attachment is continued beyond the month, a further like sum for the next month must be paid two clear days before the expiration of the month which has been already paid for, and so on for each ensuing month, otherwise the man or men in possession will be removed.

	Rs. A. P.
Article 5.—Every process of attachment by the arrest of the person ...	5 0 0

Rs. A. P.

Article 6.—Every order for the sale of property—

(*e*) in respect of the order of sale ... 1 0 0

(*f*) by way of poundage on the gross amount realized by the sale up to Rs. 1,000 ... 2 per cent.

together with a further fee on all excess of gross proceeds beyond Rs. 1,000, of ... 1 per cent.

Note.—The portion (*e*) of this fee must be paid when the process is obtained; and the poundage (*f*) at the time of making the application for payment of the proceeds of sale out of Court, as hereinafter provided.

RULE II.—Notwithstanding Rule I, no fee shall be chargeable for serving and executing any process, such as a notice, rule, summons or warrant of arrest, which may be issued by any Court of its own motion, solely for the purpose of taking cognizance of and punishing any act done, or words spoken, in contempt of its authority.

RULE III.—No process which comes within the operation of Rule I shall be drawn up for service or execution, except upon a request made to the Court for that purpose in writing, on a document bearing upon its face stamps not less in amount than the fee which by Rule I is directed to be charged for serving and executing the process so sought to be drawn up. This request may, however, at the option of the party making it, be included in the petition by which he moves the Court to order the process to issue, but in that case the petition must bear the requisite stamps for the process fee, in addition to such stamps, if any, as are needed for its own validity; and, in either case, the filing of the document in which the request is written, thus duly stamped, shall constitute payment of the fee chargeable for the process.

RULE IV.—In cases which are covered by the note to Article (2) of Part I, and the note to Articles (2) and (4) of Parts II and III of the Table of Fees in Rule I, the additional fee which may become payable after the process has been actually issued shall be paid by filing a written requisition to the Court to receive the fee, which document shall bear on the face of it stamps not less in amount than the additional fee, together with a memorandum of the purpose for which it is paid.

RULE V.—The proceeds of a sale effected in execution of any decree will only be paid out of Court on an application made for that purpose in writing, and the additional fee (*f*), Article (6), Parts II and III, must be paid by stamps affixed to, or impressed upon, the first of such applications, whether it be or be not made by the person who obtained the order for sale, or whether it does or does not extend to the whole of the proceeds. No fee will be chargeable upon any such application subsequent to the first.

N. B.—The fees paid in pursuance of these Rules must in all proceedings be deemed and treated as part of the necessary and proper costs of the party who pays them.

7th August, 1870.

Rules framed by the High Court of Judicature at Fort William in Bengal, under clause iii, Section 20 *of the Court Fees Act,* 1870.

1. The following monthly salaries shall be allowed to the Nazir and other persons employed in the service or execution of processes of the Civil Courts:—

	Rs.
1*st.*—In the Court of the District Judge—	
The Nazir being the person responsible for the due service and execution of all processes in the Courts at the Sudder Station	100
Rising by increments to	200
His Clerk or Taidnavis	10
Peons, 2nd grade	8
„ 1st grade, after three years' approved service	10
2*nd.*—In the Court of the Subordinate Judge, not being Judge of a Small Cause Court—	
Naib Nazir, Rs. 25 to 35, according to circumstances.	
Peons, as in Judge's Court.	
3*rd.*—In the Court of the Sudder Moonsiff—	Rs.
Naib Nazir	20
Peons, 2nd grade	6
„ 1st grade after three years' approved service	8
4*th.*—In the Courts of Moonsiffs not at the Sudder Station—	
Nazir	25
Peons, 2nd grade	6
„ 1st grade after three years' approved service	8
5*th.*—Small Cause Courts—	
Nazir, Peons } as at present.	

2. The following monthly salaries shall be allowed to the Nazir's peons and other officers employed in the service or execution of processes in the Courts of the Magistrates:—

	Rs.
1*st.*—In the Court of the Magistrate of the District—	
Nazir responsible for the due service and execution of all processes in the Courts of the several Magistrates at the Sudder Station ...	50
Rising by annual increments of Rs. 2 per month, to	80
Buxee or Taidnavis	16
2*nd.*—For each additional Magistrate's Court at the Sudder Station—	Rs.
Naib Nazir	25
Peons	7
3*rd.*—In Sub-Divisional Magistrates' Courts—	
Nazir of Sub-Division	30
Buxee for each additional Magistrate's Court at Sub-Division	10
Peons	7

Rules framed by the High Court of Judicature at Fort William in Bengal in pursuance of the Court Fees Act, 1870, *as to the fees chargeable for service and execution of the several processes in the Courts of Magistrates.*

1. The fees hereinafter mentioned shall be charged for serving and executing the processes to which the fees are respectively attached, *viz.*:—

			Rs.	A.	P.
(1)	Warrant of arrest ...	For the warrant in respect of one person	1	0	0
		In respect of every additional person named therein	0	4	0
(2)	Summons ...	For the summons in respect of one person	1	0	0
		In respect of every additional person named therein	0	4	0
(3)	Proclamation for absconding party under s. 183, C. Cr. Procedure	For the proclamation	2	0	0
(4)	Proclamation for witness not attending, s. 189	For the proclamation	1	0	0
(5)	Warrant of attachment	For the warrant	1	0	0
		Where it is necessary to place officers in charge of property attached, for each officer so employed, *per diem*	0	4	0
(6)	Warrant of levy of fine or of maintenance to wife, children, &c.	For the warrant	1	0	0
		And a percentage on the amount of fine or maintenance levied, *viz.*, 2 per cent. on sums not exceeding Rs. 100, and where the sum exceeds Rs. 100, then 2 per cent. on Rs. 100, and 1 per cent. on the amount of excess.			
(7)	Written order ...	For the order	1	0	0
(8)	Injunction ...	... For the injunction	1	0	0
(9)	Notice ...	... For the notice	1	0	0

2. Nothing herein contained shall be deemed to authorize the levying of any fee on any summons to attend as a juror or assessor in a Court of Session, and no fee shall be chargeable on any such summons.

3. No fee shall be chargeable in advance on any process of a Criminal Court in any case where the prosecution is on the part of Government, but it shall be competent to any Magistrate, in such case, if the accused is convicted, to order that such fees shall be paid by the accused, or any of them, in like manner as if such fees had been paid by the prosecutor in the first instance.

4. Where any percentage is directed by these rules to be taken upon amounts levied as fines or maintenance, such percentage shall be deducted from the proceeds of any property sold, or shall be paid together with the amount levied, and with the other costs of process as stated in the warrant.

5. When a proclamation has been issued for an absent witness, if the witness shall afterwards appear, and the Court shall be of opinion that such witness had absconded or concealed himself for the purpose of avoiding the service of a warrant upon him, such Court may order the witness to pay the cost of the proclamation.

6. In districts named in the margin, where the sub-divisional system has not been fully introduced, in every case where a process has to be executed at a distance of more than 25 miles from the Court from which it is issued, an addition of one-fourth is to be made to the fee chargeable; and if more than 50 miles, an addition of one-half.

Rajshahye.	Beerbhoom.
Bograh.	Cachar.
Dinagepore.	Chittagong.
Maldah.	Noakhally.
Rungpore.	Singbhoom.
Bancoorah.	Nowgong.

3rd September, 1870.

Under the provisions of s. 22 of the Court Fees Act, 1870, the following rules, made by the High Court of Judicature at Fort William in Bengal, and approved by the Lieutenant-Governor of Bengal and by the Governor-General of India in Council, are prescribed as the rules subject to which the Magistrates of Districts are to fix, and may from time to time alter, the number of peons necessary to be employed for the service and execution of processes issued out of their Courts, and each of the Courts subordinate thereto:—

1st.—The Magistrate of every District shall ascertain the average number of processes issued in a year from his own Court, and from each of the Courts subordinate thereto, during three years last past.

2nd.—The peons to be employed in each district shall be in number sufficient for the execution of a like number of processes; each peon being for this purpose considered capable of executing 300 processes per annum.

Backergunge.	Chittagong.
Dacca.	Dinagepore.
Jessore.	Mymensingh.
Sylhet.	Rajshahye.
Kamroop.	Rungpore.
Nowgong.	
Luckimpore.	

N. B.—For the districts in the 2nd column, the calculation is to be made for from May to October, inclusive, only.

3rd.—In the districts named in the margin, where the peons entrusted with a large proportion of processes have to be conveyed by boat, the number of processes which each peon is expected to serve may be reduced by one-third, and the number of peons to be employed shall be calculated accordingly.

4th.—Where it appears advisable to the Magistrate of the District, he may authorize the appointment of such number of peons on the whole for all the Courts in his district as may suffice for executing the total number of processes of those Courts, and may from time to time apportion such peons according to need among such Courts.

5th.—When it appears to the District Magistrate that the number of processes issued out of any Court or Courts in the district has increased by 10 per cent., he shall be competent to make a corresponding increase in

the number of peons; and if there shall be a diminution to the like extent, or if he should be satisfied that the processes of all or any of such Court can be executed by a smaller number of peons, it shall be his duty to make a reduction accordingly.

Under the provisions of s. 22 of the Court Fees Act, 1870, the following Rules, made by the High Court of Judicature at Fort William in Bengal, and approved by the Lieutenant-Governor of Bengal and by the Governor-General of India in Council, are prescribed as the rules subject to which the District Judges are to fix, and may from time to time alter, the number of peons necessary to be employed for the service and execution of processes issued out of their Courts, and each of the Courts subordinate thereto:—

1*st.*—The Judge of every District in the Regulation Provinces shall ascertain the average number of processes issued from his own Court, and from each of the Courts subordinate thereto, during three years last past.

2*nd.*—To this shall be added, in the districts to which Act VIII of 1869, B. C., has been extended, the average of processes issued by the Revenue Courts of the same district.

3*rd.*—The peons to be employed in each district shall be in number sufficient for the execution of a like number of processes; each peon being for this purpose considered capable of executing—

		Per annum.
In the Zillah Court and the Subordinate Judge's Court	...	200
„ Moonsiff's Court	...	250
„ Courts of Small Causes	...	300

4*th.*—In order to provide for the service of processes of certain kinds, which occupy a longer period, and in respect of which a higher fee is charged, 25 per cent. may be added in each case to the average ascertained under the 1st and 2nd Rules.

Backergunge.	Chittagong.
Dacca.	Dinagepore.
Jessore.	Mymensingh.
Sylhet.	Rajshahye.
Kamroop.	Rungpore.
Nowgong.	
Luckimpore.	

N. B—For the districts in the 2nd column, the calculation is to be made orfrom May to October, inclusive, only.

5*th.*—In the districts named in the margin, where the peons entrusted with a large proportion of processes have to be conveyed by boat, the number of processes which each peon is expected to serve may be reduced by one-third, and the number of peons to be employed shall be calculated accordingly.

6*th.*—Where there are in any districts several Courts of any one class, the Judge may authorize the appointment of such number of peons on the whole for such Courts as may suffice for executing the total number of processes, and may from time to time apportion such peons according to need among such Courts.

7*th.*—When it appears to the District Judge that the number of processes issued out of any Court or class of Courts in the district has increased by 10 per cent., he shall be competent to make a corresponding increase in the number of peons; and if there shall be a diminution to the like extent, or if he shall be satisfied that the processes of all or any of such Courts can be executed by a smaller number of peons, it shall be his duty to make a reduction accordingly.

8*th September*, 1870.

Scale of Fees for Search, &c., in the Offices of the High Court, Appellate Side.

It is hereby notified that, with the sanction of His Excellency the Governor-General in Council, the following scale of fees has been introduced into the offices of the High Court on its Appellate Side; and that they will be chargeable from and after this date,—*viz.*, the 14th November, 1870.

TABLE OF FEES.

	Rs.	A.	P.
For any search in the offices, record-rooms, and books or registers of the Court	1	0	0
For taking solemn declaration or affidavit before the Deputy Registrar	2	0	0
For a certificate of enrolment as pleader of the High Court	50	0	0

CIRCULAR ORDER No. 621.

Rule for the transmission to the Sheriff direct of Processes and Rules intended for service in Calcutta.

The Court having determined to transmit processes and rules intended for service in the town of Calcutta to the Sheriff direct, parties will not, from and after this date, be required to pay into this Court tullubana in respect of such processes and rules by stamps, as provided in the rules annexed to Circular Order No. 11 of the 7th of October last. Such processes and rules will, in future, be prepared and made over to the parties or their pleaders for delivery to the Sheriff for service, and must be delivered to him, accompanied by the requisite fees, *viz.*, 2 rupees for each person to be served.

21*st February*, 1870.

Rules for the Admission of Applications made to the High Court on its Appellate Side,—dated the 15*th of May*, 1871.

I. No application made to the High Court founded on any statement of fact shall be made otherwise than by a petition in writing, setting out the material facts, matters, and circumstances on which the applicant relies.

II. The facts stated in such petition shall be verified by the solemn affirmation of the petitioner, or by an affidavit to be annexed to the petition.

NOTE.—The affidavit may be by any person having cognizance of the facts stated. Several persons may join in an affidavit, each deposing separately to those facts which are within his own knowledge.

III. Any party opposing the grant of an application, or showing cause against a rule, who may desire to bring before the Court any facts not contained in or admitted by the petition or affidavit of the opposite party, must do so by an affidavit containing, in the form of a narrative, the material facts on which he relies.

IV. Every affidavit to be used in the High Court shall be entitled "In the High Court of Judicature at Fort William in Bengal."

If there be a cause in Court, the affidavit in support of, or in opposition to, an application respecting it, or made in it, must also be entitled "In the cause."

If there be no cause in Court, the affidavit shall be entitled "In the matter of the petition of ——————————."

V. Every such petition or affidavit as aforesaid, containing any statement of facts, shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject.

VI. Every person, other than a plaintiff or defendant in a suit in which the application is made, presenting any petition or making any affidavit, shall be described in such a manner as will serve to identify him clearly,—that is to say, by the statement of his full name, the name of his father, his caste, or religious persuasion (if he be not a Hindu), his rank or degree in life, his profession or trade, and the true place of his residence.

VII. When the petitioner in any such petition, or the deponent in any affidavit, speaks to any fact within his own knowledge, he must do so directly and positively, using the words "I affirm" (or "make oath") "and *say*."

VIII. Where the particular fact is not within the deponent's own knowledge, but is stated from information obtained from others, the petitioner or deponent must use the expression—"I am informed," and, if such be the case, he should add, "and verily believe it to be true," or he may state the source from which he received such information. When the application rests on facts disclosed in documents or copies of documents procured from any Court of Justice or other source, the deponent shall state what is the source from which they were procured, and his information or belief as to the truth of the facts disclosed in such documents.

IX. Every person presenting a petition or making an affidavit shall, if not personally known to the person before whom the petition is to be verified or the affidavit is to be made, be identified to that person by some one known to him; and the person before whom the petition is verified or the affidavit is made, shall specify at the foot of the petition or of the affidavit (as the case may be), the name and description of him by whom the identification is made, as well as the time and place of the identification, and of the verification of the petition or making of the affidavit.

X. If any person presenting a petition or making an affidavit shall appear to the person before whom the petition is to be verified or the affidavit made to be illiterate, or not fully to understand the contents of the petition or affidavit, the said person before whom the petition is to be verified or the affidavit made, shall cause the petition or affidavit (as the case may be) to be read and explained either by himself, or in his presence by a proper officer of the Court, to the person by whom it is to be verified or made. When any petition or affidavit is read and explained as herein provided, the person before whom the petition is verified or affidavit is made, shall certify in writing, at the foot of such petition or affidavit, that it has been so read or explained, and that the person verifying the petition or making the affidavit seemed perfectly to understand the same at the time of his verifying it or making it.

Rules for the preparation of Paper-books in Regular Appeals, dated 15th September, 1875.

See Rules of 1st May, 1863, *ante*.

1. In all regular appeals, the Deputy Registrar shall, forthwith upon the receipt of the record, make and [serve on the appellant an estimate of the cost of preparing and printing a complete and accurate list of all the papers contained therein, and the appellant shall, within one week of the service of this estimate on him, deposit the amount thereof with the accountant of the Court. The list shall then be made and printed in the form given below]:—

1	2	3	4	5
Number on the record.	Mark, if any, in the Court below.	Description and date of paper on the record.	Whether the whole or a portion thereof is to be inserted in the Paper-book.	Page in the Paper-book.

In these lists, columns 4 and 5 will be left blank. Column 4 will be filled in by the parties as hereinafter directed, and column 5 by the Officer of the Court. The papers are to be arranged in the order directed by Rule X of the Rules of 30th July, 1870, as to Privy Council Appeals.*

2. As soon as this list shall have been prepared, the Deputy Registrar shall deliver one copy thereof to each appellant, or set of appellants appearing separately, or to his or their vakeels respectively, free of charge. Further copies shall be supplied to any of the parties to the appeal at the rate of 4 annas a copy.

3. Within fourteen days after receipt of the list above-mentioned the appellant or appellants shall deliver to the Deputy Registrar a copy of such list signed by such appellant or appellants, or his or their advocate or vakeel, showing by filling up column 4 of the list what papers or portions of papers in the record it will be necessary to read at the hearing of the appeal.

4. In such list shall be specified not only the papers forming that portion of the record which is relied upon by the appellant or appellants, but all the papers in the record so far as may be necessary to enable the Court to dispose of the appeal.

5. Notice of such list having been filed shall be forthwith given by the Deputy Registrar to the respondents who have appeared or their vakeels respectively.

6. Any party respondent or his vakeel may without fee inspect and at his own expense take a copy of the list filed under Rule 3.

7. Each party respondent shall, within fourteen days after service on him of the notice under Rule 5, deliver to the Deputy Registrar a

* See Rule 96 of the present Rules as to Privy Council Appeals of 1st September, 1877, *post*. The part within brackets in the first clause of this rule was substituted by order of the 12th September, 1878.

copy of the list mentioned in Rule 2, showing by filling up column 4 of the list what papers or portions of papers, if any, not marked as necessary in the list furnished by the appellants, he considers it will be necessary to have read at the hearing of the appeal.

8. If any respondent considers that any portion of the record marked in the appellants' list is unnecessary, he shall so state by writing in column 4 the word "unnecessary."

9. If any respondent considers that any portion of the record has not been marked as necessary by the appellants, which under Rules 3 and 4 ought to have been so marked, he may, within three days after filing his own list under Rule 7, and on notice to the appellants, apply to the Court to compel the appellants to add that portion to their own list; and if such application be granted, the portion so added shall be struck out of the respondent's list.

10. If no list be filed by any respondent within the time specified, the paper-book will be made up according to the appellant's list.

11. Where several appellants or respondents appear by one advocate or vakeel, one list only shall be filed by each set of parties so appearing.

12. If all or a considerable portion of the necessary papers have already been printed in any former paper-book, the appellant or appellants shall so state in his or their petition of appeal and in the list furnished under Rule 3. Nothing printed in such former paper-book shall, except by special order of Court, be again printed, if sufficient copies of that paper-book be procurable. But copies of the former book shall be annexed to the new book, and a reference shall be made to the page in the former book in which each particular document or deposition is to be found.

13. Immediately upon the receipt of any list filed under Rule 3 or 7, the Deputy Registrar shall make and deliver to the party furnishing it an estimate of the costs of transcribing, translating, printing, and preparing the portions of the record marked in such list as necessary to be read, or added thereto by order of the Court. Each party furnishing a list must, within two weeks after the delivery to him or them of such estimate, deposit with the accountant of the Court the whole amount thereof.

14. If it shall be ascertained at any time that the sum deposited by any party will not cover the usual costs payable in respect of the papers marked as necessary in the list furnished by him, or added thereto by the order of the Court [or in the case of the appellant of the list prepared under Rule 1] the difference shall be estimated by the proper officer, and shall be paid within two weeks after demand by such party.

Note.—The part within brackets was added by a rule of 12th September, 1878, as well as the figure 1 in the next rule.

15. In case of any party failing to file the necessary list under Rule 3, or to make the necessary deposit under Rules [1], 13, and 14 in due time, the Deputy Registrar shall at once cause the appeal to be set down before the Division Court to which it belongs; and if the party in default does not satisfy the Court as to his delay, the appeal may be dismissed for want of prosecution, or the Court may pass such other order as it may deem proper.

16. If the sum deposited by any party shall exceed the costs for

which he is liable under the above rules, the difference shall be refunded as soon as the actual costs incurred are ascertained.

17. The Court may, at any time, upon sufficient cause shown, enlarge the time for furnishing any list or making any deposit required by these rules. Such application for enlargement must be made before the time expires, except in special cases; and it must be supported by an affidavit, stating the circumstances under which the delay took place. It must also be accompanied by a certificate of the Deputy Registrar showing the dates on which the several directions herein contained have been complied with; which certificate the Deputy Registrar shall grant upon payment of a fee of Rs. 2.

18. A separate account shall be kept of the costs of transcribing, translating, and printing the papers contained in each list.

19. The Deputy Registrar shall cause the portions of the record in respect of which the proper deposit has been made to be (where necessary) translated into English, and shall cause the same to be printed; and this, together with such lists as aforesaid, shall form the paper-book to be used by the Court at the hearing of the appeal.

20. If there be separate appeals against the same judgment, complete lists shall be filed by the parties in each appeal; and the Deputy Registrar shall, subject to the order of the Court, determine in what proportions the deposits are to be made. Nothing shall be printed twice over; but references shall be inserted in the proper places, showing where the several portions elsewhere printed are to be found.

21. No portion of the record which is not contained in the paper-book shall be read at the hearing of the appeal without the special leave of the Court. If such special leave be granted, it shall be competent to the Court to order such portion to be translated and transcribed or printed at the cost of the party requiring the same to be read.

22. The costs of transcribing, translating, printing, and preparing the paper-book shall be costs in the appeal, unless the Court hearing the appeal shall otherwise direct.

23. The Court may, upon the application of any party, and upon good and sufficient cause shown, give such special directions as to any of the matters to which these rules relate as may seem fit, and may by special order exempt any party from the operation of any portion of these rules: Provided always that the list as directed by Rules 3 and 7 must be filed in all cases, unless the party can satisfy the Court that he is unable to prepare the list himself, and that he is without any professional assistance in the litigation.

24. It shall be open to any party, at any time before the translations are completed, to deposit the amount necessary for defraying the expenses of examination of the translations before the same are printed, such amount being fixed by the Deputy Registrar; and upon such deposit being made, the translations will be examined in the same way that the translations in cases appealed to the Privy Council are examined, by one of the sworn examiners of the Court, and certified accordingly. The amount so deposited will be allowed as costs to the party making the deposit, if the Court shall so order.

25. Upon special application and deposit of the extra costs, the record will be printed in the form directed by the Privy Council.

26. In ordinary cases, 25 copies of the paper-book will be printed; but the Deputy Registrar may at his discretion increase the number.

Two copies of the paper-book may be obtained by each party appearing separately free of charge.

27. As soon as the paper-book is ready for delivery to the parties, the case shall be inserted by the Deputy Registrar in a list to be hung up in the usual places; and the case shall not be inserted in the list of cases ready for hearing until four days after its insertion in the first of the above-mentioned lists.

28. Appeals against admissions of or refusals to admit a will to probate, shall be considered as regular appeals within the meaning of these rules.

29. Every paper-book shall have printed on the cover a statement of the amount of costs incurred by each party in respect thereof.

30. These rules shall apply to all regular appeals filed after the 1st day of November, 1875.

Rules relating to Special Appeals, dated 1st of July, 1877.

I. The paper-book in all cases of special appeal, except appeals not exceeding Rs. 50 in value, will consist of the following papers; those not originally in the English language being translated into English:—

(*a.*)—*The Plaint.*

Note.—Lengthy schedules and descriptions of boundaries appended to plaints may be omitted.

(*b.*)—*The Plaintiff's written statement, if any.*

(*c.*)—*The Defendant's written statement.*

Note.—When there are several sets of defendants in a suit, the written statements of defendants not parties to the special appeal, either as appellants or respondents, may be omitted.

(*d.*)—*The Judgment of the first Court.*

(*e.*)—*The Judgment of the lower Appellate Court.*

(*f.*)—*Any Judgments or Orders of Remand passed in the case either by the lower Appellate Court on appeal or by the High Court on special appeal.*

(*g.*)—*The Memorandum of Special Appeal.*

(*h.*)—*A front leaf* containing the number of the cause, names of the Judges of the two Courts below, names of the parties and of their vakeels, date of the institution of the suit, date of the judgment of the first Court, date of the judgment of the lower Appellate Court, date on which the special appeal was filed, date of service of notice upon the respondents, and date on which the cause was ready for hearing.

II. In each case of special appeal, the Deputy Registrar will cause to be printed 12 copies of the paper-book as aforesaid.

III. The appellant, at the time of filing the memorandum of special appeal, and the respondent, at the time of entering appearance through a vakeel or attorney of the High Court, shall each of them deposit with the accountant the sum of Rs. 7-8, and shall each of them be entitled to one copy of the paper-book free of charge.

IV. If it shall be ascertained at any time that the sum deposited in any case will not cover the actual costs incurred, the difference shall be deposited by the appellant within two weeks after demand.

V. In case of any party failing to make the necessary deposit under Rule IV, the Deputy Registrar shall at once cause the appeal to be set down before the Division Court to which it belongs; and if the party does not satisfy the Court as to his delay, his appeal may be dis-

missed for want of prosecution, or the Court may pass such other order as it may deem proper.

VI. When the cause is ready for hearing, the Deputy Registrar will furnish the vakeels or attorneys engaged on either side with copies of the paper-book, for which deposit shall have been made as aforesaid. The issue of paper-books to the vakeels or attorneys will be notice to them that the case is ready for hearing.

VII. No memorandum of special appeal filed through a vakeel or attorney of the High Court, nor a *first* vakalutnamah or power-of-attorney for the appearance of the respondents, will be admitted or received, unless, at the time of presentation, the deposit has been made with the accountant under Rule III.

Provided that any second or other vakalutnamah or power-of-attorney for the appointment of new vakeels or attorneys, or re-appointment of former vakeels or attorneys by representatives of deceased parties, may be filed without such deposit.

VIII. An account shall be kept of so much of the actual cost of preparing and printing the paper-book in each special appeal as is chargeable to the parties, and the appellant and respondent shall be each of them entitled to a refund in equal shares of the excess of the sum paid by them jointly over the said actual costs.

IX. Additional paper-books supplied at the request of the parties shall be charged for.

X. In analogous cases governed by one judgment, the Court, on application, will make a special order.

XI. The Court may, upon the application of any party, and upon good and sufficient reason shown, give such special directions as to any of the matters to which these rules relate as may seem fit; and may by special order exempt any party from the operation of any portion of of these rules.

XII. These rules shall apply to all special appeals filed on and after the 1st day of August, 1877, from which date the rules of the 12th March, 1874, shall be superseded.

Rule of Practice, the 18*th April*, 1877.

The Court consider it desirable that the following appeals should be brought to hearing as early as possible, *viz.* :—

(1.) Appeals from orders of the lower Appellate Court, remanding cases for re-trial, &c.; and

(2.) Appeals from orders of the lower Appellate Courts made on remand by this Court.

IT IS ACCORDINGLY ORDERED:

1. That in the case of appeals of the classes mentioned above, there shall be added at foot of every memorandum of appeal filed after this date, a note to the following effect:—

NOTE.—This appeal is from an order of the lower Appellate Court, dated ————, remanding the case for re-trial under s. 351 of the Civil Procedure Code; or

This appeal is from an order of the lower Appellate Court (or the Court of First Instance, as the case may be) made on remand by the High Court, dated ———.

2. That such appeals shall have precedence over other appeals in the preparation for hearing, and shall, when ready, be placed on a special board of appeals for hearing.

3. That when an order of remand is made by a Bench of this Court under s. 354 [see s. 566 of Act X of 1877], the Deputy Registrar shall make a note of the same in a register to be kept for the purpose; and that he shall bring to the notice of the Division Bench any case in which the lower Court shall not have made a return to the order of remand within four months, or within such time as may have been specially ordered.

4. That Bench Clerks, when preparing daily (or peremptory) boards, shall place the appeals which are on the special board before other appeals, except such as may be part-heard or may have been adjourned, which shall, as heretofore, be placed on such daily (or peremptory) board before all other appeals whatsoever.

Scale of Costs to be ordinarily allowed to the successful party in appeals to the High Court in its Appellate Jurisdiction, to take effect from the 1st of June, 1875.

Dated 22nd of May, 1875.

SPECIAL APPEALS.

		Rs.
Not exceeding Rs. 200	Drawing grounds of appeal ...	4
	Hearing fee ...	16
Exceeding Rs. 200 and not exceeding Rs. 1,000	Drawing grounds of appeal ...	8
	Hearing fee ...	32
Exceeding Rs. 1,000 and not exceeding Rs. 5,000	Drawing grounds of appeal ...	12
	Hearing fee ...	48

REGULAR APPEALS.

Not exceeding Rs. 5,000 ...	To be fixed by the Court.	
Exceeding Rs. 5,000 and not exceeding Rs. 10,000	Drawing grounds of appeal ...	50
	Hearing fee ...	300
Exceeding Rs. 10,000 and not exceeding Rs. 20,000 ...	Drawing grounds of appeal ...	50
	Hearing fee ...	500
Exceeding Rs. 20,000 and not exceeding Rs. 50,000... ...	Drawing grounds of appeal ...	100
	Hearing fee ...	750
Exceeding Rs. 50,000	Drawing grounds of appeal ...	100
	Hearing fee ...	1,000

MISCELLANEOUS APPEALS (REGULAR OR SPECIAL).

Not exceeding Rs. 5,000 ...	Same as special appeals.	
Exceeding Rs. 5,000	Drawing grounds of appeal ...	16
	Hearing fee ...	64

REVIEWS (where notice is given and Opposite Party appears).

The same costs as were allowed upon the hearing in special and miscellaneous appeals.

In regular appeals, the costs to be fixed by the Court.

APPEALS UNDER SECTION XV OF LETTERS PATENT.

The same costs as were allowed at the previous hearing.

APPLICATION (where notice is given and Opposite Party appears.)

To be fixed by the Judge or Judges who hear the application.

GENERAL RULES.

When there are several parties to an appeal, review, or application, one set of costs will be awarded generally, unless the Court, upon the application of the parties, shall otherwise order.

Unless there is a cross-appeal filed, the hearing fee alone will be allowed to the respondent.

Rules of the High Court of Judicature at Fort William in Bengal (in its Appellate Jurisdiction), relating to the admission of Appeals to Her Majesty in Council, and to the transmission of such Appeals to England,—dated the 1st September, 1877.

1. The Court will ordinarily sit to hear applications in matters connected with the Privy Council appeals once in every week, at such time as the Judge in the Privy Council Department shall appoint.

2. If, in any urgent matter, it is necessary to make an application to the Court at any other time, notice shall be given to the Clerk in charge of the Privy Council Department, who will communicate with the Judge and obtain an appointment for the purpose. No application whatever having reference to Privy Council appeals will be heard except upon the regular day without such previous appointment.

3. Every application to the Court shall be by petition bearing the proper stamp.

4. Every such petition shall be neatly and legibly written on paper of foolscap size with a margin of two inches, and shall contain about twenty lines in each full page. The petition shall be divided into paragraphs numbered consecutively.

5. Every such petition shall be filed with the Clerk in charge of the Privy Council Department not later than four o'clock in the afternoon of the day but one previous to the sitting of the Court at which the application is to be made, at which time any affidavit intended to be used with the petition shall also be filed.

6. Affidavits in accordance with the Rules of Court of 15th May, 1871, shall be filed where necessary; but it will not be necessary to set out in the petition, or in the affidavit, any document which is a part of the record, nor will it be necessary to produce any affidavit of any facts found in the course of the suit or other proceeding out of which the appeal arises by this Court or any of the Courts below, provided that such finding has not been reversed on appeal; but the petition shall state shortly all facts upon which it is intended to rely, and shall give the number, letter, title, or other description of all documents on the record to which it is intended to refer.

7. If the party making the application can himself speak to the facts stated in the petition, no separate affidavit need be filed, but an affirmation may be attached to the petition.

8. Affidavits shall be written in the same manner as petitions, and be divided into paragraphs numbered consecutively. Petitions and affidavits not in the form herein prescribed will not be filed, but will be returned to the parties by the Clerk in charge of the Privy Council Department.

9. Applications (1) for an order to transmit orders in Council for execution to the lower Courts, where no special directions are required, (2) to transmit securities to the Mofussil Courts for investigation as to their sufficiency, and (3) for repayment of money deposited in Court, may, under ordinary circumstances, be made without notice to the opposite party. A separate list will be made of such applications, and they will be called on at the sitting of the Court, when the Court will determine whether notice must be given.

10. In all other applications notice is necessary.

11. In all cases in which it is necessary that notice to any party shall issue, such notice shall be given by delivering to the proper person a copy of the petition, together with a notice in the following form :—

Take notice that this application will be made in Court on the day of 187 , at o'clock in the forenoon, when you are required to attend and show cause against the application, if you are desirous to do so.

12. Any notice which it is necessary to serve under these Rules, or under Act VI of 1874 [see chap. xlv of Act X of 1877] may be served upon any vakeel who appeared for the party to whom notice is to be given in the appeal to this Court, unless the vakalutnama of such vakeel has been cancelled with the sanction of the Court. If there is no vakeel upon whom notice can be served, then, unless the Judge shall otherwise direct, the notice must be served upon the party in Calcutta through the Sheriff, or in the mofussil through the Court, on paying the usual fee. Such payment to be made by stamps affixed to the notice intended to be served. Notices to be served by the Sheriff, or, in the mofussil, will be signed by a Judge, if left with the Clerk in charge of the Department for that purpose.

13. If the notice is to be served in Calcutta it shall be served 24 hours before the sitting of the Court at which the application is to be made; if it is to be served in the mofussil, then the time is to be regulated by the Circular Order No. 11 of 1869.

14. If the proper notice shall not have been duly served, the hearing of the application (except in cases of urgency) will be postponed to the next sitting, unless the parties entitled to notice are present and willing to proceed at once. In all cases the parties opposing the application will be at liberty to apply for a postponement, in order to answer the affidavits, or for any other good and sufficient cause.

15. No affidavits in answer shall be read, without the special leave of the Court, which have not been filed with the Clerk of the Privy Council Department by half-past ten of the day upon which the application is to be heard.

16. It will be the duty of the Clerk in charge of the Department to have ready in Court all documents contained in the records in his charge which the parties shall, at any time before half-past ten of the forenoon of the day on which they are required, have given him notice to produce. Unless by the special order of the Court, documents will not be produced from the record-room during the sitting of the Court.

17. No orders *nisi*, or rules to show cause, will hereafter issue; but, under special circumstances, an *ex parte* application may be heard before notice is issued.

18. The prayer of the petition shall state clearly the nature of the order which it is intended to ask for. If at the hearing the applicant desires to change the nature of the application or of the order sought, this will only be permitted upon such terms as to postponement, costs, and otherwise as the Court may direct.

19. All applications, of which notice has been given to the Clerk in charge of the Department, will be set down in a list in the order in which they are notified to him. The cases in the list will be called on peremptorily in their turn; and if, by the fault of the applicant, the application cannot be proceeded with, it will be liable to be dismissed.

20. With the petition to be presented under s. 7 of Act VI of 1874 [now s. 598 of Act X of 1877], the party desirous to appeal shall file an application, accompanied by a fee of Rs. 16, to the Clerk of the Privy Council Appeals, to prepare an estimate of the expense of translating, transcribing or printing, and forwarding to the Registrar of the Privy Council the record of the case.

21. The Clerk shall, with as little delay as possible, prepare such estimate, and deliver the same to the applicant or to his vakeel.

22. The application for estimate shall state whether or not the record is to be printed in India.

23. The applicant may, at the next sitting of the Court, object to such estimate; but such objection is not to delay the making of the deposit.

24. All documents which are not originally in the English language, and which have not been translated for the use of the Court, shall be translated into English; and all translations made or used shall be revised and certified by the sworn examiner.

25. An index of all the documents included in the transcript shall be prepared and annexed to the record in the form now in use, and shall be followed by a list of all other papers, documents, and exhibits in the cause not included in the transcript; the draft of this index and list shall be furnished to the parties, who shall be at liberty to object thereto within three weeks from date of receipt.

26. In the index and transcript the papers shall be placed in the following order:—

Plaint.
Written statements.
Examination of parties, or their agents, &c.
Injunctions.
Orders of attachment, &c. (if any), obtained before judgment.
Issues framed (if any).
Exhibits of plaintiff.
——— of defendant.
Depositions of witnesses for plaintiff.
——————— for defendant.
Report of commissioner (if any), with maps, depositions, &c, annexed.
Judgment and decree.
Memorandum of appeal.
Cross-appeal, or memorandum of objections under Section 348 (if any)
Proceedings in Appellate Court (if any).
Judgment and decree of that Court.

Petition of appeal to Privy Council, affidavits, &c.
Appendix (if any).
List of papers omitted under clause 2 of Her Majesty's order in Council, and under s. 11, Act VI, 1874.

The following charges shall be payable in respect of the matters specified:—

	Rs.	A.	P.
Estimate of costs	16	0	0
Translation of vernacular portion of record, per 1,000 words	6	10	8
Examination of ditto	3	5	4
Copying English portion of record, for every 1,440 words, or part thereof	1	0	0
Examining ditto ditto, for every 1,440 words, &c.	0	8	0
Transcribing (one copy), per folio of 72 words ...	0	2	0
Or at the option of Appellant.			
Printing (*55 copies*) per printed page ...	2 to 3	0	0
Examination of transcript record, for every 72 words or part thereof	0	1	0
Ditto of proofs, for every 750 words ...	1	0	0
Certifying to two copies of printed record, for every 10 printed or manuscript pages, or part of 10 pages	1	0	0
Preparation of index, for every 16 papers or part of 16 papers	1	0	0

The above rates will be subject to alteration.

27. The estimate shall include these several matters, and be framed in accordance with the charges above specified; and any appellant who has filed his petition of appeal shall be deemed to have incurred the charge for the preparation of an index and estimate, whether the appeal be admitted or not.

28. In all cases the security offered under s. 11 of Act VI of 1874 [now s. 602 of Act X of 1877] shall consist either of cash, or Government securities, or immovable property; and in the latter case the party finding the security shall file a mortgage bond duly registered, together with a specification of the title to the property.

29. When such bond has been filed, the Court shall, if the property be situate in Calcutta, direct the security to be tested by the Registrar on the Original Side; if in the mofussil, by the Judge of the district in which the immovable property offered as security is situate.

30. Upon the arrival of any report as to the sufficiency of any security, the Clerk in charge of the Department will give notice thereof by a list to be hung up at such places as the Judge in the Privy Council Department shall direct. All parties desirous of objecting thereto shall, within six days of the case being inserted in such list, file a notice specifying their objections, and serve a copy of such notice upon the other parties to the appeal. All such objections will be disposed of at the next sitting but one after the arrival of the report.

31. The same rules as to affidavits, postponements, production of documents and otherwise, will be applicable to such notices of objection as are applicable to applications by petition.

32. If the security tendered be found insufficient, the appellant shall be bound, within six weeks of the date of such finding, to deposit cash or

Government securities to the extent of of Rs. 4,000, or to such amount as will bring up the value of the security to Rs. 4,000.

33. In case the last day for making the deposit or giving the security under s. 11 of Act VI of 1874 [now s. 602 of Act X of 1877], shall fall on a day upon which the offices of the Court are closed, the deposit may be made, or the security given, upon the first day upon which the offices re-open. But no other extension of the time specified in the Act for making the deposit or giving the security will be allowed, except that specified in Rule 32.

34. All applications by or on behalf of an infant or a person of unsound mind shall be made in the name of the infant or person of unsound mind by the person whose name is on the record as his next friend or his guardian; and, whenever any application is consented to or opposed by an infant or person of unsound mind, the infant or person of unsound mind shall in like manner be represented by the person who appears in the record as his next friend or guardian.

35. In case there is no next friend or guardian upon the record, a separate application for appointment of a next friend or guardian must be made.

36. The foregoing rules shall come into force on the first day of November next, and shall apply to all petitions then pending for the admission of appeals.

RULES, HIGH COURT, ORIGINAL SIDE, CALCUTTA.

The Rules relating to the Original Side of the High Court at Fort William are not here printed in full, as they affect only cases tried in Calcutta, and are very voluminous. A complete set of them will shortly be printed by the Registrar of the High Court, Original Side, who has already published some of them in a handbook.

The following table will, in the meantime, enable any one who wishes to consult these rules to refer to them. Some of them are printed in Mr. Wilkinson's edition of the Code of Civil Procedure, some in the Handbook above referred to, and a great many in the collections of Rules, &c., at the end of the several volumes of the Bengal Law Reports. Some have not been published in any collection. I have, however, indicated the dates on which these last were passed.

Rules applying the Rules of the Supreme Court so far as they are applicable.	Wilkinson, p. 719.	.....
Rules as to references from Small Cause Courts.	.....	12th April, 1862.
Judges and Court; Conduct of Business.	Wilkinson, p. 725 ...	10th March, 1863.
Rules relating to the Official Trustee.	*Ibid*, p. 733.	.....
Insolvent Rules ...	See Millett and Clarke's Insolvency.	.....
Ditto, amending rules 10 & 11, &c.	Wilkinson, p. 742 ...	15th Decr., 1864.
Time for service of summons ...	*Ibid*, p. 745 ...	23rd July, 1868.

Taxation of Attorney's costs ...	Wilkinson, p. 746 ...	1st Jany., 1868.
Jury Rules ...	*Ibid*, p. 746 ..	1st Decr., 1869.
Rules for regulating the supply, number, renewal, and keeping accounts of stamps.	Handbook ..	9th May, 1870.
Costs in suits in *formâ pauperis* ...	6 B. L. R., p. 17, and Wilkinson, p. 742.	25th Novr., 1870.
Fees for witnesses ...	11 *ib.*, p. 1 ...	9th Jany., 1873.
Particulars of assets in applications for probate.	11 *ib.*, p. 2 ...	1st March, 1873.
Mortgage suits, where the sum due for principal does not exceed Rs. 1,000, and fees in suits for foreclosure and in suits for partition.	Handbook ...	15th May, 1873.
Documents and books to be produced with plaint.	12 B. L. R, p 1 ...	22nd Aug., 1873.
Tables of fees ...	12 *ib*, p. 38, and Handbook.	15th March, 1874.
Admission of Attorneys ...	13 *ib*, p. 1 ...	17th March, 1874.
Production and inspection of documents.	13 *ib*, p. 17, and Handbook.	1st July, 1874.
Admission of Advocates ...	13 *ib.*, p. 31, and Handbook.	10th June, 1874.
Rules as to infants and persons of unsound mind.*	.....	....
General rules of procedure ...	14 B L R, p. 26, and Handbook.	9th Feby, 1875.
Fees when the trial occupies more than one day.	14 *ib*, p. 82 ...	17th May, 1875.
Rules as to grants of Probate, &c....	15 *ib*, p. 9 ...	22nd June, 1875.
Admission of Attornies, amending rule 9 of the Rules of the 17th of March, 1874.	15 *ib.*, p. 11 ...	1st July, 1875.
Money rules ...	15 *ib.*, p. 22 ..	11th Sept., 1875.
Rules as to issue of summons within 14 days; applications to restore plaints to the file.	15 *ib.*, p. 42 ...	4th Dec., 1875.
Rules under s. 51 of the Specific Relief Act.	.....	1st Sept., 1877.
Rule as to enquiries regarding incumbrances and sale of land under s. 287 of the Code of Civil Procedure.	This rule will be found in the note to s 287.	1st Feby., 1878.
Subsistence-money ...	.....	1st Feby., 1878.
Attestation of amendments; affidavit of verification of plaint; costs of, and examination of, copies of plaint; execution of conveyances, and endorsement of negotiable instruments under ss. 262 and 302 of the Code of Civil Procedure.	.....	1st April, 1878.
Admission of Attornies; amendment of rule 9 of the Rules of the 17th of March, 1874.	... .	1st May, 1878.
Memorandum of Appeal when judgment has been delivered orally.	.....	1st May, 1878.

* These rules have been embodied in the Code of Civil Procedure, see ss. 440, &c.

LIMITATION ACT.

(ACT XV OF 1877.)

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor General on the* 19*th July*, 1877.)

An Act for the Limitation of Suits, and for other purposes.

Preamble.

WHEREAS it is expedient to amend the law relating to the limitation of suits, appeals and certain applications to Courts; And whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

Short title.

1. This Act may be called "The Indian Limitation Act, 1877:"

Extent of Act.

It extends to the whole of British India; but nothing contained in sections two and three or in Parts II and III applies—

(*a*) to suits under the Indian Divorce Act, or

(*b*) to suits under Madras Regulation VI of 1831;

Commencement.

And it shall come into force on the first day of October, 1877.

Section 1 of Act IX provided that that Act should not apply to suits instituted before the 1st of April, 1873; the present Act applies to all suits, applications, and appeals made or presented after it came into operation on the 1st of October, 1877.

It was held in the High Court at Madras that the fact of the suit having been decided while the old law of limitation was in force has not the effect of keeping all the proceedings under it within the provisions of that old law. In all matters of substantive law, the law of limitation in force at the period of the arising of the right governs. In all cases of adjective law, the law of limitation in force at the period of enforcement governs. Execution of the decree comes under the head of purely adjective law, so that the law prevailing at the time of the application for execution must govern (*a*). Thus, where an application for execution of a decree was made in February, 1868, and proceedings sufficient to prevent the law of limitation under Act XIV of 1859 affecting the case were going on till 30th September, 1871, the next application for execution of the decree made in October, 1872, was held to be barred under Act IX of 1871, as more than three years had elapsed on that day from the date of the application in February, 1868. The judgment-creditor, who was doing all that was required by the old limitation law, was thus suddenly barred by the new (*b*). The hardship of the case, however,

(*a*) Pasupati Latchmia *v.* Pasupati Mutham Bhatlu, I. L. R., 1 Mad., 52, Holloway and Kindersley, JJ.

(*b*) Jibhai Mahipati *v.* Parbhu Bapu I. L. R., 1 Bom., 63, West, J., 6th Dec. 1875.

is no reason for not applying the new law; and s. 2 of this Act expressly provides that the Act shall not revive any right to sue already barred. But the High Courts at Bombay and Madras did not agree as to whether a suit brought after the new Limitation Act, IX of 1871, came into operation on a cause of action which was *not already barred*, by the old Act, XIV of 1859, was to be governed, as to limitation, by the old Act or by the new, the period of limitation having begun to run under the old Act. A suit (*a*) was brought after the 1st April, 1873 (when Act IX of 1871 came into operation) on a promissory note executed while the old Act XIV of 1859 was in force, but not barred under that Act on the 1st of April, 1873; and it was held that the period of limitation ought to be computed, as it would have been under Act XIV of 1859, from the date of the note, and not, as prescribed by Act IX of 1871, sched. ii, art. 72, from the time of demand. Their Lordships of the Bombay Court however, dissented from this view; and it was held (by Westropp, C. J., and Nanabhai Haridas, J., dissenting from the opinion of the Judges of Madras (*a*), and in the case of *Dayal Jairaj* v. *Khatav Ladha* (*b*), and after consulting Melvill and Kemball, JJ, who concurred in so dissenting), that where a suit was brought against A. under the old law, and B. was added after the new law came into operation, the old law applied to A., and the new to B. (*c*), considering that "it was the intention of the Legislature that Act IX of 1871 should apply to "suits brought after it came into operation upon causes of action which existed "before that day (1st April, 1873), and on which causes of action the periods of "limitation prescribed by Act XIV of 1859 had not run their full course on "that day."

"There is an exception in Act IX of 1871, s. 1, cl. *a*., of suits instituted "before the 1st of April, 1873, but none of suits brought after that day upon "causes of action not already barred by previous enactments, and which accrued "before that day—*exceptio unius est exclusio alterius.* Section 4 expressly enacts "that 'subject to the provisions contained in ss. 5 to 26 inclusive (none of which "'affects this cause), every suit instituted, &c., after the period of limitation "'prescribed therefor by the second schedule hereto annexed, shall be dismissed, "'although limitation has not been set up as a defence.' The postponement of "the operation of Act IX of 1871, which received the assent of the Governor-"General on the 24th of March, 1871, to the 1st of April, 1873, which postpone-"ment gave creditors a period of more than two years within which they might "bring their suits upon the pre-existing enactments, and the repeal of those "enactments at the expiration of that period, is, we think, conclusive to show "that thenceforth the law of limitation applicable to suits subsequently brought "upon causes of action which had accrued previously to the day to which the "operation of Act IX of 1871 stood deferred, and which had not been barred "under previous enactments, as well as to suits upon causes of action which "accrue afterwards, is Act IX of 1871" Their Lordships (Westropp, C. J., and Nanabhai Haridas, J.) also referred to the cases noted below (*d*).

Three Madras cases (*e*) were cited in support of the contention that the old limitation law was applicable; but in those cases the plaintiff's claims were already barred when Act IX of 1871 came into operation, and it was held that no suit could be brought after that date by reason of the alteration of the periods of limitation in the new enactment.

This question did not present itself for decision in the case decided by the High Court, Bombay (*f*); but their Lordships did not dissent from the

(*a*) Chinna Sami Iyengar *v.* Gopalacharrya. 7 Mad H. C. Rep., 392, Holloway and Kindersley, JJ.

(*b*) 12 Bom, 97.

(*c*) Abul Kurim *v.* Manji Hansraj, I L. R, 1 Bom, 295; see also Ram Chandra *v.* Soma, see note I. L. R., 1 Bom, 305.

(*d*) Towler *v.* Chaterton, 6 Bing., 258, 261; The Queen *v.* The Leeds and Bradford Railway Company, 18 Q B., 313; S. C., 21 L J., N. S, Mag. Ca, 193; Cornill *v* Hudson, 8 Ell & Bl, 429; S C., 27 L J, N. S., Q. B, 8; and Pardo *v.* Bingham, L. R, 4 Ch., 735.

(*e*) Vencatachella Mudali *v.* Sashagherry Rau, 7 Mad. H. C. Rep, 233; Molakatalla *v.* Pedda, *ib.*, 288; and Vencataramanier *v.* Mauche Reddy, *ib*, 298.

(*f*) I. L. R, 1 Bom., 295.

view taken by the Madras High Court, and now expressed in s. 2 of this Act. In an earlier case decided on Act IX of 1871, sched. ii, art. 127, Westropp, C. J., and Melvill, J., had held that a prescriptive title gained under a former state of the law bars a suit for possession notwithstanding this article, for the repeal of a law cannot, without express words, or clear implication to that effect in the repealing Act, take away a right acquired under the repealed enactment when it was in force (*a*). In that case the suit was instituted after the 1st of April, 1873, for a share of immoveable property, and it was decided that it was barred, inasmuch as the defendant had uninterrupted and exclusive possession of that property for more than thirty years, as well before the commencement of the suit, as before the 1st of April, 1873. The defendant had, by the operation of Reg. V of 1827, s. 1, cl. 1, acquired a right to the property, and the Legislature had not, in Act IX of 1871, either by express words or by direct implication, shown any intention of taking away that vested rights although it had repealed the Regulation. Their Lordships regarded Reg. V of 1827, s. 1, cl. 1, as a prescriptive enactment.

There is no time, independent of statutory enactment, within which a cause of action becomes extinguished, and the Acts of Limitation being laws regulating the proceedings of the Courts in this country, the suit will be governed by the law of this country relating to limitation, and not by the law of the country in which the cause of action arose (*b*), except as is provided in s. 11. So, the remedy in a foreign Court continues open for the period prescribed by the law of that Court (*c*); but in a proceeding on a foreign decree the time must be reckoned from the date of the foreign decree (*d*). This is now enacted in sched. ii, No. 117, to this Act.

This Act applies to all Courts, and they must be guided in all suits by the Act of Limitation itself; the doctrine of *laches* applied in English Courts of Equity in analogy to the Statutes of Limitation does not apply in this country (*e*).

A Limitation Act being restrictive of the ordinary right to take legal proceedings, must, where its language is ambiguous, be construed strictly,—*i. e.*, in favour of the right to proceed (*f*). The law of limitation bars the remedy, but it does not generally extinguish the right; s. 27 is an express exception to this rule. It has thus been held that money deposited as security for a decree must be considered as in the custody of the Court for the judgment-creditor, even after the expiration of the time during which he might execute his decree (*g*). The argument in this case is not reported, and a doubt is suggested by s. 4, as an application would in such a case have to be made by the judgment-creditor to get the money, and being an application for execution of a decree and barred, it must be rejected under that section.

If a thing is to be done on the happening of a contingent or uncertain event, there can be no cause of action, no limitation of time until the event has happened (*h*). If the contract is that certain acts are to be done during a succession of periods, a new cause of action arises upon each omission (*i*).

If, according to the terms of the original contract, the defendant promises to pay whenever his circumstances may enable him to do so, and he may be called upon for that purpose, the period of limitation runs from his being able to pay, not from the time the creditor finds it out: he must be on the watch (*j*).

(*a*) Sitaram Vasudeo *v.* Khanderao Balkrishna, I. L. R., 1 Bom, 286, Aug. 3, 1876.

(*b*) See Leroux *v.* Brown, 22 L. J., N. S, C. P., 1.

(*c*) Boloram Goor *v.* Kameenee Dossee, 4 Suth. W. R, 108, Morgan and Pundit, JJ.

(*d*) Hearamoney Dossee *v.* Promothonath Ghose, 2 In. Jur., N. S, 233.

(*e*) Rama Rall *v.* Raja Rall, 2 Mad. H. C. Rep, 114, Scotland, C. J., and Frere, J.; and Pedda Muthulaty *v.* N. Timma Reddy, *ib.*, 270, Frere and Holloway, JJ.

(*f*) Unna Shankar Lakhmiram *v.* Chhotalal Vajeram. I. L. R., 1 Bom., 19, Westropp, C.J., and Kemball, J.

(*g*) Sheo Golam Sahu *v.* Khub Lall, 2 Cal., 206, Ainslie and McDonell, JJ.

(*h*) Savage *v.* Alden, 2 Starkie, 232; Fenton *v.* Emblers, 1 W. Blackstone, 353; and see sched. ii, No. 65.

(*i*) *Ibid*, and Amott *v.* Holden, 22 L. J., N. S., 14.

(*j*) Walters *v.* Thanet, 2 A. & E., 757.

Where a day is fixed for payment of money, time runs from that day (*a*). This rule is exemplified by No. 66 in the schedule, which is the case of a bond payable on a specified day. A separate cause of action arises in respect of the wrongful receipt by the defendant of the profits of land belonging to a plaintiff immediately on the receipt by the defendant of each sum (*b*), and this is the rule adopted in No. 109 of sched. ii.

It was decided upon a construction of the English law of limitation, that if, by the terms of the contract, on default being made in payment of any one instalment, the entire debt shall be immediately recoverable, the entire cause of action accrues upon the first default, and the period of limitation begins to run therefrom (*c*); and this view was adopted in India in the construction of the earlier Act of 1859 (*d*), and has been expressly applied to the case of bonds and promissory notes (*e*).

Where two or more make a joint claim, and the plea of limitation is raised, it lies upon them to show a joint possession within the period of limitation (*f*). The time is to be reckoned according to the English calendar (*g*). This was a decision on the construction of the earlier law of limitation, Act XIV of 1859. Since then, the General Clauses Act, I of 1868, s. 2, has enacted generally that the English calendar is to be applied; and the same is adopted in this Act, s. 25, for the purpose of reckoning the dates of documents.

Repeal of Acts.

2. On and from that day the Acts mentioned in the first schedule hereto annexed shall be repealed to the extent therein specified.

References to Act IX of 1871.

Saving of titles already acquired.

Saving of Act IX of 1872, s. 25.

But all references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed; and nothing herein contained shall be deemed to affect the Indian Contract Act, section 25.

Suits for which period prescribed by this Act is shorter than that prescribed by Act IX of 1871.

Notwithstanding anything herein contained, any suit mentioned in No. 146 of the second schedule hereto annexed may be brought within five years next after the said first day of October, 1877, unless where the period prescribed for such suit by the said Indian Limitation Act, 1871, shall have expired before the completion of the said five years; and any other suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the said Indian Limitation Act, 1871, may be brought within two years next after the said first day of October, 1877, unless where the period prescribed for such suit by the same Act shall have expired before the completion of the said two years.

The first clause of this section corresponds with the 2nd section of Act IX of 1871; but the rest of it is new See the note to the last section. Section 25 of the Contract Act enacts that an agreement made without consideration is void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by the law of limitation.

(*a*) Kishen Kinkur Ghose *v.* Borodakanth Roy, Marsh., 533, Peacock, C.J., and Levinge, J.

(*b*) Obhoy Gobind Chowdhry *v.* Rance Surnomoyee, Suth. F. B Rep, 163.

(*c*) Hemp *v.* Garland, 4 Q. B., 524.

(*d*) Karruppana Nayak *v.* Nallama Nayak, 1 Mad. H. C. Rep, 209, Scotland, C.J., and Frere, J.; Broen *v.* Balfour, Bourke's Rep., 120, Norman, J.

(*e*) See sched. ii, No 75

(*f*) Ram Comul Chuckerbutty *v.* Nund Ram Coolal, 10 Suth. W. R., 262, Phear and Hobhouse, JJ.

(*g*) Raja Jay Mangal Sing Bahadur *v.* Lal Rang Pal Sing, 4 B. L. R., Apx., 53, Norman, Offg. C.J., and E Jackson, J.

Under Act IX of 1871, the period within which a suit might be brought upon a promissory note payable on demand was three years from the making of the demand. Under the present Act, sched. ii, No. 73, the period runs from the date of the note, as was the case under Act XIV of 1859. The period is now manifestly shorter than it was under the Act of 1871, for no demand can be made before the note was made (*a*).

Interpretation-clause.

3. In this Act, unless there be something repugnant in the subject or context—

'plaintiff' includes also any person from or through whom a plaintiff [derives his right to sue; 'applicant' includes also any person from or through whom an applicant derives his right to apply; and 'defendant' includes also any person from or through whom a defendant derives his liability to be sued:]

'easement' includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another:

'bill of exchange' includes also a hundí [and a cheque]:

'bond' includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be:

'promissory note' means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight:

'trustee' does not include a benámídár, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title:

'suit' does not include an appeal or an application:

'registered' means duly registered [in British India] under the law for the registration of documents in force at the time and place of executing the document, [or signing the decree or order,] referred to in the context:

'foreign country' means any country other than British India;

and nothing shall be deemed to be done in 'good faith' which is not done with due care and attention.

The definitions of 'minor' and 'nuisance' are omited. The age at which a person domiciled in British India attains majority is defined in Act IX of 1875. Persons not domiciled in British India attain majority at the time prescribed by the law of the country in which they are domiciled. The definitions of 'applicant,' 'defendant,' 'easement,' 'bond,' 'promissory note,' and 'suit' are added.

The words in brackets are either alterations of the words used in Act IX, or are added.

PART II.

LIMITATION OF SUITS, APPEALS, AND APPLICATIONS.

Dismissal of suits, &c., instituted, &c., after period of limitation.

4. Subject to the provisions contained in sections 5 to 25 (inclusive) every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence.

(*a*) Omirtolall Dey *v.* Howel, 2 Cal., 126, Garth, C J., and Markby, J.

Explanation.—A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is filed; and in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

Illustrations.

(*a*)—A suit is instituted after the prescribed period of limitation. Limitation is not set up as a defence and judgment is given for the plaintiff. The defendant appeals. The Appellate Court must dismiss the suit.

(*b*.)—An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed.

This section corresponds with s. 4 of Act IX of 1871. It enacts what was decided in the case of a suit in the Small Cause Court in Calcutta (*a*). It will be observed that the Code of Civil Procedure, s. 50 (d), requires the plaintiff to state when the cause of action arose; and s. 54 (e) directs the Court to reject the plaint if it is barred by lapse of time. Section 32 of the Code of 1859 did the same. If the plaint does not show when the cause of action arose, it ought to be rejected; but this informality is no ground, if the plaint be admitted, for holding that the suit is barred. That question must be inquired into and judged upon its own merits (*b*). The Code of 1859 did not apply to the Small Cause Court in question, and it was contended that limitation ought to have been set up as a defence. But it was held that the Limitation Act of 1859, which enacted (s. 1) that no suit should be maintained, &c., unless instituted within the period of limitation, &c., stood upon the same principle as any other bar to the maintenance of a suit.

This Act, like Act IX of 1871, goes farther, and extends the principle equally to appeals,—that is, if the appeal is presented after time. But the Appellate Court may do more than reject an appeal presented to itself after time; it may enquire into and decide upon the question whether the plaint was presented in time, and if not, reverse the decision of the Court below on that ground, or it may reverse the decision of the lower Court which has shut out the case; thus, where the lower Appellate Court held a suit to be barred by limitation although no issue on the point had been raised in the Court of first instance, the High Court, upon special appeal, finding that there were no facts to take the case out of the Statute, refused to disturb the decision (*c*).

A. put in a petition to sue in *formâ pauperis* for possession of certain foreclosed property within the time specified by the Limitation Act, but on her failing to appear on two occasions when called upon to give evidence of her pauperism, the case was struck off so far as the application to sue in *formâ pauperis* was concerned. The matter was afterwards re-opened, and she was ordered to appear on the 9th of August. On the 7th of August, however, she paid the stamp fees, and asked that her suit might be tried in the ordinary way, and that her second petition might be joined with her petition to sue in *formâ pauperis*. She claimed the benefit of the explanation to s. 4 of Act IX of 1871, which is in the same terms as the explanation to this section. But it was held that she could not take advantage of it; that it only applied to the case of a petition to sue as a pauper being granted, and the suit numbered and registered (*d*).

Proviso where Court is closed when period expires.

5. If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens:

(*a*) Payne *v.* Constable, 1 B L. R., O. O. C. J., 49, Peacock, C. J., Norman and Markby, JJ.

(*b*) Kallynauth Shaw *v.* Rajeeblochun Mozoomdar, 2 In. Jur., N. S., 343, Peacock, C.J., and Macpherson, J.

(*c*) Chumun Lall *v* Soorujuman Jha, 22 Suth. W. R, 263, Phear and Morris, JJ.

(*d*) Chunder Mohun Roy *v.* Bhubon Mohini Debea, I. L. R., 2 Cal., 389, Markby and Prinsep, JJ.

Proviso as to appeals and applications for review.

Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.

This corresponds with s. 5 of Act IX of 1871. When the period of limitation prescribed for a suit expired when the Court was closed for a vacation, and the Court, instead of re-opening after the vacation on the day that it should have re-opened, re-opened on a later day, and the suit was instituted when it did re-open,—it was held that the suit was instituted in time (*a*). When an appeal, &c., is thus presented after time, it should not be admitted without sufficient cause being stated in the application, and the petition should show affirmatively that the delay has not been caused by the negligence or default of the applicant (*b*). Thus, where a suit was dismissed on the 26th July, 1875, on which day the plaintiff applied for a copy of the decree and obtained one on the 31st of July, and on the 31st of August, or one day beyond the period allowed by law, presented an appeal to the Appellate Court without assigning any reason, but alleging verbally that she had miscalculated the period,—it was held that her appeal ought not to have been admitted (*c*).

The order of a single Judge of the High Court, admitting an appeal after time on an *ex parte* application, is liable to be impugned and set aside at the hearing of the appeal by the Bench before whom it is brought on for hearing, on the ground that the reasons assigned for admitting it are erroneous (*d*).

A petitioner having, on the 1st of September, 1876, obtained a certificate, giving him leave to appeal to Her Majesty in Council, was ordered to deposit the money for translations, &c., within six weeks from the grant of the certificate, or within six months from the date of the decree appealed against (*e*). The six weeks expired on the 13th of October, the six months on the 4th of November. The Court was closed for the vacation until the 23rd of October, when the offices re-opened; but the Court did not resume its sittings until the 16th of November, when the petitioner brought the money to the officer of the Court, who declined to receive it on the ground that it was tendered too late. It was held that the officer of the Court was right. This section only applies to suits, appeals, or applications, and no application was necessary in this case, the money had merely to be brought to the officer of the Court who would receive it making the usual entries, and this could have been done on any day after the 23rd of October (*f*).

Special and local laws of limitation.

6. When, by any special or local law now or hereafter in force in British India, a period of limitation is specially prescribed for any suit, appeal or application, nothing herein contained shall affect or alter the period so prescribed.

This corresponds with s. 6, but is wider in its terms; and the second paragraph of that section, which excluded from the operation of the general law

(*a*) Bishan Chand *v.* Ahmad Khan, I. L. R., 1 All., 263, Spankie and Oldfield JJ.

(*b*) Jagarnath Singh *v.* Shewratan Singh, 15 B L. R., 272, F. B.

(*c*) Zaibulnissa Bibi *v.* Kulsum Bibi, I. L. R., 1 All., 250, Turner and Oldfield, JJ. See also, for cases in which there was sufficient delay for filing an appeal, Secretary of State for India *v.* Mutu Sawmy, 4 B. L. R., App., 84; Surbhai Dayalji *v.* Raghunatho Vasanji, 10 Bom. H. C. R., 397; and see Mazcom Ali Khan, petitioner, 1 Suth. W. R., Mis., 23, where sickness was ineffectually pleaded.

(*d*) Dubey Sahai *v.* Ganeshi Lal, I. L. R, 1, All., 34, Stuart, C J., Pearson, Turner, Spankie, and Oldfield, JJ., Aug. 21, 1875.

(*e*) See s. 602 of the Code of Civil Procedure and ss. 9 and 11 of Act VI of 1874 now repealed.

(*f*) Lalla Gopee Chand, petitioner, I. L. R., 2 Cal., 128, Markby, J.

appeals from, and reviews of, judgments of High Courts on their Original Side, is omitted. The general law of limitation gives way to a special provision. Thus it was held that s. 15 of Act IX of 1871 did not apply to suits or applications under Act XVIII of 1873 (Rent, North-Western Provinces) (*a*). In another case (*b*) the Judicial Committee held that rent suits under Act X of 1859 must be governed by the special law of limitation laid down in that enactment and not by that provided in Act XIV of 1859 (the Limitation Act) passed six days after Act X, and containing provision (s. 1), that "no suit shall be maintained unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature (among them the suit in question) any law or regulation to the contrary notwithstanding;" and (s. 18) that "all suits to which the provisions of this Act are applicable shall be governed by this Act, and no other law of limitation, any Statute, Act or Regulation now in force notwithstanding." Their Lordships, in giving judgment, quoted that of Lord Hatherley (*c*): "The Legislature having had its attention directed to a special subject, and observed all the circumstances of the case, and provided for them, does not intend, by a general enactment afterwards, to derogate from its own Act, where it makes no special mention of its intention to do so (*d*)." So again where a special enactment—Act IX of 1859, s 20—which provided for suits brought in respect of property forfeited to the Government, as the property of rebels, was intended to be of a general nature affecting claims to such property before whatever Court prosecuted, and not only claims prosecuted before the Commissioners established by the Act,—it was held that the limitation here enacted could not be construed as implying any saving with respect to persons under disability (*e*). But a distinction was drawn by the Judicial Committee between this case, in which the whole Act was of a special character, and the case of an Act of a general character, such as the Code of Civil Procedure; and they held that the 246th section of that Code (VIII of 1859) would be modified in regard to limitation in the case of a minor by the operation of the 11th section of Act XIV of 1859, the law of limitation which then prevailed, and which, like the 7th section of this Act, allowed the minor time to sue after he came of age.

The Limitation Act IX of 1871, sched. ii, art. 153, gave a period of sixty days within which an appeal might be brought to the High Court under the Code of Criminal Procedure: s. 6 was the same as s. 6 of this Act. Afterwards Act X of 1872, s. 272, gave an appeal to the Local Government from a judgment of acquittal, and it was declared that "the rules of limitation should not apply to appeals presented under this section." By Act XI of 1874, s. 23, this clause was repealed, and the following clause was substituted: "No appeal shall be presented under this section after six months from the date of the judgment complained of." It was contended that the ordinary sixty days' limitation under sched. ii, art. 153 (see art. 155 of this Act) applied, and that the six months were mentioned in s. 23 of Act XI of 1874, not as giving a right of appeal at any time within six months, but as providing that such an appeal must, under all circumstances, be presented within six months, after which no excuse whatever could be received under the Limitation Act, 1871, s. 5, cl. 6 (see s. 5 of this Act) as sufficient cause for not having applied within the sixty days. But it was held that s. 23 of Act XI of 1874 was a special law governing the case, and that the Local Government could appeal within six months (*f*). The case is an illustration of the construction of this section, but it is not now directly important, as the matter is now provided for in this Act, sched. ii, art. 159, which gives the Government a period six months within which it may appeal.

(*a*) Timal Kuari *v* Ablakh Rai, I. L. R., 1 All. 254, Turner and Spankie, JJ., June 26th, 1876.

(*b*) Unnoda Persaud Mookerjee *v.* Kristo Coomar Moitro, 15 B. L. R., 60 note.

(*c*) Fitzgerald *v.* Champneys, 30 L. J., Ch., 777, at p. 782.

(*d*) See also Poulson *v.* Madhusudan Pal Chowdhry, B. L. R., Sup. Vol., 101; Gobindo Coomar Chowdhry *v.* Manson, 15 B. L. R., 56; and Mahomed Bahadur Khan *v.* Collector of Bareilly, L. R., 1 In. Ap., P. C., 167; S. C., 13 B. L. R., 292

(*e*) Mahomed Bahadur Khan *v.* The Collector of Bareilly. 13 B. L R., P. C., 292; S. C., 21 Suth W. R., 318.

(*f*) Empress *v.* Jyadulla, I. L. R., 2 Cal., 436, F. B.

Legal disability.

7. If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period, after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

Double and successive disabilities.

When he is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or when, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

Disability of representative.

When such representative is at the date of the death affected by any such disability, the rules contained in the first two paragraphs of this section shall apply.

Nothing in this section applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.

Illustrations.

(*a.*)—The right to sue for the hire of a boat accrues to A. during his minority. He attains majority four years after such accruer. He may institute his suit at any time within three years from the date of his attaining majority.

(*b.*)—A., to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accruer. A. has, under the ordinary law, only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority, within which he may bring his suit.

(*c.*)—A right to sue accrues to Z. during his minority. After the accruer, but while Z. is still a minor, he becomes insane. Time runs against Z. from the date when his insanity and minority cease.

(*d.*)—A right to sue accrues to X. during his minority. X. dies before attaining majority, and is succeeded by Y., his minor son. Time runs against Y. from the date of his attaining majority.

(*e.*)—A right to sue for an hereditary office accrues to A., who at the time is insane. Six years after the accruer A. recovers his reason. A. has six years, under the ordinary law, from the date when his insanity ceased within which to institute a suit No extension of time will be given him under this section.

(*f.*)—A right to sue as landlord to recover possession from a tenant accrues to A., who is an idiot. A. dies three years after the accruer, his idiocy continuing up to the date of his death. A.'s representative in interest has, under the ordinary law, nine years from the date of A.'s death within which to bring a suit. This section does not extend that time, except where the representative is under disability when the representation devolves upon him.

Some variations of the text of s. 7 of Act IX of 1871, with which this section corresponds, will be observed.

The first and second paragraphs, which include the two first of the old Act are extended to applications as well as suits; and where there are two disabilities

the time is equally extended when, before the first disability has ceased, a second supervenes.

In the third paragraph the words "legal representative" are substituted for "representative in interest."

The third, and part of the fourth, paragraph, so far as the word "pre-emption," are additions to the law of 1871.

The illustrations (c) and (d) are also added, as also the last words of illustration (f)—"except where the representative is himself under disability when the representation devolves upon him."

S. died in 1844, leaving two daughters, J. and B., and his second wife T., surviving him. J. was afterwards the mother of sons, the plaintiffs. T. the widow was alleged to have adopted a son in 1845, and the plaintiffs disputed this adoption and sued to set it aside. They stated in their plaint that they attained majority in 1871 and 1872, and claiming the benefit of s. 7 of Act IX of 1871, filed this suit in 1873. The defence taken was, that the suit was barred by limitation; sched. ii, No. 129 of that Act making the period run from the date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father, the period being twelve years. But s. 7 of Act IX provided, that if the person entitled to sue be at the time the right to sue accrued a minor, he might institute the suit within the same period after the disability had ceased as would otherwise have been allowed, and it was held that as none of the plaintiffs were in existence at the time when the right to sue accrued, they could not claim the benefit of s. 7 of that Act (*a*).

The present Act supposes that at the time from which the period of limitation is reckoned,—that is to say, in this instance, when the alleged adoption *became known to the plaintiff*, he was a minor: sched. ii, No. 118. Consequently the fact of his not having been in existence when the adoption took place, would be no bar to his availing himself of his disability, and he might bring a suit within six years (not twelve, as under Act IX) after he attained majority, if he knew of it during his minority, or within the same period after it came to his knowledge if he acquired that knowledge after he came of age.

This section, like the corresponding section of Act IX of 1871, limits the privilege of taking advantage of the disability to the minor himself, and after his death to his legal representative. It does not extend to a purchaser from the minor (*b*).

Although the minor may take advantage of the disability, he is not obliged to do so; there is nothing to prevent his instituting a suit through his guardian. If he could not do so, the effect would be as pointed out by the Judicial Committee to postpone rather than accelerate trials which cannot be the policy of the law; and the guardian may in that case take advantage of the disability on behalf of the minor (*c*). These cases were all decided upon the construction of s. 11 of Act XIV of 1859, but the principle applies equally to this Act.

The Bombay Minors' Act, XX of 1864, however, precludes the institution or defence of a suit on behalf of a minor's property by any one who has not taken out a certificate under that Act (*d*).

Disability of one joint creditor.

8. When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all: but where no such discharge

(*a*) Siddhessur Dutt *v.* Sham Chand Nundun, 15 B. L. R., 9 note, L. S. Jackson and McDonell, JJ.

(*b*) Mahomed Arsad Chowdhry *v.* Yakoob Ally, 15 B. L. R., 357, Markby and Morris, JJ.

(*c*) Phoolbas Koonwur *v.* Lalla Jugeshur Sahoy, I. L. R, 1 Cal., 226, see p. 243, P. C., citing and approving of the decisions in the cases of Ram Chunder Roy *v* Umbica Dossee, 7 Suth. W. R., 161, Trevor and Glover, JJ.; Ram Ghose *v.* Greedhur Ghose, 14 *ib.*, 429, Norman and Loch, JJ.; and Suffuroonissa Bibee *v* Nooral Hossein, 17 *ib*, 419, Macpherson and Dwarkanath Mitter, JJ.

(*d*) Gopal Kashi *v.* Ramabaj Saheb Patvardhan, 12 Bom., 17, Sargent and Pinhey, JJ.

can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others.

Illustrations.

(*a*.)—A. incurs a debt to a firm of which B., C., and D. are partners. B. is insane and C. is a minor. D. can give a discharge of the debt without the concurrence of B. and C. Time runs against B., C., and D.

(*b*.)—A. incurs a debt to a firm of which E., F., and G. are partners. E. and F. are insane, and G. is a minor. Time will not run against any of them until either E. or F. becomes sane, or G. attains majority.

This corresponds with s. 8 of Act IX of 1871, the illustrations being added.

Continuous running of time.

9. When once time has begun to run, no subsequent disability or inability to sue stops it:

Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

This corresponds with s. 9 of Act IX of 1871.

Suits against express trustees and their representatives.

10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time.

This corresponds with s. 10 of Act IX of 1871, the words "or assigns (not being assigns for valuable consideration)" being introduced With regard to these words see the note at p. 119 of the 2nd vol. of O'Kineally's Calcutta Reports. The object of the alteration is stated to be to assimilate the law of India to the new law, which will come into operation in England on the 1st of January, 1879, 37 and 38 Vict., c. 57, s. 1, and with 3 and 4 Wm IV., c. 27, ss. 20, 24, and 25, to prevent the litigation likely to arise from the use of the words "good faith." The schedule also, see No. 134, has been altered by the omission of those words; the alteration was made at the suggestion of Mr. Justice Green of the High Court at Bombay.

The meaning of the words "trust for a specific purpose" was discussed in the case to which this note is appended. There a Hindu widow sued as executrix, claiming the estate as in a case of intestacy. The husband did in fact leave a will giving 5,000 rupees to the plaintiff for her maintenance and making other bequests. But the plaintiff alleged that the will was void. The law of limitation was pleaded, and the plaintiff relied upon s. 10. But it was held, that this section was inapplicable, the executrix not being a trustee for a specific purpose. Pontifex, J., who tried the case, observed as follows: "It may be said that an executor holds for the specific "purpose of paying debts and legacies; but it is clear that this is not a specific "purpose as intended by s. 10, for by other parts of the Act creditors and "legatees are barred by non-claim" (*a*). That is also the case with regard to the present enactment, see sched. ii, No. 123.

Act XIV of 1859, s. 2, contained a similar provision, and upon the construction of that section a "trustee" does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrongdoer in possession without title; see s. 3. With regard to a benami transac-

(*a*) Kherodemoney Dossee *v.* Doorgamoney Dossee, 2 Cal., 112.

tion, the following was the reason given for not holding it to be a trust :— "It would be dangerous to hold that a benamidar is a trustee for the real "owner within the meaning of s. 2 of Act XIV of 1859, for, if such were the "case, a person might, after any length of time, sue another for recovery of "property by getting up a fictitious case against him, however long he may "have been in possession, that the property was conveyed to him benami. Such "a construction would tend still further to weaken the law, at present not "sufficiently powerful to suppress the evils consequent upon the pernicious "system of benami so prevelent throughout Bengal" (*a*).

As to a mortgagee, see the case undernoted (*b*).

The executor of a deceased person who had agreed to transfer certain shares to A. is not a trustee for a specific purpose within the meaning of this clause with regard to the shares which had come into his hands. The remedy A. has is a suit for specific performance, and the suit is governed, as regards limitation, by art. No. 113 of sched. ii (*c*).

The purchase of property in the name of an idol, no trusts being declared, does not render the purchaser a trustee (*d*) The *sevait* has no legal property in the property of the idol, but only the title of manager of the religious endowment (*e*). The idol itself is capable of holding the property, but where there are trusts, and the property is vested in a person partly for charitable or other like purposes, and partly for the benefit of others, he is bound to use it for such purposes, and is a trustee (*f*). Where A. advanced money to his servant B for building purposes, and B, in a suit brought by A. to recover the balance, raised the defence of the law of limitation, it was held that the matter partook of the nature of a trust to which no period of limitation would apply (*g*).

Suits on foreign contracts.

11. Suits instituted in British India on contracts entered into in a foreign country are subject to the rules prescribed by this Act.

Foreign limitation law.

No foreign rule of limitation shall be a defence to a suit instituted in British India on a contract entered into in a foreign country, unless the rule has extinguished the contract, and the parties were domiciled in such country during the period prescribed by such rule.

This corresponds with ss. 11 and 12 of Act IX of 1871.

PART III.

COMPUTATION OF PERIOD OF LIMITATION.

Exclusion of day on which right to sue accrues.

12. In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

Exclusion in case of appeals and certain applications.

In computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, and an application for a review of judgment, the day on which the judgment complained of was pronounced,

(*a*) Uma Sundari Dasi *v* Dwarkanath Roy, 2 B. L. R, A. C., 291, *per* Peacock, C. J.

(*b*) Lall Doss *v.* Jamal Ali, B L. R., F. B, 901.

(*c*) Ahmed Mahomed Patel *v.* Adjein Dooply, I. L. R., 2 Cal., 323, Garth, C. J., and Mitter, J.

(*d*) Braja Sundari Debi *v.* Rani Lachmi Kunwari, 2 B L R., A. C., 155, Norman and E. Jackson, JJ.

(*e*) Shibessouree Debia *v.* Mothooranath Acharjo, 13 Moo. I. A., 270.

(*f*) Syud Shaw Alleh Ahmed *v.* Musst Bibee Nusseebun, 21 Suth. W. R., 415, Phear and Morris, JJ.

(*g*) Narayandas *v* Maharaja of Burdwan, 1 B. L. R., S. N., xi, Bayley and Macpherson, JJ.

and the time requisite for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed, shall be excluded.

Where a decree is appealed against or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

The first paragraph of this section (which corresponds with s. 13 of Act IX of 1871) includes appeals and applications, as well as suits; consequently, the words "right to sue accrued" are replaced by the words "such period is to be reckoned."

In the second paragraph the words "an application to the High Court for the admission of a special appeal" are omitted.

The third paragraph is an addition; it applies equally to all Courts, and consequently the practice which disallowed this time, on the ground that Counsel should take a note of the judgment on their briefs, is superseded.

Exclusion of time of defendant's absence from British India.

13. In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded.

This corresponds with s. 14 of Act IX of 1871, but the second part of that section, which excluded its operation where "service of a summons to appear and answer in the suit can, during such absence, be made under the Code of Civil Procedure, s. 60," is now omitted.

Exclusion of time of proceeding *bonâ fide* in Court without jurisdiction.

14. In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Like exclusion in case of order under Civil Procedure Code, s. 20.

In computing the period of limitation prescribed for a suit, proceedings in which have been stayed by order under the Code of Civil Procedure, section 20, the interval between the institution of the suit and the date of so staying proceedings, and the time requisite for going from the Court in which proceedings are stayed to the Court in which the suit is re-instituted, shall be excluded.

Like exclusion in case of application.

In computing the period of limitation prescribed for any application, the time during which the applicant has been making another application for the same relief shall be excluded, where the last-mentioned application is made in good faith to a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to grant it.

Explanation 1.—In excluding the time during which a former suit or application was pending or being made, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation 2.—A plaintiff resisting an appeal presented on the

ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section.

In this section, which corresponds with s. 15 of Act IX of 1871, the words "civil proceeding" are substituted for the words "suit;" and the words "or some person whom he represents" are omitted after the words "same defendant." The words "right to sue" are substituted for "cause of action," and the word "prosecuted" for the word "instituted."

The explanations are the same, with the exception that the first of them includes applications as well as suits.

None of these alterations, however, seem to bring into the operation of this section the case of a defendant in an original suit resisting *bonâ fide* a claim made in a Court without jurisdiction.

The second and third paragraphs of this section have been added, the second in consequence of the introduction of s. 20 of the Code of Civil Procedure, and the third in consequence of a doubt expressed by the Courts as to whether an application for execution could be called a suit, &c. (*a*). The principle of this section appears to have been applied in a case (*b*) decided by the Judicial Committee in 1860 on the construction of Reg. III of 1793, s. 14, where a plaintiff having succeeded in his suit for possession went on to claim wasilat during the period he was kept out of possession, a period of many years. He made no default himself in the prosecution of this claim, but it appeared that an order of the Court in his favor passed at an early date, and on which the subsequent proceedings were founded, had been made without jurisdiction, and it was held that he was not barred by limitation or restricted in his claim to the period (twelve years) laid down in the Regulation. In a later case (*c*) tried in Bengal a somewhat similar question arose. Under a decree made in a suit brought by A. against B., A. obtained possession of certain property. The decree was reversed in appeal. The Court of appeal made no order as to wasilat, or mesne profits. B. then obtained from the Court of first instance an order for possession and mesne profits. The High Court, however, set aside this order, so far as it related to mesne profits, on the ground that the Court of first instance had no power to alter the decree of the Appellate Court, and that in so doing it had acted without jurisdiction, holding that B. should have applied to the Court of appeal to amend its decree in this respect, or, in the alternative, should have brought a separate suit for the wasilat. B. applied for a review of this judgment, but was unsuccessful. She then brought a suit for the wasilat. It was necessary for B. in this suit to call in aid the 14th section of Act XIV of 1859, the then operative law of limitations, a section corresponding to that now under discussion; and it was held by a Full Bench, that although B. had been engaged in proceedings which were within the meaning of the 14th section of Act XIV in one sense, these proceedings were not annulled from "defect of jurisdiction or any such cause," and consequently that the time occupied in obtaining and seeking to uphold the order for mesne profits ought not to be deducted in computing the period of limitation for the subsequent suit. Peacock, C. J., however, dissented from the rest of the Full Bench, and after pointing out the distinction between the case of a plaintiff who gets a decree for possession without mesne profits, when it would be improper for the Court executing the decree to alter it by giving mesne profits, and that of a plaintiff who, after losing his case in the Court of first instance, is restored to his original position when the decree of that Court is reversed, and ought to be restored therefore to possession and to the fruits of his property which had been appro-

(*a*) Jiwan Singh *v.* Sarnam Singh, I. L. R., 1 All., F. B., 97; Banee Kant Ghose *v.* Haran Kisto Ghose, 24 Suth. W R, 405, L. S. Jackson and McDonell, JJ.; and Promothonath Roy *v.* Watson, *ib.*, 303, Birch and McDonell, JJ.

(*b*) Doorgapersaud Roy Chowdry *v.* Tarapersaud Roy Chowdry, 8 Moo. I. A., 308.

(*c*) Hurro Chunder Roy Chowdhry *v.* Sooradhonee Debia, B. L. R., F. B., 985; S. C., 9 Suth. W. R., F. B., 402; see also Rajah Perhlad Sein *v.* Gunness Lall Tewarry, 25 Suth. W. R., 540, Kemp and Birch, JJ.

priated by the defendant in consequence of a decree which had been set aside,—held, that it must have been for default of jurisdiction that the lower Court had been held, as he thought wrongly, not to have the power to award mesne profits. It is to be observed also that the words of Act XIV were "defect of jurisdiction or other cause" not "or any such cause," whereas it seems to have been assumed by the rest of the Court, that the "other cause" must have been a cause *equisdem generis* with "defect of jurisdiction." Where a general word follows particular words which are of the same nature, it takes, no doubt, its meaning from them, comprehending only things of the same kind as that designated by them unless there is something to show that a wider sense was intended (*a*); and the words "other cause of a like nature," used in the present enactment, appear to point to a more restricted meaning than could be put upon Act XIV. They would seem, however, to include the case of a plaintiff who sued a defendant who was dead at the time the plaint was filed, although the plaintiff was not aware of the fact (*b*); for a Court has no jurisdiction to pass a decree against a dead man; or where a suit was improperly valued and brought in a Court which had not jurisdiction over a suit of the real value in question (*c*); or where a suit is wrongly brought in the Revenue Court where the Civil Court alone has jurisdiction (*d*); but the converse case does not hold good where there is a special law of limitation governing the Revenue Court, which law contains no such exemption (*e*).

The words of this section and of s. 15 of Act IX of 1871, which it replaces, are wider than the words of s. 14 of the old Act of 1859, and include an appeal as well as a suit; but even on the construction of Act XIV of 1859, it was considered that the whole time in which the plaintiff had been prosecuting a suit *bonâ fide* and with due diligence for the same cause of action, in which he fails in consequence of a final determination in the suit, whether upon appeal or otherwise, that the Court in which the suit was brought had no jurisdiction, is to be deducted (*f*); and applying this construction it will follow that when the suit is determined, but not in an appeal, as when the proceedings are declared to be without jurisdiction, on an application under the 15th section of the Charter Act, the whole time should be allowed.

Exclusion of time during which commencement of suit is stayed by injunction or order.

15. In computing the period of limitation prescribed for any suit, the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and day on which it was withdrawn, shall be excluded.

This corresponds with s. 16 of Act IX of 1871. It includes an "order" as well as an "injunction," and it excludes in addition the "day on which it was issued or made and the day on which it was withdrawn."

Exclusion of time during which judgment-debtor is attempting to set aside execution-sale.

16. In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which the judgment-debtor has been prosecuting a proceeding to set aside the sale shall be excluded.

This corresponds with s. 17 of Act IX of 1871, substituting the word "proceeding" for the word "suit" to set aside the sale.

(*a*) Harrison *v.* Blackbury, 34 L. J., C. P., 109; Ringer *v.* Cann, 3 M. & W., 343.

(*b*) Mohan Chand Kandu *v.* Azim Kazi Chowdhrain, 3 B. L. R., A, C., 233, Peacock, C.J., and Dwarkanath Mitter, J.

(*c*) Chandi Dasi *v.* Janakiram, 1 B. L. R, S. N., xii, Kemp and E. Jackson, JJ.

(*d*) Haris Chandra Dutt *v.* Jagadamba Dasi, 8 B. L. R, 190 note, Norman, Offg. C. J., and Ainslie J.; Prosonnocoomar Pal Chowdhry *v.* Muddun Mohun Pal Chowdhry, 11 *ib.*, Apx., 31 note, L. S. Jackson and Mitter, JJ.; Gobindo Coomar Chowdhry *v.* Manson, 15 *ib.*, 56, Phear and Morris, JJ.

(*e*) See s. 6, *ante*; Poulson *v.* Madhusudan Pal Chowdhry, B. L. R., F. B., 101; Unoda Persaud Mookerjee *v.* Kristo Coomar Moitro, 15 B. L. R., 60 note, P. C; Sham Kuar *v.* Gaya Din, I. L. R., 1 All., 255, F. B.

(*f*) Lukhinarain Mitter *v* Khettro Pal Singh Roy, 20 Suth. W. R., P. C., 380.

Effect of death before right to sue accrues.

17. When a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.

When a person against whom, if he were living, a right to institute a suit or make an application would have accrued dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application.

Nothing in the former part of this section applies to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office.

This corresponds with s. 18 of Act IX of 1871, the words "institute a suit or make an application" being substituted for "sue," and corresponding alterations are made throughout the section.

In the last paragraph "suits to enforce rights of pre-emption" are added and included in the exemption.

Effect of fraud.

18. When any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed [from him,]

the time limited for instituting a suit [or making an application]

(*a*) against the person guilty of the fraud or accessory thereto, or,

(*b*) against any person claiming through him otherwise than in good faith and for valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

This section, which corresponds with s. 19 of Act IX of 1871, also includes "applications" as well as "suits;" and the document mentioned in the second paragraph must have been fraudulently concealed from the person having a right to institute the suit.

In the second paragraph at the end, the words "from him" are introduced.

The corresponding section of Act IX was considered inapplicable except when the fraud has been committed by the party against whom the right is sought to be enforced (*a*). In a case (*b*) decided under Act XIV of 1859, s. 9, the defendant had published a defamatory libel concerning the plaintiffs in the shape of an official report, which he, as Consul, had sent home to his Government. The plaintiffs knew shortly after the publication that they had been libelled, but were unable to sue, as they did not know the words in which the libel was couched. The report was held not to be privileged, but the period for the institution of the suit was held to be barred by lapse of time. The plaintiffs had used every endeavour to obtain a copy of the report, and the defendant had successfully eluded their enquiry. It was contended by the plaintiffs

(*a*) Ramdoyal Khan *v.* Ajoodhia Ram Khan, I. L. R., 2 Cal., 1, Markby J.; but see Dwarkanath Bhooya *v.* Rajah Ajoodhia Ram Khan, 21 Suth. W. R., 109, Markby and Birch, JJ.

(*b*) Robert and Charriol *v.* Lombard, 1 In. Jur., N. S. 192, Phear, J.

that this constituted fraud so as to give the plaintiffs the benefit of the enactment. It was decided, however, that the conduct of the defendant did not amount to fraud so as to enable them to do this, and the suit was dismissed.

Effect of acknowledgment in writing.

19. If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

Explanation 1.—For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation 2.—In this section "signed" means signed either personally or by an agent duly authorized in this behalf.

This section, which takes the place of s. 20 of Act IX of 1871, has been recast. The latter was confined to acknowledgments of a debt or legacy. Explanation 1 is altered to suit this change, and in this explanation the words "but it must amount to an express undertaking to pay or deliver the debt or legacy or to an unqualified admission of the liability as subsisting" are not re-enacted. They would have been inconsistent with the earlier part of the explanation.

The person who might make the acknowledgment was under the Act of 1871 the defendant or his "agent generally or specially authorized in this behalf" only, as included now in Explanation 2.

In the second paragraph the words "when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received" has been replaced by "but oral evidence of its contents shall not be received."

Explanation 2—"nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them" and the illustrations are omitted here, and included in the new section (21).

The principle is laid down by Lord Tenterden that where there is a clear acknowledgment of a debt, a promise to pay must be inferred (*a*).

This section, like s. 20 of Act IX of 1871, but unlike Act XIV of 1859 s. 4, requires that the writing, &c., shall have been made before the expiration of the period of limitation originally prescribed.

If a contract has been broken, and the cause of action which has thereupon arisen has been suspended by a subsequent agreement between the parties which is also broken, and the creditor remitted to his original right of action, the time of limitation will run from the period of the breach of the second arrangement, and not from the time of the breach of the original contract. But it is essential, to take the case out of the law of limitations, that there should be a new and binding agreement between the parties, giving the creditor a new remedy for a new consideration (*b*), and it must be in writing as directed by this section.

(*a*) Tanner *v.* Smart, 1 B. and C., 603; see also Quincey *v.* Sharpe, L. R., 1 Ex., 72.
(*b*) Irving *v.* Veitch, 3 Mee. & W., 109, 110.

The sufficiency of the writing as an acknowledgment is to be judged of by the Court (*a*); it need not be in any particular form: thus, a kuboolyut, which contained an acknowledgment that a sum was due, was held to be sufficient (*b*), and a recital in a bill of sale was held to have the same effect (*c*).

It is not necessary that the acknowledgment should have been made to the creditor; it may have been made to the Court (*d*), or to a stranger, as is now expressly enacted and had been before decided (*e*).

The writing must be signed, not sealed (*f*), by the party or his agent "duly authorized," a phrase which must imply an authority in writing, otherwise the acknowledgment would be, so far as the principal is concerned, oral. The words "signed by him" used in s. 4 of Act XIV of 1859 were considered to be sufficiently complied with where the signature appeared on the body of the instrument, which was delivered over as complete, although not signed at the foot or end (*g*). The manager of a joint Hindu family, or the executor of a Hindu will, was held to have no power, under Act XIV of 1859, s. 4, to revive a debt barred by limitation except as against himself (*h*). Section 2, *ante*, would prevent a debt being revived under any circumstances under this Act. Couch, C. J., in that case said: "I am speaking of what the law was at the "time of this transaction, s. 4 of Act XIV of 1859 being then applicable. It "would not, I think, be right to apply to India the decisions of the English "Courts as to executors being at liberty not to avail themselves of the law of "limitation, because those decisions probably rest upon the peculiar position "of an executor in England, and the rights which he may have from his having "been considered originally the representative of the Ordinary, and to have entire "power over the estate. They would not be a safe guide in this country, where, "amongst Hindus, an executor really is not recognized. The probate of a will "by a Hindu does not have the same effect as probate of a will in England; "nor does the calling of the man to whom property is left as executor put him "exactly in the same position as an English executor. We, therefore, cannot "apply those cases here, and there is no ground for saying that any acknowledg-"ment of Gourinarain would prevent the operation of the law of limitation."

The later enactments regarding Limitation and the Hindu Wills Act have made considerable alterations in the law, and an acknowledgment by an executor, who has proved a will under the latter Act, would, if otherwise sufficient, bind the estate of his testator; but neither such an executor, nor any other executor, can be said to be the agent of a beneficiary under the will so as to bind him in respect of matters unconnected with the estate, and it is very doubtful whether a manager of a Hindu family could even, in respect of the estate, bind any one but himself or some person from whom he had received due authority to do so.

In Act IX of 1871 there was, as has been already noticed, a clause enacting that a writing, in order to take the case out of the law of limitation, must amount to an express undertaking to pay or deliver the debt or legacy [to which the section (20) was confined] or to an unqualified admission of the liability as subsisting. This clause is not repeated here. It will, therefore, be convenient to refer to some cases in which writings have been held sufficient to take the case out of the law of limitations, or the reverse.

(*a*) Kristna Row *v.* Hachapa Sugapa, 2 Mad. H. C. Rep., 307.

(*b*) Bengal Indigo Company *v.* Koylas Chunder Das, 10 Suth. W. R., 293, Peacock, C J., and Mitter, J.

(*c*) Madhusudan Chowdhry *v.* Brajanath Chandra, 6 B. L. R., 299.

(*d*) Digumburee Debea *v* Saroda Pershad Roy, 3 Suth. W. R, Mis., 27, Loch and Glover, JJ.; Luchmee Narain *v.* Shudasheo Singh, 5 *ib.*, Mis., 12, Kemp and Glover, JJ.; Prosonno Coomar Roy Chowdhry *v.* Kashee Kant Bhuttacharjee, *ib.*, 31, Seton-Karr and Sumbhoonath Pundit, JJ.

(*e*) Hurro Chunder Roy *v.* Monee Mohinee Dossee, Suth S. C. C. Cases, 139, Bayley and Phear, JJ.; Mudhusudan Chowdhry *v.* Brajanath Chandra, 6 B. L. R., 299, Paul, J.; Nijamudin *v.* Mahomed Ali, 4 Mad. H. C. Rep, 385, Scotland, C. J., and Collett, J.

(*f*) Luchmun Pershad *v.* Rumzan Ali, 8 Suth. W. R, 518, Seton-Karr and Macpherson, JJ.

(*g*) Khwaja Muhammad Janula *v.* Venkatarayar, 4 Mad. H C. Rep., 79, Scotland, C. J., and Holloway, J.

(*h*) Gopalnarain Mozoomdar *v.* Muddomutty Guptee, 14 B. L. R., 21. see p. 49.

It is enough that the admission recognizes the claim as of right, and it is not necessary that any particular sum should have been mentioned by either party, or that a promise to pay should have been made by the defendant (*a*). It will be enough if a debtor in reply to a letter from his creditor demanding payment of the debt asks for time to pay (*b*). A defendant by her promissory note, dated 1st April, 1865, promised to pay Rs. 1,000 to the plaintiff with interest at 12 per cent., and on the 18th July, 1866, wrote to plaintiff "I further hold myself responsible for 1,000 rupees and 900 rupees respectively, &c." It was held by Phear, J., and in appeal by Peacock, C.J., and Macpherson, J., that this was a sufficient acknowledgment of the debt on the promissory note, and that parol evidence might be given to connect the two documents (*c*). The words "enclosed a remittance of £40 to old account" were held not sufficient an admission to revive the old debt (*d*); and it was attempted unsuccessfully to infer an admission by inference from a series of letters, there being no direct admission in any of them (*e*).

Where a defendant, on making a part-payment of his bond had also made the following memorandum on the back of it—"Payment on account of this up "to the 21st day of November, &c., the interest was paid in full, and on account "of the principal Rs. 107 $\frac{5}{16}$, one hundred and seven rupees and eleven annas; "the signature of K. R. A.,"—it was held that this was clearly an admission that the debt due upon the bond at the time K. R. A. signed the memorandum was the amount of the principal less the sum of Rs. 107-11 (*f*). This decision was dissented from by Macpherson and Seton-Karr, JJ. (*g*), who followed the view taken by Peacock, C. J., and L. S. Jackson, J., in another case, on the ground that as the Legislature had not made a part-payment in itself sufficient to take the case out of the operation of the law of limitation, it did not appear to have been intended that an inference of acknowledgment of the debt should be made from the record of a part-payment. The law is, however, now altered; the provision of the next section (20) show a different intention in the Legislature, and such a writing as was the subject of the Madras decision would, probably, now be considered to be a sufficient acknowledgment.

Effect of payment of interest as such.

Effect of part-payment of principal.

20. When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,

or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf,

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made:

Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.

Effect of receipt of produce of mortgaged land.

Where mortgaged land is in the possession of the mortgagee, the receipt of the produce of such land shall be deemed to be a payment for the purpose of this section.

This corresponds with s. 21 of Act IX of 1871, the words in the beginning

(*a*) Gupikishen Goswami *v.* Brindabun Chandra Sircar, 3 B. L. R., 37, P. C.

(*b*) Harrison *v.* Hope, 9 B. L. R., Apx, 43, Macpherson, J.

(*c*) Umesh Chandra Mookerjee *v.* Sageman, 5 B. L. R., 633 note, Peacock, C. J., and Macpherson, J.

(*d*) Shearman *v.* Fleming, 5 B. L. R., 619, Couch, C. J., and Phear, J.; see also Khwaja Muhammad Janula *v.* Venkatarayar, 4 Mad. H. C. Rep., 79, Scotland, C. J., and Holloway, J.; Luchman Pershad *v.* Rumzan Ali, 8 Suth. W. R., 513, Seton-Karr and Macpherson, JJ.

(*e*) Royen *v.* Montriou, 6 B. L. R., 550, Phear, J.

(*f*) Kristna Row *v.* Hachapa Sugapa, 2 Mad., 307, Scotland, C. J., and Frere, J.

(*g*) Gorachund Dutt *v.* Lokenath Dutt, 8 Suth. W. R., 334.

of the proviso restricting it to a debt which has arisen on a contract in writing, and the words "on the instrument, or in his own books, or in the books of the creditor" at the end of the proviso being omitted; and the clause relating to the receipt of the produce of mortgaged land being added.

The words "prescribed period," which were used in Act IX, have been held to mean the period prescribed for the repayment of the debt, &c. (*a*). The expression seems to be used in a different sense in other parts of the Act, for example in ss. 12, 13, 14, &c.; but there the words are "period of limitation prescribed for any suit," &c., and the omission of the words "of limitation," &c., have there been considered to indicate the period of repayment of the loan. In the present enactment, s. 2, a general provision is made that no right once barred can be revived; a payment, therefore, could not revive a debt once barred, and unless the words in Act IX are construed as the corresponding words were construed in the case cited, they would appear to be superfluous.

One of several joint contractors, &c., not chargeable by reason of acknowledgment or payment made by another of them.

21. Nothing in sections 19 and 20 renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of, any other or others of them.

This section is transposed so as to make it applicable to a part-payment as well as to a written acknowledgment.

Effect of substituting or adding new plaintiff or defendant.

22. When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Proviso where original plaintiff dies.

Provided that, when a plaintiff dies, and the suit is continued by his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted by the deceased plaintiff:

Proviso where original defendant dies.

Provided also, that when a defendant dies, and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant.

This corresponds with s. 22 of Act IX of 1871, the words "legal representative" being used in lieu of "representative in interest" in the provisoes. See the note to s. 1. A plaint being returned for amendment, the amended plaint is in time if the original plaint was in time, the amended plaint being taken by itself presented out of time (*b*).

Continuing breaches and wrongs.

23. In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

This corresponds with a part of s. 23 of Act IX of 1871, but the part of that section which deals with successive breaches of contract, and the last paragraph which exempted from the operation of that part of the section suit for the breach of contracts for the payment of money by instalments, where, on default made in payment of one instalment, the whole becomes due, are omitted; as is also the illustration to that section. This section also includes the case of a continuing wrong independent of contract, and consequently the case of a continuing nuisance, which was provided for by s. 24 of Act IX of 1871, now

(*a*) Tarincy Churn Nundy *v.* Shaikh Abdur Rohoman, 2 Cal., 346, Mitter and Maclean, JJ.

(*b*) Shamchand Koondoo *v.* Kally Kanth Roy, Marsh., 336.

omitted. A right to a turn of worship is not a recurring right so as to give a new cause of action every time the turn comes round and is obstructed (*a*).

Suit for compensation for act not actionable without special damage.

24. In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

Illustrations.

(*a.*)—A. owns the surface of a field. B. owns the subsoil. B. digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation in the case of a suit by A. against B. runs from the time of the subsidence.

(*b.*)—A. speaks and publishes of B. slanderous words not actionable in themselves without special damage caused thereby. C. in consequence refuses to employ B. as his clerk. The period of limitation in the case of a suit by B. against A. for compensation for the slander does not commence till the refusal.

This is substantially the same as s. 25 of Act IX of 1871, although the words are altered and the second illustration is added. The principle on which this section is based is exemplified in the case of *Bonomi* v. *Backhouse* (*b*), the circumstances of which case are stated in Illustration (a). See also *Gillon* v. *Boddington* (*c*), where A., by digging a basin or canal in his own land, caused a stream to flow against his neighbour's wall, and gradually to undermine it, so that at last the wall fell,—the period of limitation was held to run from the falling of the wall, and not from the time of the digging of the basin or canal.

Computation of time mentioned in instruments.

25. All instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar.

Illustrations.

(*a.*)—A Hindú makes a promissory note bearing a native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiry of four months after date computed according to the Gregorian calendar.

(*b*)—A Hindú makes a bond, bearing a native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiry of one year after date computed according to the Gregorian calendar.

This corresponds with s. 26 of Act IX of 1871.

PART IV.

ACQUISITION OF OWNERSHIP BY POSSESSION.

Acquisition of right to easements.

26. Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

(*a*) Gour Mohun Chowdhry *v.* Modun Mohan Chowdhry, 6 B. L. R., 352, Kemp and Glover, JJ.

(*b*) 28 L. J., Q. B., 378.

(*c*) R. & M., 161.

the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claims to which such period relates is contested.

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Illustrations.

(*a*.)—A suit is brought in 1881 for obstructing a right of way. The defendant admits the obstruction but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January 1860 to 1st January 1880. The plaintiff is entitled to judgment.

(*b*)—In a like suit also brought in 1881 the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1858 to 1878. The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.

(*c*.)—In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.

This corresponds with s. 27 of Act IX of 1871. A family property having been partitioned, a house No 12 fell to the lot of R G. D., deceased, the father of M. D., and No. 13, the adjoining house, to another member of the family, from whom it descended to R. D. This was in 1835. The representatives of R. D. subsequently sold No. 13 to B. N., who, in the year 1860, conveyed it to M. D. and G. D. M. D., however, took sole possession of No. 13 under this deed of purchase, and retained it until 1867, when it was decided, on an award, that it belonged solely to G. D., having been bought with his money. G. D. took possession, and in 1870 sold No. 13 to B. D. In 1871, B. D. erected certain buildings on the premises No 13, and thereby obstructed the light and air in No. 12. M. D. thereupon sued B. D. asking for an injunction to restrain the obstruction. It was contended, on the authority noted below (*a*), for the plaintiff, that he having been in possession since 1835 was entitled to an injunction, as the easement was one of necessity, and consequently there could be no merger or extinguishment by the union of possession during the period from 1860 to 1867 (*b*). And that in fact, there was no such union of possession so as to extinguish the easement, for the plaintiff's interest in No. 13 was not during that interval equal to that in his own property (*c*). For the defendant it was contended that the law relating to the mode of acquiring a title to an easement as provided by s. 27 of Act IX of 1871, virtually abolished the mode of acquiring such a title by immemorial usage. That the section was founded on the English Prescription Act, 2 and 3 Wm. IV, c. 71, under which it had been held in England that easements could now only be acquired under the Statute (*d*). It was also urged that there had been such an unity of possession from 1860 to 1867 as had the effect of extinguishing all easements between the two tenements (*e*). It was held by Markby, J., that

(*a*) Bagram *v.* Khetter Nath Karformah, 3 B L. R, O. C., 18; Yates *v.* Jack, L R., 1 Ch, 295; and Dent *v.* the Auction Mart Co, L. R, 2. Eq, 238

(*b*) Pearson *v.* Spencer, 1 B. & S., 571.

(*c*) Co. Litt. 114, *b*; R. *v.* Inhabitants of Hermitage, Carth., 239.

(*d*) Tapling *v.* Jones, 11 H. L. Ca., 290.

(*e*) Addison on Torts, 4th ed., 139, 140; Onley *v.* Gardiner, 4 M. & W., 496; and Battishall *v.* Reed, 18 C. B.,696.

the plaintiff had not, between 1860 and 1867, an estate of "as high and perdurable a nature" in No. 13 as he had in No. 12; and that consequently, according to the rule laid down by Lord Coke, the easements between the two tenements were not extinguished. But that during the period 1860—1867, the plaintiff had not enjoyed "as of right" any easement in respect of No. 13, of which he was the occupier. That this did not depend upon the nature of his interests or on the question whether his occupation was rightful or wrongful, but upon the words of s. 27, under which it was impossible to say that a person can intend, as dominant owner, to enjoy an easement as against himself as servient occupier. The learned Judge also held that the Limitation Act did not exclude other modes of acquiring an easement by enjoyment; that there were no words to which such a construction could be given, and, with the history of the English Prescription Act before them, it could scarcely be supposed that the Legislature in India, had they intended any such exclusion, would have omitted to express their intention. The case must, therefore, be governed by the law as it stood before the passing of Act IX of 1871 (*a*).

Where the owner of the dominant tenement, with the intention of preventing the use of the way, created an obstruction of a permanent nature which rendered such use impossible, the way cannot be said, during the continuance of such obstruction, to have been "openly enjoyed" within the meaning of s. 27 of Act IX of 1871; and, therefore, although there may have been no interruption within the meaning of that section, a right to the way is not established under the Act (*b*); and the two Acts being in this respect identical, the decision may be taken as explanatory of the present enactment.

This was a suit for a declaration of the plaintiff's right of way over a lane leading from a public road to a door in the plaintiff's house, which lane the defendant, who resided at the end of the lane, had obstructed, so as to prevent access to the plaintiff's house. It appeared that the house in respect of which the easement was claimed belonged in 1855 to H. C., during the time of whose occupation there was user of the right of way over the lane to the door, until he had the door bricked up. In April, 1865, the house was sold by H. C., and in June, 1867, was conveyed by the purchaser to the plaintiff. From the time when the door was blocked up to the date of the plaintiff's purchase no user was proved. The suit was brought in June, 1875, about a month after the erection by the defendant of the obstruction complained of.

This section does not apply to a suit to restrain one co-sharer in a joint property from appropriating to his own particular use a portion of such property without the consent of the other co-sharers (*c*). Such co-sharer cannot be said to be a person claiming title as of right adversely to his co-sharers.

Exclusion in favour of reversioner of servient tenement.

27. Provided that, when any land or water upon, over, or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A. sues for a declaration that he is entitled to a right of way over B.'s land. A. proves that he has enjoyed the right for twenty-five years; but B. shows that

(*a*) Modhoosoodun Dey *v.* Bissonath Dey, 15 B L. R., 361.

(*b*) Sham Churn Auddy *v.* Tariney Churn Banerjee, I. L. R., 1 Cal., 422, Garth, C. J., and Pontifex J.

(*c*) Bissambhur Shaha *v.* Shib Chunder Shaha, 22 Suth W. R., 286, Ainslie and McDonell, JJ.

during ten of these years C., a Hindú widow, had a life-interest in the land, that on C.'s death B. became entitled to the land, and that within two years after C.'s death he contested A.'s claim to the right. The suit must be dismissed, as A., with reference to the provisions of this section, has only proved enjoyment for fifteen years.

This corresponds with s. 28 of Act IX of 1871, which, however, excluded the case of access and use of light and air.

Extinguishment of right to property.

28. At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

This corresponds with s. 29 of Act IX of 1871, which was, however, confined to suits for possession of land or an hereditary office.

THE FIRST SCHEDULE.

(*See Section* 2.)

Number and year of Acts.	Title.	Extent of repeal.
X of 1865 ...	The Indian Succession Act	In section 321, the words "within two years after the death of the testator, or one year after the legacy has been paid."
IX of 1871 ...	The Indian Limitation Act, 1871.	The whole.
X of 1877 ...	The Code of Civil Procedure.	Section 599, and in section 601 the words "within thirty days from the date of the order."

THE SECOND SCHEDULE.

(*See Section* 4.)

FIRST DIVISION: SUITS.

These numbers, instances, or illustrations correspond generally with those in the schedules of Act IX of 1871 Where any change has been made it will be noticed. Where the numbers differ, the number in the schedule of the Act of 1871 will be printed in brackets below the number in this schedule, thus $\frac{12}{[14]}$, and where fresh matter is introduced, it will be so stated.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part I.—Thirty days.	
1.—To contest an award of the Board of Revenue under Act No. XXIII of 1863 (*to provide for the adjudication of claims to waste lands*).	Thirty days ...	When notice of the award is delivered to the plaintiff.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part II—Ninety days.	
2.—For compensation for doing, or for omitting to do, an act alleged to be in pursuance of any enactment in force for the time being in British India.	Ninety days ...	When the act or omission takes place.
	Part III.—Six months.	
3.—Under the Specific Relief Act, 1877, section 9, to recover possession of immoveable property. The 9th section of the Specific Relief Act takes the place of the 15th section of Act XIV of 1859, which is repealed. The provisions of both Acts are the same, and this illustration is the same as the third illustration in the second schedule of Act IX of 1871.	Six months ...	When the dispossession occurs.
4.—Under Act No. IX of 1860 (*to provide for the speedy determination of certain disputes between workmen engaged in railway and other public works and their employers*), section one.	Ditto ...	When the wages, hire or price of work claimed accrue or accrues due.
5.—Under the Code of Civil Procedure, chapter xxxix (*Of summary procedure on negotiable instruments*). Chap. xxxix of the Code of Civil Procedure embodies Act V of 1866, which is now repealed.	Ditto ...	When the instrument sued upon becomes due and payable.
	Part IV.—One year.	
6.—Upon a Statute, Act, Regulation or Bye-law, for a penalty or forfeiture.	One year ...	When the penalty or forfeiture is incurred.
7.—For the wages of a household servant, artisan or labourer not provided for by this schedule, No. 4.	Ditto ...	When the wages accrue due.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part IV.—One year,—contd.	
8.—For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house.	One year ...	When the food or drink is delivered.
9.—For the price of lodging	Ditto ...	When [the price becomes payable]. The words in brackets are substituted for the words "the lodging ends."
10.—To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract	Ditto ...	When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered. The words in the Act of 1871 were "when the purchaser takes actual possession under the sale sought to be impeached." The purchaser of the equity of redemption of land, which at the time of the sale is in the usufructuary possession of the mortgagee, was held to take "actual possession" when the equity of redemption is completely transferred to him (*a*).
11.—By a person against [new] whom an order is passed under section 280, 281, 282 or 335 of the Code of Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order.	Ditto ...	The date of the order.
12.—To set aside any of the [14] following sales:— (*a*) sale in execution of a decree of a Civil Court; (*b*) sale in pursuance of a decree or order of a Collector or other officer of revenue;	Ditto ...	When the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought.

(*a*) Jageshar Singh *v.* Jawahir Sing, I. L. R., 1 All., 311, F. B. (Steuart, C.J., dissenting).

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
(c) sale for arrears of Government revenue, or for any demand recoverable as such arrears; (d) sale of a patni taluq sold for current arrears of rent. *Explanation.*—In this clause 'patni' includes any intermediate tenure saleable for current arrears of rent. M. sold to S. her rights under a decree for mesne profits which she had obtained against A. and two other persons. S., therefore, proceeded to execute the decree against A.'s property. It was sold in execution, and purchased by B. It was declared, in a suit brought by A., that S. had bought M.'s interests in the decree M. had obtained against A., not for himself but for A.'s joint debtors, and that consequently S. had no right to execute it against A. A. then sued B. to recover the property. It was held, that the purchase of the benefit of the decree by A.'s joint debtors, although it had the legal effect of satisfying the judgment-debt, did not affect the decree itself. The decree was not void, but only voidable; and the sale under it was binding on A. The suit was, therefore, a suit in effect to set aside a sale under a decree, and inasmuch as it was not instituted within a year from the date of the sale, was barred (a).	*Part IV.—One year,*—contd.	
13.—To alter or set aside a [15] decision or order of a Civil Court in any proceeding other than a suit.	One year ...	The date of the final decision or order in the case by a Court competent to determine it finally.
14.—To set aside any act [or [16] order] of an officer of Government in his official capacity, not herein otherwise expressly provided for.	Ditto ...	The date of the act [or order].

(a) Abdul Munsoor *v.* Abdool Hamid, I. L. R., 2 Cal., 98, Garth, C.J., and Mitter, J.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation	Time from which period begins to run.
	Part IV. — One year,—contd.	
15.—Against Government to [17] set aside any attachment, lease or transfer of immoveable property by the Revenue authorities for arrears of Government revenue.	One year ...	When the attachment, lease or transfer is made.
16.—Against Government to [18] recover money paid under protest in satisfaction of a claim made by the Revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears.	Ditto ...	When the payment is made.
17.—Against Government for [19] compensation for land acquired for public purposes.	Ditto ...	The date of determining the amount of the compensation.
18.—Like suit for compensation [20] when the acquisition is not completed.	Ditto ...	The date of the refusal to complete.
19.—For [compensation for] [21] false imprisonment.	Ditto ...	When the imprisonment ends.
20.—By executors, administrators [12] or representatives under Act No. XII of 1855 (*to enable executors, administrators or representatives to sue and be sued for certain wrongs*).	Ditto ...	The date of the death of the person wronged.
21.—By executors, administrators [13] or representatives under Act No. XIII of 1855 (*to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong*).	Ditto ...	The date of the death of the person killed.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part IV.—One year,—contd.	
22.—For [compensation for] any other injury to the person.	One year ...	When the injury is committed.
23.—For [compensation for] a malicious prosecution.	Ditto ...	When the plaintiff is acquitted, [or the prosecution is otherwise terminated]. The words in brackets are added.
24.—For [compensation for] libel.	Ditto ...	When the libel is published.
25.—For [compensation for] slander.	Ditto ...	When the words are spoken [or, if the words are not actionable in themselves, when the special damage complained of results]. The words in brackets are added.
26.—For [compensation for] [27] loss of service occasioned by the seduction of the plaintiff's servant or daughter.	Ditto ...	When the loss occurs.
27.—For [compensation for] [28] inducing a person to break a contract with the plaintiff.	Ditto ...	The date of the breach.
28.—For [compensation for] [29] an illegal, irregular or excessive distress.	Ditto ...	The date of the distress.
29.—For compensation for [30] wrongful seizure of moveable property under legal process.	Ditto ...	The date of the seizure.
	Part V.—Two years.	
30.—Against a carrier [for [36] compensation] for losing or injuring goods.	Two years ...	When the loss or injury occurs.
31.—Against a carrier [for [37] compensation] for delay in delivering goods.	Ditto ...	When the goods ought to be delivered.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part V.—Two years,—contd.	
32.—Against one who, having a right to use property for specific purposes, perverts it to other purposes. [38]	Two years ...	When the perversion first becomes known to the person injured thereby. This is substituted for "the time of the perversion."
33.—Under Act No. XII of 1855 (*to enable executors, administrators or representatives to sue and to be sued for certain wrongs*) against an executor, administrator or other representative. [39]	Ditto ...	When the wrong complained of is done.
34.—For the recovery of a wife. [41]	Ditto ...	When possession is demanded and refused.
35.—For the restitution of conjugal rights. [42]	Ditto ...	When restitution is demanded and is refused [by the husband or wife, being of full age and sound mind]. The words in brackets are added.
36.—For compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for. [40] The word "wrong" in the second line is omitted.	Ditto ...	When the malfeasance, misfeasance or nonfeasance takes place. This is substituted for "when the wrong is done or the default happens."
	Past VI.—Three years.	
37.—For [compensation for] obstructing a way or a watercourse. [31]	Three years ... [For two years.]	The date of the obstruction.
38.—For [compensation for] diverting a watercourse. [32]	Three years ... [For two years.]	The date of the diversion.
39.—For compensation for trespass upon immoveable property. [43]	Three years ...	The date of the trespass.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI.—Three years,—contd.	
40.—For compensation for [11] infringing copyright or any other exclusive privilege.	Three years ... [For one year.]	The date of the infringement.
41.—To restrain waste ... [New]	Three years ...	When the waste begins.
42.—For compensation for [86] injury caused by an injunction wrongfully obtained.	Ditto ...	When the injunction ceases.
43.—Under the Indian Succession Act, 1865, section 320 or 321, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets. [New]	Ditto ...	The date of the payment or distribution.
44.—By a ward who has attained majority, to set aside a sale by his guardian. [New]	Ditto ...	When the ward attains majority.
45.—To contest an award [44] under any of the following Regulations of the Bengal Code:— VII of 1822, IX of 1825, and IX of 1833.	Ditto ...	The date of the final award or order in the case.
46.—By a party bound by [45] such award to recover any property comprised therein.	Ditto ...	The date of the final award or order in the case.
47.—By any person bound [46] by an order respecting the possession of property made under the Code of Criminal Procedure, chap. xl, or the Bombay Mám-	Ditto ...	The date of the final order in the case.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI.—Three years,—contd.	
latdárs Courts Act, or by any one claiming under such person, to recover the property comprised in such order. This clause is varied in consequence of the enactment of chap. xl of the Code of Criminal Procedure (Act X of 1872) in lieu of Act XXV of 1861, chap. xxii As to the Bombay Act, see Act XVI of 1838 (G. G in C.) and Act V of 1864 (Bom.)		
48.—For specific moveable [47 & 48] property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same. No. 47 of Act IX of 1871 was "for lost moveable property not dishonestly misappropriated or converted." No. 48 was "for moveable property acquired by theft, extortion, cheating or dishonest misappropriation or conversion."	Three years ...	When the person having the right to the possession of the property first learns in whose possession it is. In both Nos 47 and 48 of Act IX of 1871, the time began to run "when the property [was] demanded and refused."
49 —For other specific move- [New] able property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	Ditto ...	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.
50.—For the hire of animals, [49] vehicles, boats or household furniture.	Ditto ...	When the hire becomes payable.
51.—For the balance of [50] money advanced in payment of goods to be delivered.	Ditto ...	When the goods ought to be delivered.
52.—For the price of goods [51] sold and delivered, where no fixed period of credit is agreed upon.	Ditto ...	The date of the delivery of the goods.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI.—Three years.—contd.	
53.—For the price of goods [52] sold and delivered to be paid for after the expiry of a fixed period of credit.	Three years ...	When the period of credit expires.
54.—For the price of goods [53] sold and delivered to be paid for by a bill of exchange, no such bill being given.	Ditto ...	When the period of the proposed bill elapses.
55.—For the price of trees [54] or growing crops sold by the plaintiff to the defendant, where no fixed period of credit is agreed upon.	Ditto ...	The date of the sale.
56.—For the price of work [55] done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Ditto ...	When the work is done.
57.—For money payable for [56] money lent.	Ditto ...	When the loan is made.
58.—Like suit when the [57] lender has given a cheque for the money.	Ditto ...	When the cheque is paid.
59.—For money lent under [58] an agreement that it shall be payable on demand.	Ditto ...	When the loan is made. This is substituted for "when the demand is made." This re-establishes the law as it was before the Act of 1871 was passed, and restores the authority of the case of *Norton* v. *Ellam* (*a*).
60.—For money deposited [New] under an agreement that it shall be payable on demand. Limitation runs in the case of a claim for costs deposited in a suit from the conclusion of the litigation (*b*).	Ditto ...	When the demand is made.

(*a*) 2 M. & W., 461; see note to No. 73, below.
(*b*) Mullick Mahomed Yakoob *v.* Chowdhry Shaikh Zohoorul Huq, 25 Suth. W. R., 309.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI.—Three years,—contd.	
61.—For money payable to [59] the plaintiff for money paid for the defendant.	Three years ...	When the money is paid.
62.—For money payable by [60] the defendant to the plaintiff for money received by the defendant for the plaintiff's use. A. K., on 1st of April, 1870, received from M. R. a hundi for Rs. 500 for value. On the 2nd August, 1872, A. K. filed a suit against M. R. and M. H., alleging that, on the 27th of March, 1871, M. H. purchased this hundi from him, promising to pay him Rs. 534 for it; that M. H. gave it to J. H. for the purpose of obtaining payment from M. R., and that J. H. subsequently told A. K. that the hundi was lost. A. K. prayed that M. R. and M. H. might be decreed to pay him Rs. 534, with profit and interest. M. H. denied having bought the hundi, and alleged that A. K. had given it himself to J. H. to get it cashed. M. R. admitted that he had given the hundi to A. K. for Rs. 500, but said that he had paid J. H. on the 31st of March, 1871. The Judge, on the 25th of June, 1874, added J. H. as a party to the suit, who denied the payment by M. R., and pleaded limitation. It was held with reference to Act IX of 1871, s. 22, corresponding with s. 22 of this Act, that sched. ii, art. 60, applied to the case so as far as J. H. was concerned, and that, therefore, if payment was not proved to have been made to him within three years before the 24th of June, 1874, the day on which J. H. was added as a defendant, the suit as against him was barred (*a*). A suit for his salary by a mohurir against an ameen, who had	Ditto ...	When the money is received.

(*c*) Abdul Karim *v.* Manji Hansraj, I. L. R., 1 Bom., 295, Westropp, C. J., and Nanabhai Haridas, J., Aug. 7, 1876.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI.—Three years,—contd.	
drawn the salaries of the establishment under him, and had failed to pay the plaintiff, is not a suit by a servant, but a suit for money received to the plaintiff's use (*a*). A suit for the recovery of money obtained by fraud and collusion is a suit for money received by the defendant for the plaintiff's use (*b*).		
63.—For money payable for [61] interest upon money due from the defendant to the plaintiff.	Three years ..	When the interest becomes due.
64.—For money payable to [62] the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them. An account stated within the meaning of this clause need not be signed by the debtor (*c*).	Ditto ...	When the accounts are stated in writing signed by the defendant or his agent duly authorized in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives. This is substituted for "when the accounts are stated, unless where the debt is made payable at a future time, and then when that time arrives."
65.—For compensation for [63] breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Ditto ...	When the time specified arrives or the contingency happens.
66.—On a single bond where [65] a day is specified for payment.	Ditto ..	The day so specified.
67.—On a single bond where [66] no such day is specified.	Ditto ..	The date of executing the bond.

(*a*) Abhaya Charan Dutt *v.* Haro Chandra Das Banik, 4 B. L. R., Apx., 68.

(*b*) Raghumoni Audhikari *v.* Nilmoni Sing Deo, I. L. R., 2 Cal., 393, Markby and Prinsep, JJ.

(*c*) Tariney Churn Nundy *v.* Shaikh Abdur Rohoman, 2 Cal., 346, Mitter and Maclean, JJ.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI.—Three years,—contd.	
68.—On a bond subject to a [67] condition.	Three years ...	When the condition is broken.
69.—On a bill of exchange [66] or promissory note payable at a fixed time after date.	Ditto ...	When the bill or note falls due.
70.—On a bill of exchange [69] payable at sight, or after sight, [but not at a fixed time]. The words in brackets are added.	Ditto ...	When the bill is presented.
71.—On a bill of exchange [70] accepted payable at a particular place.	Ditto ...	When the bill is presented at that place.
72.—On a bill of exchange [71] or promissory note payable at a fixed time after sight or after demand. See the note to the next article.	Ditto ...	When the fixed time expires.
73.—On a bill of exchange [72] or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue.	Ditto ...	The date of the bill or note. This is substituted for "when the demand is made." A note payable "on demand" is payable at once, it is the same as the case of money lent payable on request with interest. Where no demand is necessary before bringing the action, it is a present debt payable without any demand, and the limitation begins to run from the date of the note (*a*). It is quite different from the case of a note payable at sight, because there, by the terms of the contract, it must be shown before the action is brought (*b*),—that is, it must be presented for payment (*c*). In one case (*d*) the form of the note was "Twenty-four months *after demand*, I promise," &c., and Lord Tenterden held that, on the authority of *Holmes* v. *Kerrison*, a demand was necessary,

(*a*) Norton *v.* Ellam, 2 M. & W., 461.
(*b*) *Ibid.*
(*c*) Holmes *v.* Kerrison, 2 Taunt, 323.
(*d*) Thorpe *v.* Booth, 1 Ryan. & Moody, 389.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI.—Three years,—contd.	
		and the verdict was for the plaintiff, but he expressed a doubt upon the point; a rule to enter a nonsuit in this case was, however, refused. So where the bill is payable so many months *after notice*, the limitation does not begin to run till notice and the expiry of the stipulated time (*a*).
74.—On a promissory note or bond payable by instalments.	Three years ...	The expiration of the first term of payment, as to the part then payable; and for the other parts, the expiration of the respective terms of payment.
75.—On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one instalment, the whole shall be due.	Ditto ...	When the first default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made [in respect of which there is no such waiver]. The words in brackets are added.
76.—On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Ditto ...	The date of the delivery to the payee.
77.—On a dishonoured foreign bill where protest has been made and notice given.	Ditto ...	When the notice is given.
78.—By the payee against the drawer of a bill of exchange which has been dishonoured by non-acceptance.	Ditto ...	The date of the refusal to accept.
79.—By the acceptor of an [81] accommodation-bill against the drawer.	Ditto ...	When the acceptor pays the amount [of the bill].

(*a*) Clayton *v.* Gosling, 5 B. & C., 360.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI—Three years,—contd.	
80.—Suit on a bill of exchange, promissory note [or bond] not herein expressly provided for. The words "or bond" are added.	Three years ...	When the bill, note [or bond] becomes payable. The words "or bond" are added
81.—By a surety against the [82] principal debtor.	Ditto ...	When the surety pays the creditor.
82.—By a surety against a [83] co-surety.	Ditto ...	When the surety pays anything in excess of his own share.
83.—Upon any other con- [84] tract to indemnify.	Ditto ...	When the plaintiff is actually damnified.
84.—By an attorney or vakíl [85] for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid. Where the plaintiff was employed to execute a decree and obtained a prohibitory order, but did no further work in the matter, and the decree-holder and judgment-creditor settled the matters in dispute between them without the plaintiff's knowledge, but this compromise was not made through, or certified to, the Court which passed the decree,—it was held that the plaintiff's claim for costs was not barred by Act IX of 1871, art. 85 of sched. ii (*a*). There was here no discontinuance by the plaintiff of the business which he was conducting for the defendant. Nor had the business terminated. The compromise not being made through the Court, could not be recognized by the Court.	Ditto ...	The date of the termination of the suit or business, or (where the attorney or vakíl properly discontinues the suit or business) the date of such discontinuance.
85.—For the balance due on [87] a mutual, open and current account, where	Ditto ...	The close of the year in which the last item admitted or proved is entered in

(*a*) Hearn *v.* Bapu Sapu Trakin, I. L. R., 1 Bom., 505, Westropp, C.J., and Sarjeant, J; see also Whitehead *v.* Lord, 21 L. J., Exch., 239.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI.—Three years,—contd.	
there have been reciprocal demands between the parties.	Three years ..	the account; such year to be computed as in the account. This is substituted for "the time of the last item admitted or proved in the account." See the case (*a*) noted below in which items more than three years old had been admitted. They would now be limited to the year in which this last item appears.
86.—On a policy of insurance [88] when the sum assured is payable [immediately] after proof of the death or loss has been given to or received by the insurers. The word "immediately" is added. In most insurance offices the sum is not payable immediately after the proof of death, but after a lapse of a month or two.	Ditto ...	When proof of the death or loss is given or received to or by the insurers, whether by or from the plaintiff, or any other person.
87.—By the assured to recover premia paid [89] under a policy voidable at the election of the insurers.	Ditto ..	When the insurers elect to avoid the policy.
88.—Against a factor for an [64] account.	Ditto ...	When the account is, [during the continuance of the agency,] demanded [and refused] or, where no such demand is made, when the agency terminates. The words in brackets are added.
89.—By a principal against [90] his agent for moveable property received by the latter and not accounted for.	Ditto ...	Ditto. This is substituted for "where the accounts is demanded and refused."
90.—Other suits by principals [91] against agents for neglect or misconduct.	Ditto ...	When the neglect or misconduct [becomes known to the plaintiff]. The words in brackets are substituted for the word "occurs."

(*a*) Watson *v.* Aga Mehedee Sherazee, L. R., 1 I. A., 396.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI.—Three years,—contd.	
91.—To cancel or set aside [92] an instrument not otherwise provided for.	Three years ...	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. This is substituted for "where the instrument is executed."
92.—To declare the forgery [93] of an instrument issued or registered. The words "or attempted to be enforced" are omitted here and occur in the next number.	Ditto ...	When the issue or registration becomes known to the plaintiff. This is substituted for "the date of the issue [or] registration."
93.—To declare the forgery of an instrument attempted to be enforced against the plaintiff. See the note to article 144.	Ditto ...	The date of the attempt.
94.—For property which the plaintiff has conveyed while insane.	Ditto ...	When the plaintiff is restored to sanity, and has knowledge of the conveyance.
95.—To set aside a decree [95 & 96] obtained by fraud, or for other relief on the ground of fraud. It has been held that the corresponding article of Act IX applies to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of that act; but not to a case where a patnidar under a Hindu widow with a widow's estate bought the interest of the widow, and then fraudulently made default in payment of the Government revenue, in consequence of which default the property was put up for sale, and he bought it himself under another name. In such a case the reversioner would have twelve years under ordinary circumstances within which they might sue (*a*), and the plaintiff might also take advantage of s. 18.	Ditto ..	When the fraud becomes known to the party wronged.

(*a*) Chunder Nath Chowdhry *v.* Thrithanund Thakoor, 2 Cal., 148, L. S. Jackson and Cunningham, JJ.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI.—Three years,—contd.	
96.—For relief on the ground [97] of mistake.	Three years ...	When the mistake becomes known to the plaintiff.
97.—For money paid upon [98] an existing consideration which afterwards fails.	Ditto ...	The date of the failure.
98.—To make good out of [99] the general estate of a deceased trustee the loss occasioned by a breach of trust.	Ditto ...	The date of the trustee's death, or, if the loss has not then resulted, the date of the loss. The word "resulted" is substituted for the words "been occasioned."
99.—For contribution by a [100] party who has paid the whole amount due under a joint decree, or by a sharer in a joint estate who has paid the whole amount of revenue due from himself and his co-sharers.	Ditto ...	The date of the plaintiff's advance in excess of his own share. The same rule applies in all suits for contribution; the cause of action accrues on the date on which the sums of money which are sought to be recovered were paid (*a*).
100.—By a co-trustee to en- [101] force against the estate of a deceased trustee a claim for contribution.	Ditto ...	When the right to contribution accrues.
101.—For a seaman's wages. [102]	Ditto ...	The end of the voyage during which the wages are earned.
102.—For wages not other- [New] wise expressly provided for by this schedule.	Ditto ...	When the wages accrue due.
103.—By a Muhammadan for exigible dower (*mu'ajjal*).	Ditto ...	When the dower is demanded and refused, or (where during the continuance of

(*a*) Boykant Nath Saha *v.* Gour Monee Dassee Chowdrain, 2 Suth. W. R., 159; Nobo Kristo Bhunj *v.* Raj Bullubh Bhunj, 3 *ib.*, 189; Ram Krisna Roy *v.* Madan Gopal Roy, 6 B. L. R., Apx., 103 note; S. M. Bimala Debi *v.* S. M. Tarasundari Debi, *ib.*, Apx., 011.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI—Three years,—contd.	
		the marriage no such demand has been made) when the marriage is dissolved by death or divorce. An unsuccessful application by a wife to be allowed to sue for her dower in *formâ pauperis*, though opposed by her husband, who denies his liability in a counter-petition, is not such a demand and refusal as to constitute a cause of action. Such an application merely expresses an intention to demand, if allowed to do so in a particular way (*a*).
104.—By a Muhammadan for deferred dower (*mu'wajjal*).	Three years ...	When the marriage is dissolved by death or divorce.
105.—By a mortgagor after the mortgage has been satisfied, to recover surplus collections received by the mortgagee.	Ditto ...	When the mortgagor re-enters on the mortgaged porperty. This is substituted for "the date of the receipt."
106.—For an account and a share of the profits of a dissolved partnership.	Ditto ...	The date of the dissolution.
107.—By the manager of a joint estate of an undivided family for contribution in respect of a payment made by him on account of the estate. "The manager" is substituted for "a Hindu manager."	Ditto ...	The date of the payment.
108.—By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease.	Ditto ...	When the trees are cut down.

(*a*) Ranee Khajooroonissa *v.* Ranee Rycesoonissa, L. R., 2 I. A., 235.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION : SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VI.—Three years,—contd.	
109.—For the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years ...	When the profits are received, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, [when he recovers possession]. The words in brackets are substituted for "the date of the decree of the Appellate Court."
110.—For arrears of rent ...	Ditto ...	When the arrears become due.
111.—By a vendor of immoveable property to enforce his lien for unpaid purchase-money.	Ditto ...	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance.
112.—For a call by a company registered under any Statute or Act.	Ditto ...	When the call is [payable]. "Payable" is substituted for "made."
113.—For specific performance of a contract. The executor of a deceased person, who had agreed to transfer certain shares to A., is not a trustee for a specific purpose within the meaning of s. 10; but A. can sue for specific performance, and the case will be governed in respect of limitation by this article (*a*).	Ditto ..	[The date fixed for the performance, or if no such date is fixed,] when the plaintiff has notice that performance is refused. The words in brackets are added. The last words, "performance is refused," are substituted for "his right is denied."
114.—For the rescission of a contract.	Ditto ...	When the facts entitling the plaintiff to have the contract rescinded first become known to him. This is substituted for "when the contract is executed by the plaintiff."
115.—For [compensation for] the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	Ditto ...	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.

(*a*) Ahmed Mahomed Pattel *v.* Adjein Dooply, I. L. R., 2 Cal., 323, Garth, C. J., and Mitter, J.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION : SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VII.—Six years.	
116.—For compensation for [117] the breach of a contract in writing registered. "For compensation for the breach of a contract" is substituted for "on a promise or contract."	Six years ...	When the period of limitation would begin to run against a suit brought on a similar contract not registered. The words "promise or" are omitted.
117.—Upon a foreign judg- [116] ment as defined in the Code of Civil Procedure.	Ditto ...	The date of the judgment.
118.—To obtain a declara- [129] tion that an alleged adoption is invalid, or never in fact took place.	Ditto ... [For twelve years.]	When the alleged adoption becomes known to the plaintiff. Under the 129th section of Act IX of 1871, which is split into these two, 118 and 119, the time began to run from the date of the adoption or (at the option of the plaintiff), the date of the death of the adoptive father.
119.—To obtain a declaration [129] that an adoption is valid.	Six years ... [For twelve years.]	When the rights of the adopted son as such are interfered with.
120.—Suit for which no pe- [118] riod of limitation is provided elsewhere in this schedule. A. got a decree against B. for rent at an enhanced rate on the 29th of June, 1863, which decree was affirmed both in regular and special appeals, but was reversed by the Privy Council on the 5th of May, 1873. Between the two dates, A. got sixteen other decrees for enhanced rents, based on his original decree of June, 1863. A Full Bench having ruled that a suit for the refund of the excess rent would lie, it was held that such a suit must be brought within six years under Act IX of 1871, sched. ii, cl. 118, which is the same as sched. ii, No. 120 of this Act; and, under the circumstances, no interest was allowed (*a*).	Six years ...	When the right to sue accrues.

(*a*) Kalichurn Dutt *v.* Jogesh Chunder Dutt, 2 Cal., 354, Garth, C. J., and McDonell, J.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suits.	Period of limitation.	Time from which period begins to run.
	Part VIII.—Twelve years	
121.—To avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, or in a *patni taluq* or other saleable tenure sold for arrears of rent. [119 & 120] The words "the estate, taluk or tenure, being freed from incumbrances and under-tenure" are omitted.	Twelve years ...	When the sale becomes final and conclusive.
122.—Upon a judgment obtained in British India, or a recognizance. [121]	Ditto ...	The date of the judgment or recognizance.
123.—For a legacy [or for a share of a residue bequeathed by a testator,] or for a distributive share of the property of an intestate. [122] The words in brackets are added. This article, as altered, include expressly the case of a distributive share of the property of a testator or intestate, moveable and immoveable; thus avoiding the question which arose under the corresponding clause (122) of the old Act (*a*).	Ditto ...	When the legacy or share becomes payable or deliverable.
124.—For possession of an hereditary office. [123]	Ditto ...	When the defendant takes possession of the office adversely to the plaintiff. The words "or some person through whom he claims" are omitted. *Explanation.*—An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed.

(*a*) In Treepoora Soondery Dossee *v.* Debendronath Tagore, I. L. R., 2 Cal., 45, Pontifex, J.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VIII.—Twelve years,—contd.	
125.—Suit during the life of a [124] Hindú or Muhammadan female by a Hindú or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her remarriage.	Twelve years ...	The date of the alienation.
The 124th No. of Act IX of 1871 was confined to the case of Hindú widow and ran as follows. "Suit during the life of a Hindú widow by a Hindú entitled to the possession of land on her death to have an alienation made by the widow declared to be void except for her life." Neither clause includes the case of a purchaser of the reversionary interest unless he is a Hindu or Mahomedan. Where a Hindu widow alienates her own interest in the estate, her act does not affect the reversioner so as to cause the time of limitation to run, as against him, with reference to a suit for possession by him when he succeeds the widow (*a*). But there are cases in which possession adverse to the widow is possession adverse to the reversioner, and in that case time would run against the reversioner (*b*).		
126.—By a Hindu governed [125] by the law of the Mitakshara to set aside his father's alienation of ancestral property.	Ditto ...	When the alienee takes possession of the property.

(*a*) Musst. Raj Kunwur *v.* Sheomurat Kunwar, 5 B. L. R., 585.

(*b*) See Nobin Chandra Chuckerbutty *v.* Issar Chandra Chuckerbutty, 5 B. L. R., 599, Full Bench; Ganga Charan Roy *v.* Jagarnath Dutt, 3 *ib.*, 208; and Srinath Gangopadhya *v.* Mahes Chandra Roy, 4 *ib.*

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VIII.—Twelve years,—contd.	
127.—By a person excluded from joint family property to enforce a right to share therein. "Person" is substituted for "Hindú." This clause applies only in proceedings between the members of a joint family; it does not apply to cases in which the question of joint property or not joint property has only to be decided incidentally for the purpose of establishing the family rights as against strangers (*a*). A claim by a member of a joint Hindu family to a share in a family dwelling, on the allegation that the house was originally joint, falls under this clause (*b*). In a suit to enforce a right to a share of joint family property, it lies upon the plaintiff to prove possession of the share or the receipt of payment on account of it within twelve years. It is not enough for him to show that it was joint family property (*c*).	Twelve years ...	When the exclusion becomes known to the plaintiff. This is substituted for "when the plaintiff claims and is refused his share."
128.—By a Hindu for arrears of maintenance. The words "arrears of" are added.	Ditto ...	When the arrears are payable. This is substituted for "when the maintenance sued for is claimed and refused," see the next No.
129.—By a Hindú for a [128] declaration of his right to maintenance.	Ditto ...	When the right is denied.

(*a*) Radanath Das *v.* Elliott, 6 B. L. R., 530, P. C.

(*b*) Denonath Shaw *v.* Hurrynarain Shaw, 12 B. L. R., 349, Pontifex, J.

(*c*) Gossain Dass Koondoo *v.* Siroo Koomaree Debia, 12 B. L. R., 219, Couch, C.J., and Glover, J., citing Uma Sundari Dasi *v.* Dwarkanath Roy, 2 B. L. R., A. C., 284. Cited in argument, Madhub Dyal *v.* Punchanun Dyal, Suth. W. R., 1864, 349; Umbika Churn Sett *v.* Bhuggobutty Churn Sett, 3 Suth W. R., 173; Bydonath Ojha *v.* Gopal Mal, 6 Suth. W. R., 170; Hurrechur Mookerjee *v.* Teenkowree Dossee, 6 Suth. W. R., 170; and *contra* Rujoneekant Mitter *v.* Premchand Bose, 1 Hay, 513; Musst. Indermonee Dabea *v.* Rajnarain Chand Mozoomdar, Marsh., 172, and Biressur Banerjee *v.* Onnoda Churn Banerjee, 3 Suth. W. R., 12.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VIII.—Twelve years,—contd.	
130.—For the resumption or assessment of rent-free land.	Twelve years ...	When the right to resume or assess the land first accrues. The proviso added to this clause in the old Act is now omitted.
131.—To establish a periodically recurring right.	Ditto ...	When the plaintiff is first refused the enjoyment of the right.
132.—To enforce payment of money charged upon immoveable property. *Explanation.*—The allowance and fees respectively called *málikána* and *haqqs* shall, for the purpose of this clause, be deemed to be money charged upon immoveable property. A suit on mortgage bond against a purchaser of mortgaged property to charge the land and also for the money personally against the obligor, may be brought within twelve years from the date of the cause of action (*a*)	Ditto ...	When the money sued for becomes due.
133.—To recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration. The words "in good faith" at the end of the clause are omitted.	Ditto ...	The date of the purchase.
134.—To recover possession of immoveable property conveyed or	Ditto ...	Ditto.

(*a*) Juneswar Das *v.* Mahabeer Singh, L. R., 3 I. A., 1.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION : SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VIII.—Twelve years,—contd.	
bequeathed in trust, or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration. The words "in good faith" are here likewise omitted. In order to claim the benefit of this section the plaintiff must show (1) that he is a purchaser according to the proper meaning of the term, (2) that he is a purchaser for valuable consideration (*a*). A purchaser of a mortgage as a mortgagee does not, but a person who purchases that which is *de facto* a mortgage upon a representation made to him, and in the full belief that it is not a mortgage but an absolute title, does, come within the class contemplated by this section (*a*).		
135. — Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged.	Twelve years ...	When the mortgagor's right to possession determines. This is substituted for "when the mortgagee is first entitled to possession." A mortgagee by conditional sale has a right of entry immediately after default, and the Regulations do not debar him from the stipulated possession. Limitation runs from the date of such default, no new cause of action arising upon foreclosure (*b*).
136.—By a purchaser at a private sale for possession of immoveable property sold, when the vendor was out of possession at the date of the sale.	Ditto ...	When the vendor is first entitled to possession.

(*a*) Radanath Das *v.* Elliott, 6 B. L. R., 544, P. C.

(*b*) Dinonath Gangooly *v.* Nursingh Pershad Doss, 22 Suth. W. R., 90, Markby and Mitter, JJ.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VIII.—Twelve years,—contd.	
137.—Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale.	Twelve years ...	When the judgment-debtor is first entitled to possession. An auction-purchaser is barred by implied acquiescence from pleading that he is not bound by the acts of his predecessor, if he does not question those acts at any time within twelve years from the date of his purchase (*a*).
138.—By a purchaser of land at a sale in execution of a decree, for possession of the purchased land, when [the judgment-debtor was in possession at the date of the sale]. The words in brackets are substituted for "when he never has had possession."	Ditto ...	The date of the sale.
139.—By a landlord to recover possession from a tenant. [140]	Ditto ...	When the tenancy is determined. In a suit for possession of land with mesne profits, where limitation was pleaded, the payment by the defendants of a part of the profits to plaintiff's vendors within twelve years prior to the suit was held to be sufficient to prevent the operation of the law of limitation (*b*), the payment of the profits keeping alive the tenancy or possession in the landlord. Where land situated within a talook was allowed to lay fallow, and was used by neighbouring villagers of the same mouzah as a grazing common for the pasturage of their cattle, and it was not shown that the talookdar had not also grazed his own cattle there, it was held that the presumption was, that it was so used with the consent of the talookdar, against whom limitation could not run by reason of such use as if he were out of possession (*c*).

(*a*) Sibdyal Ghose *v.* Gouree Roy, 18 Suth. W. R., 281, Bayley and Ainslie, JJ.
(*b*) Anund Chunder Pooshalee *v.* Mooktakeshee Dabia, 21 Suth. W. R., 130, Couch, C.J., and Glover, J.
(*c*) Ooma Churn Chowdhry *v.* Umbika Churn Dey, 20 W. R., 285, Glover, J.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VIII.—Twelve years—contd	
140.—By a remainderman, a [141] reversioner (other than a landlord), or a devisee, for possession of immoveable property.	Twelve years ...	When his estate falls into possession.
141.—Like suit by a Hindú [142] [or Muhammadan] entitled to the possession of immoveable property on the death of a Hindú [or Muhammadan female]. The word "Muhammadan" is introduced, and the word "female" is substituted for "widow."	Ditto ...	When the [female] dies.
142.—For possession of im- [143] moveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Ditto ...	The date of the dispossession or discontinuance. There must have been possession and a dispossession (*a*). The possession of the manager of the estate of a Hindu family is not adverse to the rest of the family (*b*). But the possession of other members of the family may be adverse to a Hindu childless widow having the estate of a Hindu widow (*c*). Where a decree-holder, after purchase at an execution-sale of his judgment-debtor's rights and interests, sues for a declaration of title and for possession, and defendant pleads that neither plaintiff nor his judgment-debtor was in possession within twelve years prior to the suit, the plea is not rebutted by the fact of the suit having been brought within twelve years from the date of the auction-purchase (*d*). A mortgage deed gave the mortgagee a right of entry on default. Default was made, but he did not enter. Afterwards the mortgagor sold part of the property, and the purchaser registered his purchase

(*a*) Mokoond Narain Deo *v.* Khetter Mohun Dhamat, 19 Suth. W. R., 298, Markby, and Birch, JJ.

(*b*) Runjeet Singh *v.* Koer Gujraj Singh, L. R., 1 I. A., 9.

(*c*) Krishnadhun Chowdhry *v.* Hurcoomary Chowdhrain, 25 Suth. W. R., 37, Kemp and Birch, JJ.

(*d*) Ahmed Ali *v.* Haree Chand, 21 W. R., 282, Kemp, J.

THE SECOND SCHEDULE—*continued*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VIII.—Twelve years,—contd.	
		and took possession. Thirteen years afterwards the assignee of the mortgagee brought a suit for foreclosure, and got a decree. A subsequent suit by the assignee of the mortgagee against the purchaser from the mortgagor was held to be barred by twelve years' adverse possession (*a*). Adverse possession of a Patilkiwatan for twelve years by a person who was nominated Patil by one branch of a family descended from a common ancestor with the plaintiff, is a bar to a suit by the plaintiff to establish his right to officiate as Patil in turn with the defendant (*b*).
143.—Like suit, when the [144] plaintiff has become entitled by reason of any forfeiture or breach of condition.	Twelve years ...	When the forfeiture is incurred or the condition is broken.
144.—For possession of immoveable property or any interest therein not hereby otherwise specially provided for. [145]	Ditto ...	When the possession of the defendant becomes adverse to the plaintiff. The words "or of some person through whom he claims" are omitted. A let an under-tenure to B., which was sold under Act X of 1859, s. 105, free from incumbrances, for arrears of rent, and bought by A. himself. C. had, at the time of sale, held the land as a trespasser for more than twelve years. Limitation runs from the time that A. purchased B.'s rights, not when C. first took possession (*c*). On the death of A. his immoveable property was taken possession of by C under an alleged bill of sale from A It was held that a suit by A.'s heir for possession, and to set aside the deed, was governed by article No. 145, and not by No 93, of Act IX of 1871, corresponding with Nos. 144 and 93 of this Act (*d*).

(*a*) Brojonath Koondoo Chowdhry *v.* Khelut Chunder Ghose, 14 Moo I. A , 144. See also Anundo Moyee Dossee *v.* Dhonendro Chunder Mookerjee, 14 Moo. I. A., 101.

(*b*) Giriapa *v.* Jakana, 12 Bom. H. C. Rep , 172.

(*c*) Woomesh Chunder Goopto *v.* Raj Narain Roy, 10 *ib.*, 15, Peacock, C.J , Loch and L S Jackson, JJ.

(*d*) Trilochun *v.* Nobokishore Ghuttuck, 2 Cal., 10, Birch and Mitter, JJ.

THE SECOND SCHEDULE—*continued.*

FIRST DIVISION: SUITS—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part IX.—Thirty years.	
145.—Against a depositary [147] or pawnee to recover moveable property deposited or pawned. A Collector, to whom revenue is paid in excess, is not a depositary, pawnee, &c., within the meaning of this section (*a*). The word 'deposit,' as used in this clause, mean a deposit recoverable in specie, mere over-payments come under cl. 62 (*b*).	Thirty years ...	The date of the deposit or pawn. The following words "unless where an acknowledgment of teh title of the depositor, or of his right of redemption, has, before the expiration of the prescribed period, been made in writing, signed by the depositary, or pawnee, or some person claiming under him, and in such case, the date of the acknowledgment," which were in the corresponding clause of Act X of 1871, are here left out. Their re-enactment was unnecessary in consequence of the more general language used in s. 19 of this Act, which relates to acknowledgments in writing; the corresponding section of Act IX of 1871, s. 20, being limited to acknowledgments of debts or legacies.
146.—Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property mortgaged.	Ditto .. [For sixty years.]	When any part of the principal or interest was last paid on account of the mortgage debt.
	Part X.—Sixty years.	
147.—By a mortgagee for [New] foreclosure or sale.	Sixty years ..	When the money secured by the mortgage becomes due.
148.—Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.	Ditto ...	When the right to redeem or to recover possession accrues. This is substituted for "the date of the mortgage, unless where an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expi-

(*a*) Gobind Chandra *v.* The Collector of Dacca, 3 B. L. R., Apx., 57.

(*b*) Radha Nath Bose *v.* Bama Churn Mookerjee, 25 Suth. W. R., 415.

THE SECOND SCHEDULE—*continued*

FIRST DIVISION. SUITS—concluded

Description of suit.	Period of limitation	Time from which period begins to run.
	Part X—Sixty years,—contd.	
		ration of the prescribed period, been made in writing signed by the mortgagee or some person claiming under him, and in such case, the date of the acknowledgment." Provided that all claims to redeem, arising under instruments of mortgage of immoveable property situate in British Burma, which have been executed before the first day of May 1863, shall be governed by the rules of limitation in force in that province immediately before the same day.
149 —Any suit by or on behalf of the Secretary of State for India in Council. [150]	Sixty years ..	When the period of limitation would begin to run under this Act against a like suit by a private person. This is substituted for "when the right to sue accrued."

SECOND DIVISION · APPEALS.

Description of appeal.	Period of limitation	Time from which period begins to run.
150 —Under the Code of Criminal Procedure from a sentence of death passed by a Sessions Judge [New]	Seven days ..	The date of the sentence.
151.—From a decree or order of the High Courts of Judicature at Fort William, Madras and Bombay in the exercise of its original jurisdiction [New]	Twenty days ...	The date of the decree or order.

THE SECOND SCHEDULE—*continued.*

SECOND DIVISION: APPEAL.—concluded.

Description of appeal.	Period of limitation.	Time from which period begins to run.
152.—Under the Code of [151] Civil Procedure to the Court of a District Judge.	Thirty days ...	The date of the decree [or order] appealed against. The words "or order" are added.
153.—Under the same Code, [New] section 601, to a High Court.	Ditto ...	The date of the order refusing the certificate.
154.—Under the Code of Criminal Procedure to [152] any Court other than a High Court.	Ditto ...	The date of the sentence or order appealed against.
155.—Under the same Code [153] to a High Court [except in the cases provided for by No. 150 and No. 157]. The words in brackets are added.	Sixty days ...	Ditto.
156.—Under the Code of [154] Civil Procedure to a High Court [except in the cases provided for by No. 151 and No. 153]. The words in brackets are added.	Ninety days ...	The date of the decree or order appealed against.
157.—Under the Code of [New] Criminal Procedure from a judgment of acquittal.	Six months ...	The date of the judgment appealed against.

THIRD DIVISION: APPLICATIONS.

Description of application.	Period of limitation.	Time from which period begins to run.
158.—Under the Code of [155] Civil Procedure to set aside an award.	Ten days ...	When the award is submitted to the Court. The words "and notice of the submission has been given to the persons and in the manner prescribed by the High Court" are omitted.

THE SECOND SCHEDULE—*continued.*

THIRD DIVISION: APPLICATIONS—continued.

Description of application.	Period of limitation.	Time from which period begins to run.
159.—For leave to appear and [New] defend a suit under chap. xxxix of the Code of Civil Procedure. The form No. 172 given in the Code of Civil Procedure gives only seven days, and that was the time prescribed by Act V of 1866. But this schedule being a later enactment must be taken to give the correct time. The word "seven" has evidently been retained in the form by mistake. See the note to s. 533 of the Code.	Ten days ...	When the summons is served.
160.—For an order under [New] section 629 of the same Code restoring to the file a rejected application for review.	Fifteen days ...	When the application for review is rejected.
161.—For an order under [New] section 258 of the same Code compelling a decree-holder to certify payment or adjustment.	Ditto ...	When the payment or adjustment is made.
162.—For a review of judg- [164] ment by any of the High Courts of Judicature at Fort William, Madras, and Bombay in the exercise of its original jurisdiction. See also No. 173, *post.*	Twenty days ...	The date of the decree or order. The words "or order" are added.
163.—By a plaintiff for an [156] order to set aside a dismissal by default The word "dismissal" is substituted for "judgment."	Thirty days ...	The date of the dismissal.
164.—By a defendant for an [157] order to set aside a judgment *ex parte.*	Ditto ...	The date of executing any process for enforcing the judgment. A notice given to the judgment-debtor calling upon him to show cause why the decree should not be executed, is not a suffi-

THE SECOND SCHEDULE.—*continued.*

THIRD DIVISION: APPLICATIONS—continued.

Description of application.	Period of limitation.	Time from which period begins to run.
		cient "process for enforcing" the judgment within the meaning of this clause. Such process means actual process by attachment in execution of the person or property of the debtor (*a*).
165.—Under the Code of [158] Civil Procedure, by a person dispossessed of immoveable property, and disputing the right of the decree-holder [or purchaser at a sale in execution of a decree] to be put into possession. The words in brackets are added.	Thirty days ...	The date of the dispossession.
166.—To set aside a sale in [159] execution of a decree, on the ground of irregularity in publishing or conducting the sale.	Ditto ...	The date of the sale.
167.—Complaining of resist- [160] ance or obstruction to delivery of possession of immoveable property decreed or sold in execution of a decree, or of dispossession in the delivery of possession to the decreeholder or the purchaser of such property.	Ditto ...	The date of the resistance, obstruction or dispossession.
168.—For re-admission of an [161] appeal dismissed for want of prosecution.	Ditto ...	The date of the dismissal.
169.—For a re-hearing of an [New] appeal heard *ex parte* in the absence of the respondent.	Ditto ...	The date of the decree in appeal.
170 —For leave to appeal as [162] a pauper.	Ditto ... [For ninety days.]	The date of the decree appealed against.

(*a*) Poorno Chunder Coondoo *v.* Prosonno Coomar Sikdar, I. L. R., 2 Cal., 123, Pontifex, J.

THE SECOND SCHEDULE—*continued.*

THIRD DIVISION: APPLICATIONS—continued.

Description of application.	Period of limitation.	Time from which period begins to run.
171.—Under section 363 or [New] 365 of the Code of Civil Procedure by a person claiming to be the legal representative of a deceased plaintiff.	Sixty days ...	The date of the plaintiff's death.
172.—By a purchaser at an [New] execution-sale to set aside the sale on the ground that the person whose interest in the property purported to be sold had no saleable interest therein.	Ditto ...	The date of the sale
173 —For a review of judg- [164] ment, except in the cases provided for by No. 162. See also No. 162, *ante.*	Ninety days ...	The date of the decree or order. The words "or order" are added.
174.—By a creditor of an [New] insolvent judgment-debtor under section 353 of the Code of Civil Procedure.	Ditto ...	The date of the publication of the schedule.
175.—For payment of the [New] amount of a decree by instalments.	Six months ...	The date of the decree.
176 —Under the Code of [165] Civil Procedure, section 516 or 525, that an award be filed in Court.	Ditto ...	The date of the award.
177.—For the admission of [New] an appeal to Her Majesty in Council.	Ditto ...	The date of the decree appealed against.
178 —Applications for which [New] no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, section 230.	Three years ...	When the right to apply accrues

THE SECOND SCHEDULE—*continued.*

THIRD DIVISION: APPLICATIONS—continued.

Description of application.	Period of limitation.	Time from which period begins to run.
179.—For the execution of [167 & 168] a decree or order of any Civil Court not provided for by No. 180 [or by the Code of Civil Procedure, section 230]. The words in brackets are added. Section 230 bars a second application after twelve years from the date of the decree, or of the decree on appeal; or, where the decree, &c., directs the payment of money or delivery of property by instalments, the date of the default in paying or delivery the instalment in respect of which the applicant seeks to enforce the decree. It was held (*a*) that the application to "enforce" a decree referred to in the corresponding article (167), cl. 4, of Act IX of 1871, must be an application under s. 212 of Act VIII of 1859, corresponding with s. 235 of the new Code, X of 1877, by which the proceedings in execution are *commenced*, and not applications of an incidental kind made during the pendency of such proceedings; but that an application might be made *simpliciter* "to keep in force" the decree so as to prevent the operations of the law of limitation. The law is altered now, and "any step taken in aid of execution" is sufficient. Ainslie, J., who referred the above case, accepted, rather than concurred in, the decision of the Full Bench, and in referring it indicated his own opinion that any application for the *express* purpose of enforcing the primary application for execution would come within the meaning of the clause. The learned Judge used the word "express" in order to avoid the question of *bona fides* and any conflict with a former decision of a Full Bench (*b*). It was held in the earlier case, and as it seems in conformity with the law as it now stands, that the words "unless it see cause to the contrary," used in s. 221 of Act VIII, and	Three years, or, where a certified copy of the decree or order has been registered, six years.	1 The date of the decree or order, or 2 (where there has been an appeal) the date of the final decree or order of the Appellate Court, or 3 (where there has been a review of judgment) the date of the decision passed on the review, or This is as far as the term prescribed under No. 168 was defined; the rest of this column is new as regards registered decrees. 4 (where the application next hereinafter mentioned has been made) the date of applying [in accordance with law to the proper Court for execution, or to take some step in aid of execution, of the decree or order,] or The words in brackets are substituted for "to the Court to enforce, or keep in force, the decree or order." 5 (where the notice next hereinafter mentioned has been issued) the date of issuing a notice under the Code of Civil Procedure, section 248, or 6 (where the application is to enforce any payment which the decree or order directs to be made at a specified date) the date so specified. *Explanation I.*—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 4 of this number shall take effect in

(*a*) Chunder Coomar Roy *v.* Bhogobutty Prosunno Roy, 1 Cal., 23, F. B.
(*b*) Eshan Chunder Bose *v.* Prannath Nag, 14 B. L. R., F. B., 152; S. C., 22 Suth. W. R., 513.

THE SECOND SCHEDULE—*continued.*

THIRD DIVISION APPLICATIONS—continued.

Description of application.	Period of application.	Time from which period begins to run.
repeated in s. 250 of the new Code, X of 1877, did not give the Court any discretion in granting or refusing execution, provided all the previous requisites in the application for execution had been complied with. This was in accordance with the opinion of Sir Barnes Peacock (*a*), and disapproving of the decision of Phear, J. (*b*). But at the same time Couch, C.J., and L. S. Jackson, J., pointed out the inconvenience of the state of the law, and their recommendations have been carried into effect by the Legislature, which has, so far as a second application to execute a decree is concerned, enacted (s. 230 of Act X of 1877), that no such second application shall be granted unless the Court be satisfied that the first having been granted has been prosecuted with due diligence. Under Act IX of 1871 and under this Act, if the application to execute the decree is within the time limited from the date of a former application, the question of *bona fides* does not arise (*c*). This is contrary to the ruling of a Full Bench (*d*), which was a decision under the old law, and which was followed by many other cases. But although the Court cannot now go into the question whether a previous application was colorable or not, it can enquire whether at the date of that application the decree was alive or not (*e*). Bearing in mind the change in the law, the following instances decided under the old law would appear applicable to the present Statute. A precept to the Collector sent by the Civil Court under Reg. XLVIII of 1793, cl. 2, s. 24, for the mutation of names in terms of the Court's decree, is sufficient (*f*). So also an appearance in support of a decree in		favour only of such of the said persons or their representatives as it may be made by. But when the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all. Where the decree or order has been passed severally against more persons than one distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all. *Explanation II.* — "Proper Court" means the Court whose duty it is (whether under section 226 or 227 of the Code of Civil Procedure or otherwise) to execute the decree or order. These two Explanations are added.

(*a*) Davis *v.* Middleton, 4 Wym. S. C. C. Ref., 7; S. C., 8 Suth W. R., 282, Peacock, C.J. and Markby, J.

(*b*) Byjnath Pundit *v.* Kunhya Lall Pundit, 9 Suth. W. R., 527.

(*c*) Eshan Chunder Bose *v.* Prannath Nag, 14 B. L. R., 143, F. B.

(*d*) Ram Sahai Sing *v.* Sheo Sahai Sing, B. L. R., Sup. Vol., 492.

(*e*) Anoda Proshad Rai *v.* Sheikh Kurpan Ali, 1 Cal., 408, Kemp and Morris, JJ.; and sec. s. 2, *ante.*

(*f*) Musst. Nanerbi Kunwar *v.* Musst. Kasturi Kunwar, 4 B. L. R., A. C., 158.

THE SECOND SCHEDULE—*continued.*

THIRD DIVISION: APPLICATIONS—continued.

Description of application.	Period of limitation.	Time from which period begins to run.
proceedings to get it set aside (*a*). So where the representatives of a deceased decree-holder applied for execution of the decree, and were directed to furnish proof that they were representatives of the deceased, and did so (*b*). Certain sharers in a decree, of which execution was sought, were allowed to count the time of pendency of a special appeal made by their co-respondents, in which they did not appear, but of which the grounds were common to all the respondents (*c*). The fact that the proceedings are in the end abortive, does not take from them the character of a proceeding to enforce the decree or of a step in aid of execution (*d*). The confirmation of a sale made in execution of a decree is sufficient to keep the decree in force. The decree-holder is not answerable for delay of the Court in confirming the sale (*e*). So, too, an application for execution of a decree, filed within eight days of the expiry of the period of limitation, keeps the decree alive, although the notice upon the judgment-debtor, which had to be served in another district through the Court of that district, had not actually been served upon him (*f*). Where a decree-holder enters into a compromise on solenamah with his judgment-debtor, under which the debtor agrees to pay a certain sum, and makes other conditions, the original decree gives place to the compromise, which again can only be enforced by a fresh suit instituted within the period of limitation (*g*). But where (*h*), on the 28th September 1858, the defendants executed a bond payable by instalments of Rs. 50, payable in the months of August and January in each		

(*a*) Bhubaneswari Debi *v.* Mahendra Nath Chowdhry, 3 B. L. R., Apx., 33, Loch and Mitter, JJ.

(*b*) Adina Bibi *v.* Sububunnissa Bibi, 3 B. L. R., Apx., 142.

(*c*) Bhoobunessuree Debia *v.* Chunder Monee Debia, 21 Suth. W. R., 243, Kemp and Glover, JJ.

(*d*) Roy Dhunput Singh *v.* Modhomotee Dabia, 18 Suth. W. R., 76, P. C.

(*e*) Gobind Chunder Chowdhry *v.* Juhoorul Nissa Bibee, 18 Suth. W. R., 156, Bayley and Mitter, JJ.

(*f*) Rajeeb Lochun Saha Chowdhry *v.* Masseyk, 18 Suth. W. R., 193, Bayley and Ainslie, JJ.

(*g*) Prankristo Ghose *v.* Sujeeun Singh, 18 Suth. W. R., 179, Kemp and Glover, JJ.

(*h*) Upendra Mohan Tagore *v.* Takalia Bepari, 2 B. L. R., 345.

THE SECOND SCHEDULE—*continued.*

THIRD DIVISION: APPLICATIONS—continued.

Description of application.	Period of limitation.	Time from which period begins to run.
year, with a stipulation that if they failed to pay a single instalment the whole amount of the bond, including a part which had been remitted, should become due, and the plaintiff should be entitled to realize the same by execution. This arrangement appears to have been made on an application to execute a decree bearing date April, 1853. The decree-holder assented to these terms, and it was ordered that "the case be decided according to the terms of the instalment bond." The instalment due in August 1864 was paid, the next was not paid; but subsequent instalments were paid, the last in December, 1864. It was held, that this was a proceeding to keep the decree alive, and that an application for execution in the month of December, 1867, was within time. This follows the decision of the Judges of the High Court, N. W. Provinces, dated 9th March, 1867, in which it appears to have been decided that a decree, so far as regarded the last instalment, could be executed within three years from the date when it was made payable by the decree, notwithstanding the omission to realize all previous instalments due from and after the date of the decree, which, in fact, had been paid by private arrangement without recourse to the Court (*a*). This class of cases must be distinguished from those in which an attempt is made by private arrangement to alter the time of limitation prescribed by the law. This cannot be done, nor can the parties alter the decree even by consent (*b*). Proceedings may be taken against a judgment-debtor in the execution of a decree any time within three years from the last application of the kind, even though they are not instituted within thirty days (see No. 167) after a wrongful obstruction alleged to have been put by him on the way of the judg-		

(*a*) See also Bhubaneswari Debi *v.* Dinanath Sandyal, 2 B. L. R., A. C., 320.

(*b*) See Krishna Kamal Sing *v.* Hira Sirdar, 4 B. L. R., F. B., 103; S. C., 13 Suth. W. R., F. B., 44; Azim Nulla Moodeen *v.* Cruikshank, 11 B. L. R., 70.

BENGAL SECRETARIAT LIBRARY

THE SECOND SCHEDULE—*continued.*

THIRD DIVISION: APPLICATIONS—continued.

Description of application.	Period of limitation.	Time from which period begins to run.
ment-creditor's obtaining possession (*a*). Applications for review are not applications in aid of execution, and cannot be treated as proceedings taken to keep a decree alive or a step in aid of execution (*b*). It has been held that a a decree, which is indivisible, is kept alive by execution-proceedings relating to a part of it (*c*); but where a decree-holder obtained possession of certain property under an order for execution, and in consequence had to meet proceedings instituted by a third person under Act VIII of 1859, s. 230, but did not execute his decree so far as it related to costs,—it was held that the proceedings in question did not keep alive the decree or save limitation in respect to the costs (*d*). Again, where a plaintiff got a decree for land and for moveable property, and the defendant appealed with respect to the decree so far as it touched the moveable property, and the plaintiff appeared and resisted the appeal,—it was held that this was not a "proceeding" on the part of the plaintiff to keep alive his decree in respect of the land, so as to take the case out of the operation of the law of limitation (*e*). It may be questionable, however, whether these two last cases would not come within the meaning of this present enactment, and whether they could not justly be held to be applications in aid of execution. Mere informalities in a petition for execution of a decree cannot affect the proceeding so as to bar limitation (*f*). Thus proceedings had in the High Court for the purpose of getting a Privy Council order sent down to the lower Court for execution, whether strictly legitimate or not with reference to Act XXV of 1852, s. 2, must be taken to be proceed-		

(*a*) Hunkur Singh *v.* Madho Lall, 21 Suth. W. R., 147.

(*b*) Bibee Luteefun *v.* Rajroop Singh, 19 Suth. W. R., 185.

(*c*) Doya Moyee Dabee *v.* Nilmoney Chuckerbutty, 25 Suth. W. R., 70, Glover and Mitter, JJ.

(*d*) Baboo Nath Jha *v.* Khugput Doss, 19 Suth. W. R., 226, Phear and Ainslie, JJ.

(*e*) Srinath Mazumdar *v.* Braja Nath Mazumdar, 4 B. L. R., Apx., 99.

(*f*) Bullohee Kant Buttacharjee *v.* Koylash Chander Roy, 18th Suth. W. R., 254, Bayley and Ainslie, JJ.

THE SECOND SCHEDULE—*continued.*

THIRD DIVISION: APPLICATIONS—continued.

Description of application.	Period of limitation.	Time from which period begins to run.
ings keeping the decree alive (*a*). But it was held that an informal petition to the Judge executing a decree, made by the judgment-creditor with a view to the reversal of certain proceedings of the Collector in whose hands the property attached was lodged, was, under Act IX of 1871, insufficient to prevent the operation of the Limitation Act (*b*). It is perhaps doubtful whether such an application would even now be sufficient; if it is made to a wrong Court or in an improper way, it can hardly be called a step in aid of execution, although it may be sufficient to give the applicant the advantage of s. 14. But then it must have been made in good faith. The decree in appeal or in review, if the decree of the lower Court is reversed or modified or affirmed after hearing the appeal, is the decree to be executed, and time runs from the date of such decree. Where the respondent appears, he takes a step to keep the decree alive; but where the respondent does nothing, and his decree is nevertheless affirmed, the original decree is the one to be executed, and time runs from the date of such original decree (*c*). But it must be executed within the time prescribed for executing the decree of the lower Court, dating from the period of the decree-holder's appearing (if he does appear) in the appeal or review (*d*). The last two decisions were passed when Act XIV of 1859 was in force, and the last was decided after consideration was given by the Court to the decision of the Full Bench in the first case. They do not appear to be consistent with each other; but, until modified, must, it is submitted, apply equally to the present Act.		

(*a*) Lethbridge *v.* Rajah Saheb Prohlad Sen, 19 Suth. W. R., 301, Phear and Ainslie, JJ.

(*b*) Jibhai Mahipati *v.* Parbhu Bapu, I. L. R., 1 Bom., 59, West, J., Dec. 6, 1875; see also Gouree Sunkur Tribedee *v.* Arman Ali Chowdhry, 21 Suth. W. R., 309, cited.

(*c*) Biprodoss Gossain *v.* Chunder Seekur Chatterjee, 7 Suth. W. R., 521, F. B.

(*d*) Ram Churn Bysac *v.* Lukhee Kant Bonnick, 16 Suth. W. R., F. B., 1; see also Bistoo Pershad Chuckerbuty *v.* Ishan Chunder Roy, 23 *ib.*, 57, Phear and Morris, JJ.

THE SECOND SCHEDULE—*concluded.*

THIRD DIVISION: APPLICATIONS—*concluded.*

Description of application.	Period of limitation.	Time from which period begins to run.
180.—To enforce a judgment, [169] decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, [or an order of Her Majesty in Council]. The words in brackets are added, being taken from Act VI of 1874, which made that addition to the corresponding clause of Act IX of 1871.	Twelve years	When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right: Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money, has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment, or the latest of such revivors, payments, or acknowledgments as the case may be.

THE SPECIFIC RELIEF ACT.

(ACT I OF 1877.)

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor General on the 7th February, 1877.)

An Act to define and amend the law relating to certain kinds of Specific Relief.

Preamble.

WHEREAS it is expedient to define and amend the law relating to certain kinds of specific relief obtainable in civil suits; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

Short title.

1. This Act may be called "The Specific Relief Act, 1877."

Local extent.

It extends to the whole of British India, except the Scheduled Districts as defined in Act No. XIV of 1874.

Commencement.

And it shall come into force on the first day of May, 1877.

Repeal of enactments.

2. On and from that day the Acts specified in the schedule hereto annexed shall be repealed to the extent mentioned in its third column.

Interpretation-clause.

3. In this Act, unless there be something repugnant in the subject or context,—

'obligation.'

'obligation' includes every duty enforceable by law:

'trust.'

'trust' includes every species of express, implied, or constructive fiduciary ownership:

'trustee.'

'trustee' includes every person holding expressly, by implication, or constructively, a fiduciary character:

Illustrations.

(*a*) Z. bequeaths land to A., 'not doubting that he will pay thereout an annuity of Rs. 1,000 to B. for his life.' A. accepts the bequest. A. is a trustee, within the meaning of this Act, for B., to the extent of the annuity.

(*b.*) A. is the legal, medical, or spiritual adviser of B. By availing himself of his situation as such adviser, A. gains some pecuniary advantage which might otherwise have accrued to B. A. is a trustee, for B., within the meaning of this Act, of such advantage.

(*c.*) A., being B.'s banker, discloses for his own purpose the state of B.'s account. A. is a trustee, within the meaning of this Act, for B., of the benefit gained by him by means of such disclosure.

(*d.*) A, the mortgagee of certain leaseholds, renews the lease in his own name. A. is a trustee, within the meaning of this Act, of the renewed lease, for those interested in the original lease.

(*e.*) A., one of several partners, is employed to purchase goods for the firm. A., unknown to his co-partners, supplies them, at the market-price, with goods previously bought by himself when the price was lower, and thus makes a considerable profit. A. is a trustee, for his co-partners, within the meaning of this Act, of the profit so made.

(*f.*) A., the manager of B.'s indigo-factory, becomes agent for C., a vendor of indigo-seed, and receives, without B.'s assent, commission on the seed purchased from C. for the factory. A. is a trustee, within the meaning of this Act, for B., of the commission so received.

(*g.*) A. buys certain land with notice that B. has already contracted to buy it. A. is a trustee, within the meaning of this Act, for B., of the land so bought.

(*h.*) A. buys land from B., having notice that C. is in occupation of the land. A. omits to make any inquiry as to the nature of C.'s interest therein. A. is a trustee within the meaning of this Act, for C., to the extent of that interest.

'settlement.'

'settlement' means any instrument (other than a will or codicil as defined by the Indian Succession Act) whereby the destination or devolution of successive interests in moveable or immoveable property is disposed of or is agreed to be disposed of:

Words defined in Contract Act.

and all words occurring in this Act, which are defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively assigned to them by that Act.

Savings.

4. Except where it is herein otherwise expressly enacted, nothing in this Act shall be deemed—

(*a*) to give any right to relief in respect of any agreement which is not a contract;

(*b*) to deprive any person of any right to relief, other than specific performance, which he may have under any contract; or

(*c*) to affect the operation of the Indian Registration Act on documents.

The Contract Act, IX of 1872, defines (s. 2) a contract to be an agreement enforceable by law; by s. 10 it is enacted that "all agreements are contracts if they are made by the free consent of parties competent to contract, for lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

Specific relief how given.

5. Specific relief is given—

(*a*) by taking possession of certain property and delivering it to a claimant;

(*b*) by ordering a party to do the very act which he is under an obligation to do;

(*c*) by preventing a party from doing that which he is under an obligation not to do;

(*d*) by determining and declaring the rights of parties otherwise than by an award of compensation; or

(*e*) by appointing a receiver.

Preventive relief.

6. Specific relief granted under clause (*c*) of section 5 is called preventive relief.

Relief not granted to enforce penal law.

7. Specific relief cannot be granted for the mere purpose of enforcing a penal law.

PART II.

OF SPECIFIC RELIEF.

CHAPTER I.

OF RECOVERING POSSESSION OF PROPERTY.

(a) *Possession of Immoveable Property.*

Recovery of specific immoveable property.

8. A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure.

Suit by person dispossessed of immoveable property.

9. If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Government.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

This section replaces s. 15 of Act XIV of 1859, which is repealed by this Act Adverse possession for any period sufficient to bar the rightful owner, peaceably enjoyed (*a*), gives a title (*b*), that is, if enjoyed for twelve years (*c*); and within that period a suit can be brought to try the title without the plaintiff necessarily taking any proceeding under this section (*d*). Indeed, in such a suit as is here contemplated, the question of title does not arise; all that the plaintiff has to prove is the illegal dispossession (*e*). But a plaintiff who has succeeded in obtaining possession under this section, establishes by so doing a *primâ facie* title sufficient to support a subsequent suit for mesne profits (*f*). A landlord in Bengal who ejects his ryot without the intervention of a Court of law, dispossesses him illegally within the meaning of this section, and the ryot has a right to recover possession notwithstanding the landlord may have a title (*g*).

With regard to dispossession from landed property, &c, in the mofussil. If the dispossession has been by force, and a dispute exists, which, in the opinion of the Magistrate, is likely to induce a breach of the peace, the Magistrate may, under s. 530 of the Code of Criminal Procedure (Act X of 1872), record a proceeding stating the grounds on which he has formed his opinion; and after calling the disputants before him, put that party in possession who was in possession when the proceedings were instituted before him (*h*). An award under the Criminal Procedure Code does not bar a suit for possession under this Act (*i*).

(*a*) Act IX of 1877, s. 26.

(*b*) *Ibid*, s. 27.

(*c*) *Ibid*, sched. ii, No 142.

(*d*) Khaja Emajee Tollollah *v.* Kistosoondur Surma, 4 Wym., 195; S. C, 8 Suth. W. R., 386.

(*e*) *Ibid*; and see Radha Bullub Gossain *v.* Kishen Gobind Gossain, 7 Wym., 1.

(*f*) Radha Churn Ghatak *v.* Zamirunissa Khanam, B. L. R., F B., 67, Peacock, C J., and L. S. Jackson and Markby, JJ.

(*g*) Jonardun Acharjee *v.* Haradun Acharjee, 9 Suth. W R.. 513, F. B.

(*h*) *In re* Pithiram Chowdhry Rai Bahadoor, 20 Suth. W. R., Cr. Rul., 51 Couch, C J., and Glover, J.

(*i*) *Ibid*; *In re* Chytun Chunder Roy, 20 Suth. W. R., 12.

If the dispossession is not accompanied by force, but is illegal, the person dispossessed may proceed under this section of the Specific Relief Act, or may bring a regular suit, to recover possession. In the last case he rests upon his title; in the two first, the question of title does not arise, but merely that of possession. The question of title is reserved for determination in any regular suit that may be brought afterwards.

Where the plaintiff seeks to establish his title to possession of the land, he must, if out of possession, prove that he has a superior title to the person in possession; in other words, the burthen of proof is upon him; consequently, if, when in possession, he anticipates a forcible dispossession accompanied by circumstances likely to induce a breach of the peace, he should apply at once to the Magistrate under s. 230 of the Criminal Procedure Code; in which case he will have to establish affirmatively that a dispute likely to induce a breach of the peace is likely to ensue, otherwise the Magistrate, unless he records this fact according to the decisions of the Courts in Calcutta and in Bombay (*a*), would have no jurisdiction. In Madras, however, it has been held that the Magistrate need not record the fact to give himself jurisdiction (cited as above); but this case does not go so far as to decide that the Magistrate has jurisdiction, the fact not existing. Possession of land being *primâ facie* evidence of title, it follows that, if the proceeding is taken after the dispossession has occurred, the onus in proving title in the subsequent suit will lie upon the person dispossessed, who seeks to recover possession. On this point again there is a conflict between the decision in Madras and in the other High Courts (*b*). The point is of importance, because, according to our view of the case, the person who illegally and with violence ousts another, who is in peaceable possession of the land, obtains an advantage, when the title comes to be tried, by throwing the burthen of proof upon his adversary. It appears to have been some such consideration as this which has induced the Madras High Court to hold that the possession of the trespasser is no possession within the meaning of s. 530 of the Criminal Procedure Code. And which sometimes induces Magistrates, when acting under that section, to go into the question of title. They do so, however, without any jurisdiction, and these decisions furnish frequent grounds for appeals and motions to set them aside. It is to be regretted that the law is so, but it is clear upon the authorities in Bengal, Bombay, and Allahabad, that the person in possession, when the Magistrate begins his enquiry, is to be maintained in possession even although he acquired it by force, unless, under s. 534, the person dispossessing has been convicted of an offence attended with criminal force, the person dispossessed is then to be restored to possession. If, however, the person in possession is merely illegally dispossessed, and no such dispute arises or is anticipated, he can sue under the present section of the Specific Relief Act, and without showing his title, and leaves his opponent to show affirmatively a better title if he can.

(*b*) *Possession of Moveable Property.*

Recovery of specific moveable property.

10. A person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Code of Civil Procedure.

EXPLANATION 1.—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled.

EXPLANATION 2.—A special or temporary right to the present possession of property is sufficient to support a suit under this section.

Illustrations.

(*a*) A. bequeaths land to B. for his life, with remainder to C. A. dies. B. enters on the land, but C., without B.'s consent, obtains possession of the title-deeds. B. may recover them from C.

(*a*) Harvey *v.* Brice, 4 Suth. W. R., 26, Kemp and Seton-Karr, JJ.; *In re* Nathu Manickchand, Bom. H. C., June 15, 1871, cited in Prinsep's Law of Criminal Procedure, 1875, p. 470.

(*b*) See Prinsep's Criminal Procedure Code, note to s. 530.

(*b*) A. pledges certain jewels to B. to secure a loan. B. disposes of them before he is entitled to do so. A., without having paid or tendered the amount of the loan, sues B. for possession of the jewels. The suit should be dismissed, as A. is not entitled to their possession, whatever right he may have to secure their safe custody.

(*c*.) A. receives a letter addressed to him by B. B. gets back the letter without A.'s consent. A. has such a property therein as entitles him to recover it from B

(*d*.) A. deposits books and papers for safe custody with B. B. loses them and C. finds them, but refuses to deliver them to B. when demanded. B. may recover them from C., subject to C.'s right, if any, under section 168 of the Indian Contract Act, 1872.

(*e*) A., a warehouse-keeper, is charged with the delivery of certain goods to Z., which B. takes out of A.'s possession. A. may sue B. for the goods.

Illustration (d): the right of the finder is, under s. 168 of the Contract Act, to retain the goods until he is compensated for his trouble and the expense incurred to preserve them.

Liability of person in possession, not as owner, to deliver to person entitled to immediate possession.

11. Any person having the possession or control of a particular article of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:—

(*a*) when the thing claimed is held by the defendant as the agent or trustee of the claimant;

(*b*) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed;

(*c*) when it would be extremely difficult to ascertain the actual damage caused by its loss;

(*d*) when the possession of the thing claimed has been wrongfully transferred from the claimant.

Illustrations.

of clause (*a*):— A., proceeding to Europe, leaves his furniture in charge of B. as his agent during his absence B., without A.'s authority, pledges the furniture to C., and C., knowing that B. had no right to pledge the furniture, advertises it for sale. C. may be compelled to deliver the furniture to A., for he holds it as A.'s trustee.

of clause (*b*):— Z. has got possession of an idol belonging to A.'s family, and of which A. is the proper custodian Z. may be compelled to deliver the idol to A.

of clause (*c*):— A. is entitled to a picture by a dead painter and a pair of rare China vases. B. has possession of them. The articles are of too special a character to bear an ascertainable market-value. B. may be compelled to deliver them to A.

See Fry on Specific Performance, chap. i, § 29, where other instances are given.

CHAPTER II.

OF THE SPECIFIC PERFORMANCE OF CONTRACTS.

(*a*) *Contracts which may be specifically enforced.*

Cases in which specific performance enforceable.

12. Except as otherwise provided in this chapter, the specific performance of any contract may in the discretion of the Court be enforced—

(*a*) when the act agreed to be done is in the performance, wholly or partly, of a trust;

(*b*) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done;

(*c*) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or

(*d*) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

EXPLANATION.—Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved.

Illustrations.

of clause (*a*):—A. holds certain stock in trust for B. A. wrongfully disposes of the stock. The law creates an obligation on A. to restore the same quantity of stock to B., and B. may enforce specific performance of this obligation.

of clause (*b*):—A. agrees to buy, and B. agrees to sell, a picture by a dead painter and two rare China vases. A. may compel B. specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance.

of clause (*c*):—A. contracts with B. to sell him a house for Rs. 1,000. B. is entitled to a decree directing A. to convey the house to him, he paying the purchase-money.

In consideration of being released from certain obligations imposed on it by its Act of Incorporation, a railway-company contract with Z. to make an archway through their railway to connect lands of Z. severed by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a wharf as specified in the contract. Z. is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money; and the Court may appoint a proper person to superintend the construction of the archway, road, siding, and wharf.

A. contracts to sell, and B. contracts to buy, a certain number of railway-shares of a particular description. A. refuses to complete the sale. B. may compel A. specifically to perform this agreement, for the shares are limited in number and not always to be had in the market, and their possession carries with it the status of a shareholder, which cannot otherwise be procured.

A. contracts with B. to paint a picture for B., who agrees to pay therefor Rs. 1,000. The picture is painted. B. is entitled to have it delivered to him on payment or tender of the Rs. 1,000.

of clause (*d*):—A. transfers without endorsement, but for valuable consideration, a promissory note to B. A becomes insolvent, and C. is appointed his assignee. B. may compel C. to endorse the note, for C. has succeeded to A.'s liabilities, and a decree for pecuniary compensation for not endorsing the note would be fruitless.

The subject of this section is discussed in the first chapter of Mr. Justice Fry's work on Specific Performance, and in chapter 18 of Mr. Justice Story's work on Equity Jurisprudence.

In comparing those works with the present enactment, it must be remembered that the reason why Courts of Equity in England interfered to enforce specific performance of contracts was because Courts of Law were unable to do more than give redress in damages, often a very inadequate remedy.

In this country, however, there never has been any distinction between Courts of Law and Courts of Equity, except in the case of the Supreme Courts, which were established at the end of the last century, and which, although presided over by one set of Judges in each Presidency, entertained suits on their Plea Side and their Equity Side, forming as it were two distinct tribunals.

This distinction was abolished on the abolition of the Supreme Courts and the Courts of Sudder Dewanny Adawlut in 1862, and the creation of the High

Courts in their stead, forming one tribunal of the last resort in this country; and by the application of the Code of Civil Procedure to all civil trials in India.

There is nothing now to prevent a suitor, if he so please, framing his plaint in the alternative and asking for specific performance or for damages, or to prevent the Court giving him full relief; but in so doing it must act upon the principles laid down in this enactment, which is rather a guide to the Judge in the exercise of his discretion than an Act defining the jurisdiction of the Courts (*a*).

The three last clauses of this section, (b), (c), and (d), enumerate the leading principle upon which Courts of Equity decree specific performance. It is thus expressed by Mr. Justice Storey (*b*): "It does not proceed" (as is sometimes erroneously supposed) "upon any distinction between real estate and "personal estate" (or as we term them in India, immoveable and moveable property), "but upon the ground that damages at law may not in the particular "case afford a complete remedy." The explanation proceeds, however, to raise a presumption in favor of the specific performance of contracts to transfer immoveable property, which must prevail unless rebutted by other evidence; it is a question of evidence, and the onus is here thrown upon the party alleging that a sufficient remedy can be had in damages.

Numerous instances will be found in the books of particular cases in which specific performance has been granted or refused; everything depends upon the particular case; the Court is vested with a discretion to be exercised as is laid down in s. 22, *post*.

Some examples may be cited. Thus, in the case of trusts it has been laid down that the value of the subject-matter of the trust is immaterial, the Court will act whatever may be its value (*c*). Again, where a money-compensation can be assessed, no specific relief will be ordered; thus it has been held in England that specific performance will not be enforced of an agreement for the transfer of *stock* (*d*); and on this principle specific performance would, unless under special circumstances, be refused where the contract was for the sale of Government securities, the proper remedy being to purchase other securities and sue for any difference in price. This is quite a different case from the case supposed in the first illustration to this section; in the one case the person in possession is bound to put the person he has wronged in his first position; in the other, there is no wrong independent of contract, but a contract which may be satisfied by damages.

Contracts of which the subject has partially ceased to exist.

13. Notwithstanding anything contained in section 56 of the Indian Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance.

Illustrations.

(*a*.) A contracts to sell a house to B for a lakh of rupees. The day after the contract is made, the house is destroyed by a cyclone. B may be compelled to perform his part of the contract by paying the purchase-money.

(*b*.) In consideration of a sum of money payable by B, A. contracts to grant an annuity to B. for B.'s life. The day after the contract has been made B. is thrown from his horse and killed. B.'s representative may be compelled to pay the purchase-money.

Section 56 of the Indian Contract Act declares an agreement to do an impossible act to be void.

Specific performance of part of contract where part unperformed is small.

14. Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compen-

(*a*) See also Story, § 717.
(*b*) Equity Jurisprudence, § 717.
(*c*) Fry, chap. i, § 36.
(*d*) *Ibid*, chap. i, § 24.

sation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

Illustrations.

(*a.*) A. contracts to sell B. a piece of land consisting of 100 bighas. It turns out that 98 bighas of the land belong to A., and the two remaining bighas to a stranger, who refuses to part with them. The two bighas are not necessary for the use or enjoyment of the 98 bighas, nor so important for such use or enjoyment that the loss of them may not be made good in money. A. may be directed, at the suit of B., to convey to B. the 98 bighas and to make compensation to him for not conveying the two remaining bighas; or B. may be directed, at the suit of A., to pay to A., on receiving the conveyance and possession of the land, the stipulated purchase-money, less a sum awarded as compensation for the deficiency.

(*b.*) In a contract for the sale and purchase of a house and lands for two lakhs of rupees, it is agreed that part of the furniture should be taken at a valuation. The Court may direct specific performance of the contract notwithstanding the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house.

Specific performance of part of contract where part unperformed is large.

15. Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.

Illustrations.

(*a.*) A. contracts to sell to B. a piece of land consisting of 100 bighas. It turns out that 50 bighas of the land belong to A., and the other 50 bighas to a stranger, who refuses to part with them. A. cannot obtain a decree against B. for the specific performance of the contract; but if B. is willing to pay the price agreed upon, and to take the 50 bighas which belong to A., waiving all right to compensation either for the deficiency or for loss sustained by him through A.'s neglect or default, B. is entitled to a decree directing A. to convey those 50 bighas to him on payment of the purchase-money.

(*b.*) A. contracts to sell to B. an estate with a house and garden for a lakh of rupees. The garden is important for the enjoyment of the house. It turns out that A. is unable to convey the garden. A. cannot obtain a decree against B. for the specific performance of the contract; but if B. is willing to pay the price agreed upon, and to take the estate and house without the garden, waiving all right to compensation, either for the deficiency or for loss sustained by him through A.'s neglect or default, B. is entitled to a decree directing A. to convey the house to him on payment of the purchase-money.

In this section a second principle is introduced, namely, that of compensation; an illustration (a) is given, and it will be observed that the obligation to perform is mutual. The property may have become depreciated, or may have increased in value; in the former case, the vendee may be compelled to purchase; and in the latter, the vendor may be compelled to convey. A. case may occur in which a vendee would obtain a considerable advantage by having the contract specifically performed, for if the vendor should become

insolvent, the vendee, if the transaction was *bonâ fide*, would get all that he contracted for; but if he sued for damages, his suit would merely give him a claim which would rank with the claims of the other creditors (*a*). But where the vendor becomes insolvent before the contract is performed, he cannot enforce specific performance, because the subject of the contract is vested in his assignee, and the assignee cannot be forced to enter into covenants which would bind him personally; but if the vendee will elect to take the conveyance subject to such covenants as the assignee can properly give, or if he will give such covenants as are demanded, the contract may be performed, the property passes to the vendee, and the purchase-money to the assignee to be held by him as part of the estate of the insolvent in trust for the general body of the creditors. There is no want of mutuality, but by the circumstance of the insolvency the person in whom the property has become vested cannot be compelled to enter into covenants which are personal; and consequently, unless he is willing to enter into such personal covenants, he is not in a position to claim the specific performance of the contract.

Specific performance of independent part of contract.

16. When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part.

Bar in other cases of specific performance of part of contract.

17. The Court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections.

Purchaser's rights against vendor with imperfect title.

18. Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this chapter) has the following rights:—

(*a*) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;

(*b*) where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence;

(*c*) where the vendor professes to sell unincumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee;

(*d*) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and cost on the interest of the vendor or lessor in the property agreed to be sold or let.

Power to award compensation in certain cases.

19. Any person suing for the specific performance of a contract, may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

(*a*) Story, § 721; Fry. § 210.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

EXPLANATION.—The circumstance that the contract has become incapable of specific performance, does not preclude the Court from exercising the jurisdiction conferred by this section.

Illustrations

of the second paragraph:—A. contracts to sell a hundred maunds of rice to B. B. brings a suit to compel A. to perform the contract or to pay compensation. The Court is of opinion that A. has made a valid contract and has broken it, without excuse, to the injury of B., but that specific performance is not the proper remedy. It shall award to B. such compensation as it deems just.

of the third paragraph:—A. contracts with B. to sell him a house for Rs. 1,000, the price to be paid and the possession given on the 1st January, 1877. A. fails to perform his part of the contract, and B. brings his suit for specific performance and compensation, which is decided in his favour on the 1st January, 1878. The decree may, besides ordering specific performance, award to B. compensation for any loss which he had sustained by A.'s refusal.

of the Explanation:—A., a purchaser, sues B., his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit, the patent expires. The Court may award A. compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose.

A. sues for the specific performance of a resolution passed by the Directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The Court may, under this section, award A. compensation for the non-performance.

Liquidation of damages not a bar to specific performance.

20. A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

Illustration.

A. contracts to grant B. an underlease of property held by A. under C., and that he will apply to C. for a license necessary to the validity of the underlease, and that if the license is not procured, A. will pay B. Rs. 10,000. A. refuses to apply for the license and offers to pay B. the Rs. 10,000. B. is nevertheless entitled to have the contract specifically enforced if C. consents to give the license.

(*b*) *Contracts which cannot be specifically enforced.*

Contracts not specifically enforceable.

21. The following contracts cannot be specifically enforced—

(*a*) a contract for the non-performance of which compensation in money is an adequate relief;

(*b*) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;

(*c*) a contract the terms of which the Court cannot find with reasonable certainty;

(*d*) a contract which is in its nature revocable;

(*e*) a contract made by trustees either in excess of their powers or in breach of their trust;

(*f*) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers;

(*g*) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;

(*h*) a contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

And save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced; but if any person who has made such a contract and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

Illustrations

to (*a*):—A. contracts to sell, and B. contracts to buy, a lakh of rupees in the four per cent. loan of the Government of India:

A. contracts to sell, and B. contracts to buy, 40 chests of indigo at Rs. 1,000 per chest:

In consideration of certain property having been transferred by A. to B., B. contracts to open a credit in A.'s favour to the extent of Rs. 10,000, and to honour A.'s drafts to that amount.

The above contracts cannot be specifically enforced, for, in the first and the second, both A. and B., and in the third A., would be reimbursed by compensation in money.

to (*b*):—A. contracts to render personal service to B:

A. contracts to employ B. on personal service:

A., an author, contracts with B, a publisher, to complete a literary work.

B. cannot enforce specific performance of these contracts.

A. contracts to buy B.'s business at the amount of a valuation to be made by two valuers, one to be named by A. and the other by B. A. and B. each name a valuer, but before the valuation is made, A. instructs his valuer not to proceed:

By a charter-party entered into in Calcutta between A., the owner of a ship, and B, the charterer, it is agreed that the ship shall proceed to Rangoon, and there load a cargo of rice, and thence proceed to London, freight to be paid one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London:

A. lets land to B., and B. contracts to cultivate it in a particular manner for three years next after the date of the lease:

A. and B. contract that, in consideration of annual advances to be made by A., B. will, for three years next after the date of the contract, grow particular crops on the land in his possession and deliver them to A. when cut and ready for delivery:

A. contracts with B. that, in consideration of Rs. 1,000 to be paid to him by B., he will paint a picture for B.:

A. contracts with B. to execute certain works which the Court cannot superintend:

A. contracts to supply B. with all the goods of a certain class which B. may require :

A. contracts with B. to take from B. a lease of a certain house for a specified term, at a specified rent, "if the drawing-room is handsomely decorated," even if it is held to have so much certainty that compensation can be recovered for its breach :

A. contracts to marry B.

The above contracts cannot be specifically enforced.

to (*c*) :—A., the owner of a refreshment-room, contracts with B. to give him accommodation there for the sale of his goods and to furnish him with the necessary appliances. A refuses to perform his contract. The case is one for compensation and not for specific performance, the amount and nature of the accommodation and appliances being undefined.

to (*d*) :—A. and B. contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed, for if it were so performed, either A. or B. might at once dissolve the partnership.

to (*e*) :—A. is a trustee of land with power to lease it for seven years. He enters into a contract with B. to grant a lease of the land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced.

The Directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders. They contract to sell it without any such sanction. This contract cannot be specifically enforced.

Two trustees, A. and B., empowered to sell trust-property worth a lakh of rupees, contract to sell it to C. for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. C. cannot enforce its specific performance.

The promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property. They take no proper precautions to ascertain the value of such property, and in fact agree to pay an extravagant price therefor. They also stipulate that the vendors shall give them a bonus out of the purchase-money. This contract cannot be specifically enforced.

to (*f*) :—A company existing for the sole purpose of making and working a railway, contracts for the purchase of a piece of land for the purpose of erecting a cotton-mill thereon. This contract cannot be specifically enforced.

to (*g*) :—A. contracts to let for twenty-one years to B. the right to use such part of a certain railway made by A. as was upon B.'s land, and that B. should have a right of running carriages over the whole line on certain terms, and might require A. to supply the necessary engine-power, and that A. should during the term keep the whole railway in good repair. Specific performance of this contract must be refused to B.

to (*h*) :—A. contracts to pay an annuity to B. for the lives of C. and D. It turns out that, at the date of the contract, C., though supposed by A. and B. to be alive, was dead. The contract cannot be specifically performed.

(*c*) *Of the Discretion of the Court.*

Discretion as to decreeing specific performance.

22. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance :—

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

Illustrations.

(*a*.) A., a tenant for life of certain property, assigns his interest therein to B. C. contracts to buy, and B. contracts to sell, that interest. Before the con-

tract is completed, A. receives a mortal injury, from the effects of which he dies the day after the contract is executed. If B. and C. were equally ignorant or equally aware of the fact, B. is entitled to specific performance of the contract. If B. knew the fact, and C. did not, specific performance of the contract should be refused to B.

(*b.*) A. contracts to sell to B the interest of C. in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that C.'s interest is worth nothing. In fact the value of C.'s interest depends on the result of certain partnership-accounts on which he is heavily in debt to his partners. This indebtedness is known to A., but not to B. Specific performance of the contract should be refused to A.

(*c.*) A. contracts to sell, and B. contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. B. does not know of this circumstance, and A. conceals it from him. Specific performance of the contract should be refused to A.

(*d.*) A.'s property is put up to auction. B. requests C., A.'s attorney, to bid for him. C. does this inadvertently and in good faith. The persons present seeing the vendor's attorney bidding, think that he is a mere puffer and cease to compete. The lot is knocked down to B. at a low price. Specific performance of the contract should be refused to B.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

Illustrations.

(*e.*) A. is entitled to some land under his father's will on condition that, if he sells it within twenty-five years, half the purchase-money shall go to B. A., forgetting the condition, contracts, before the expiration of the twenty-five years, to sell the land to C. Here the enforcement of the contract would operate so harshly on A., that the Court will not compel its specific performance in favour of C.

(*f.*) A. and B., trustees, join their beneficiary, C., in a contract to sell the trust-estate to D., and personally agree to exonerate the estate from heavy incumbrances to which it is subject. The purchase-money is not nearly enough to discharge those incumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to D.

(*g.*) A., the owner of an estate, contracts to sell it to B., and stipulates that he, A., shall not be obliged to define its boundary. The estate really comprises a valuable property not known to either to be part of it. Specific performance of the contract should be refused to B., unless he waives his claim to the unknown property.

(*h.*) A. contracts with B. to sell him certain land, and to make a road to it from a certain railway-station. It is found afterwards that A. cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to B., even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

(*i.*) A., a lessee of mines, contracts with B., his lessor, that at any time during the continuance of the lease B. may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to B.

(*j.*) A. contracts to buy certain land from B. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to B.

(*k.*) A. contracts with B. to buy from B.'s manufactory and not elsewhere all the goods of a certain class used by A. in his trade. The Court cannot com-

pel B. to supply the goods, but if he does not supply them, A. may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to B.

The following is a case in which the Court may properly exercise a discretion to decree specific performance:—

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

Illustration.

A. sells land to a railway-company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A.

(*d*) *For whom Contracts may be specifically enforced.*

Who may obtain specific performance.

23. Except as otherwise provided by this chapter, the specific performance of a contract may be obtained by—

(*a*) any party thereto;

(*b*) the representative in interest, or the principal, of any party thereto: provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed;

(*c*) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder;

(*d*) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman;

(*e*) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant;

(*f*) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;

(*g*) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation;

(*h*) when the promoters of a public company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company.

(*e*) *For whom Contracts cannot be specifically enforced.*

Personal bars to the relief.

24. Specific performance of a contract cannot be enforced in favour of a person—

(*a*) who could not recover compensation for its breach;

(*b*) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed;

(*c*) who had already chosen his remedy and obtained satisfaction for the alleged breach of contract; or

(*d*) who, previously to the contract, had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) had been made and was then in force.

Illustrations

to clause (*a*):—A., in the character of agent for B., enters into an agreement with C. to buy C.'s house. A. is in reality acting, not as agent for B., but on his own account. A. cannot enforce specific performance of this contract.

to clause (*b*):—A. contracts to sell B. a house and to become tenant thereof for a term of fourteen years from the date of the sale at a specified yearly rent. A. becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract.

A. contracts to sell B. a house and garden in which there are ornamental trees, a material element in the value of the property as a residence. A., without B.'s consent, fells the trees. A cannot enforce specific performance of the contract.

A., holding land under a contract with B. for a lease, commits waste, or treats the land in an unhusbandlike manner. A. cannot enforce specific performance of the contract.

A. contracts to let, and B. contracts to take, an unfinished house, B. contracting to finish the house and the lease to contain covenants on the part of A. to keep the house in repair. B. finishes the house in a very defective manner: he cannot enforce the contract specifically, though A. and B. may sue each other for compensation for breach of it.

to clause (*c*):—A. contracts to let, and B. contracts to take, a house for a specified term at a specified rent. B. refuses to perform the contract. A. thereupon sues for, and obtains, compensation for the breach. A. cannot obtain specific performance of the contract.

Contracts to sell property by one who has no title, or who is a voluntary settler.

25. A contract for the sale or letting of property, whether moveable or immoveable, cannot be specifically enforced in favour of a vendor or lessor—

(*a*) who, knowing himself not to have any title to the property, has contracted to sell or let the same;

(*b*) who, though he entered into the contract believing that he had a good title to the property, cannot, at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt;

(*c*) who, previous to entering into the contract, has made a settlement (though not founded on any valuable consideration) of the subject-matter of the contract.

Illustrations.

(*a.*) A., without C.'s authority, contracts to sell to B. an estate which A. knows to belong to C. A. cannot enforce specific performance of this contract, even though C. is willing to confirm it.

(*b.*) A. bequeaths his land to trustees, declaring that they may sell it with the consent in writing of B. B. gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with C. to sell him the land. C. refuses to carry out the contract. The trustees cannot specifically enforce this contract, as, in the absence of B.'s consent to the particular sale to C., the title which they can give C. is, as the law stands, not free from reasonable doubt.

(*c.*) A., being in possession of certain land, contracts to sell it to Z. On enquiry it turns out that A. claims the land as heir of B., who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. A cannot compel Z. specifically to perform the contract.

(*d.*) A., out of natural love and affection, makes a settlement of certain property on his brothers and their issue, and afterwards enters into a contract to sell the property to a stranger. A. cannot enforce specific performance of this contract so as to override the settlement, and thus prejudice the interests of the persons claiming under it.

(*f*) *For whom Contracts cannot be specifically enforced except with a variation.*

Non-enforcement except with variation.

26. Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases (namely) :—

(*a*) where by fraud or mistake of fact the contract of which performance is sought is in terms different from that which the defendant supposed it to be when he entered into it;

(*b*) where by fraud, mistake of fact, or surprise, the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff;

(*c*) where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part, which adds to the contract, but which he refuses to fulfil;

(*d*) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce;

(*e*) where the parties have, subsequently to the execution of the contract, contracted to vary it.

Illustrations.

(*a.*) A., B., and C. sign a writing by which they purport to contract each to enter into a bond to D. for Rs. 1,000. In a suit by D., to make A., B, and C. separately liable each to the extent of Rs. 1,000, they prove that the word 'each' was inserted by mistake; that the intention was that they should give a joint bond for Rs. 1,000. D. can obtain the performance sought only with the variation thus set up.

(*b.*) A. sues B. to compel specific performance of a contract in writing to buy a dwelling-house. B. proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variation set up by B.

(*c.*) A. contracts in writing to let to B. a wharf, together with a strip of A.'s land delineated in a map. Before signing the contract, B. proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of A.'s land of the same dimensions, and to this A. expressly assented. B. then signed the written contract. A. cannot obtain specific performance of the written contract, except with the variation set up by B.

(*d.*) A and B. enter into negociations for the purpose of securing land to B. for his life, with remainder to his issue. They execute a contract the terms of which are found to confer an absolute ownership on B. The contract so framed cannot be specifically enforced.

(*e.*) A. contracts in writing to let a house to B, for a certain term, at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing, so, with B.'s consent, A. pulls it down and erects a new house in its place: B. contracting orally to pay rent at Rs. 120

per mensem. B. then sues to enforce specific performance of the contract in writing. He cannot enforce it, except with the variations made by the subsequent oral contract.

This section must be read with the 92nd section of the Indian Evidence Act, which prescribes the cases in which parol evidence is admissible to contradict, vary, add to, or substract from, the terms of a document (*a*). There are several instances in Fry on Specific Performance which afford us good illustrations of the principles of this clause of the Evidence Act (*b*).

Fry, § 484, Mistake. But where there is no mistake about the terms of the contract, but one party understood them to mean one thing and the other another, the Court cannot decree specific performance (*c*).

The Court in these cases cannot enforce specific performance without a variation, but it is not obliged to enforce it at all. It has a discretion (s. 22), and where from lapse of time or other good cause the contract ought not to be enforced, it may be refused (*d*), or where the enforcement of the parol variation would be unfair to either party (*e*).

Where the variation consists in the plaintiff's admission of some term against himself or in favor of the defendants, or where the term which constitutes the variation is immaterial from its being merely the expression of what would be implied or from its having been actually performed, the Court will not refuse the evidence of the agreement (*f*).

(*g*) *Against whom Contracts may be specifically enforced.*

Relief against parties and persons claiming under them by subsequent title.

27. Except as otherwise provided by this chapter, specific performance of a contract may be enforced against—

(*a*) either party thereto:

(*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract (*g*);

(*c*) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(*d*) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation;

(*e*) when the promoters of a public company have, before its incorporation, entered into a contract, the company: provided that the company has ratified and adopted the contract and the contract is warranted by the terms of the incorporation.

Illustrations

to clause (b):—A. contracts to convey certain land to B. by a particular day. A dies intestate before that day without having conveyed the land. B. may compel A.'s heir or other representative in interest to perform the contract specifically.

A. contracts to sell certain land to B. for Rs 5,000. A. afterwards conveys the land for Rs. 6,000 to C., who has notice of the original contract. B. may enforce specific performance of the contract as against C.

(*a*) Act I of 1872, § 92.
(*b*) Fry, § 483, *et seq.*
(*c*) *Ibid*, §§ 486, 487.
(*d*) *Ibid*, § 489.
(*e*) *Ibid*, § 488.
(*f*) *Ibid*, § 419.
(*g*) See Fry, § 82, where he has notice, the purchaser may be decreed to perform specifically; Fry, § 135; Finch *v.* Lord Salisbury and Hawtrey, Finch, § 212; Fry, § 135; but unless he has notice he is not a proper party, Fry, § 82.

A. contracts to sell land to B. for Rs. 5,000. B. takes possession of the land. Afterwards A. sells it to C. for Rs. 6,000. C. makes no inquiry of B. relating to his interest in the land. B.'s possession is sufficient to affect C. with notice of his interest, and he may enforce specific performance of the contract against C.

A. contracts, in consideration of Rs. 1,000, to bequeath certain of his lands to B. Immediately after the contract A. dies intestate, and C. takes out administration to his estate. B. may enforce specific performance of the contract against C.

A. contracts to sell certain land to B. Before the completion of the contract, A. becomes a lunatic and C. is appointed his committee. B. may specifically enforce the contract against C.

to clause (c) :—A., the tenant for life of an estate, with remainder to B, in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to C., who has notice of the settlement. Before the sale is completed, A. dies. C. may enforce specific performance of the contract against B.

A. and B. are joint tenants of land, the undivided moiety of which either may alien in his lifetime, but which, subject to that right, devolves on the survivor. A. contracts to sell his moiety to C. and dies. C. may enforce specific performance of the contract against B.

A stranger to the contract cannot be a party against whom a decree for specific performance can be made, even although his concurrence in the contract may be necessary (*a*).

(*h*) *Against whom Contracts cannot be specifically enforced.*

What parties cannot be compelled to perform.

28. Specific performance of a contract cannot be enforced against a party thereto in any of the following cases :—

(*a*) If the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff ;

(*b*) if his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention or unfair practices, of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled ;

(*c*) if his assent was given under the influence of mistake of fact, misapprehension or surprise: Provided that, when the contract provides for compensation in case of mistake, compensation may be made for a mistake within the scope of such provision, and the contract may be specifically enforced in other respects if proper to be so enforced.

Illustrations

to clause (*c*) :—A., one of two executors, in the erroneous belief that he had the authority of his co-executor, enters into an agreement for the sale to B. of his testator's property. B. cannot insist on the sale being completed.

A. directs an auctioneer to sell certain land. A. afterwards revokes the auctioneer's authority as to 20 bighas of this land, but the auctioneer inadvertently sells the whole to B., who has not notice of the revocation. B. cannot enforce specific performance of the agreement.

Clause (*a*):—Inadequacy of price, even amounting to great hardship, is not of itself a ground for relieving a man from a contract which he has wittingly and willingly entered into (*b*).

(*a*) Fry, § 79. (*b*) Fry, § 279.

Clause (*b*) :—In cases of fraud, the Court will not only not perform the contract, but will order it to be delivered up to be cancelled (*a*). In cases of misrepresentation also the Court may cancel the contract (*b*).

(*i*) *The effect of dismissing a Suit for Specific Performance.*

Bar of suit for breach after dismissal.

29. The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be.

(*j*) *Awards and Directions to execute Settlements.*

Application of preceding sections to awards and testamentary directions to execute settlements.

30. The provisions of this chapter as to contracts shall, *mutatis mutandis*, apply to awards and to directions in a will or codicil to execute a particular settlement.

CHAPTER III.

OF THE RECTIFICATION OF INSTRUMENTS.

When instrument may be rectified.

31. When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

Illustrations.

(*a.*) A, intending to sell to B. his house and one of three godowns adjacent to it, executes a conveyance prepared by B., in which, through B.'s fraud, all three godowns are included. Of the two godowns which were fraudulently included, B. gives one to C. and lets the other to D. for a rent, neither C. nor D. having any knowledge of the fraud. The conveyance may, as against B. and C., be rectified so as to exclude from it the godown given to C.; but it cannot be rectified so as to affect D.'s lease.

(*b.*) By a marriage-settlement, A, the father of B., the intended wife, covenants with C., the intended husband, to pay to C., his executors, administrators, and assigns, during A.'s life, an annuity of Rs. 5,000. C. dies insolvent, and the official assignee claims the annuity from A. The Court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for B. and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity.

Presumption as to intent of parties.

32. For the purpose of rectifying a contract in writing, the Court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

Principles of rectification.

33. In rectifying a written instrument, the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.

(*a*) Fry, § 233. (*b*) Fry, § 425.

Specific enforcement of rectified contract.

34. A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint and the Court thinks fit, specifically enforced.

Illustration.

A. contracts in writing to pay his attorney, B, a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of the client, which, if construed strictly, would exclude B. from all rights under it. B. is entitled, if the Court thinks fit, to have it rectified, and to an order for payment of the sum, as if at the time of its execution it had expressed the intention of the parties.

CHAPTER IV.

OF THE RESCISSION OF CONTRACTS.

When rescission may be adjudged.

35. Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely —

(*a*) where the contract is voidable or terminable by the plaintiff;

(*b*) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff;

(*c*) where a decree for specific performance of a contract of sale or of a contract to take a lease has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the Court has ordered him to pay.

When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case the Court may by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require.

Illustrations

to (*a*):—A. sells a field to B. There is a right of way over the field of which A. has direct personal knowledge, but which he conceals from B. B. is entitled to have the contract rescinded.

to (*b*):—A., an attorney, induces his client, B, a Hindu widow, to transfer property to him for the purpose of defrauding B.'s creditors. Here the parties are not equally in fault, and B. is entitled to have the instrument of transfer rescinded.

Rescission for mistake.

36. Rescission of a contract in writing cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

Alternative prayer for rescission in suit for specific performance.

37. A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

38. On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

Court may require party rescinding to do equity.

CHAPTER V.

OF THE CANCELLATION OF INSTRUMENTS.

39. Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instruments, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

When cancellation may be ordered.

If the instrument has been registered under the Indian Registration Act, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered, and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

Illustrations.

(*a.*) A., the owner of a ship, by fraudulently representing her to be seaworthy, induces B., an underwriter, to ensure her. B. may obtain the cancellation of the policy.

(*b.*) A. conveys land to B., who bequeaths it to C. and dies. Thereupon D. gets possession of the land and produces a forged instrument stating that the conveyance was made to B. in trust for him. C. may obtain the cancellation of the forged instrument.

(*c.*) A., representing that the tenants on his land were all at will, sells it to B., and conveys it to him by an instrument dated the 1st January, 1877. Soon after that day, A. fraudulently grants to C. a lease of part of the lands dated the 1st October, 1876, and procures the lease to be registered under the Indian Registration Act. B. may obtain the cancellation of this lease.

(*d.*) A. agrees to sell and deliver a ship to B., to be paid for by B.'s acceptances of four bills of exchange, for sums amounting to Rs 30,000, to be drawn by A on B. The bills are drawn and accepted, but the ship is not delivered according to the agreement. A. sues B. on one of the bills. B. may obtain the cancellation of all the bills.

40. Where an instrument is evidence of different rights and different obligations, the Court may, in a proper case, cancel it in part and allow it to stand for the residue.

What instruments may be partially cancelled.

Illustration.

A. draws a bill on B., who endorses it to C., by whom it appears to be endorsed to D., who endorses it to E C.'s endorsement is forged. C. is entitled to have such endorsement cancelled, leaving the bill to stand in other respects.

41. On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

Power to require party for whom instrument is cancelled to make compensation.

CHAPTER VI.

OF DECLARATORY DECREES.

Discretion of Court as to declarations of status or right.

42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

Bar to such declaration.

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

EXPLANATION.—A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

Illustrations.

(*a.*) A. is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. A. may sue for a declaration that they are not entitled to the right so claimed.

(*b.*) A. bequeaths his property to B., C., and D., 'to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children.' No such children are in existence. In a suit against A.'s executor, the Court may declare whether B., C., and D. took the property absolutely, or only for their lives, and it may also declare the interests of the children before their rights are vested.

(*c.*) A. covenants that if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The Court may make the declaration.

(*d.*) A. alienates to B. property in which A. has merely a life-interest. The alienation is invalid as against C., who is entitled as reversioner. The Court may in a suit by C. against A. and B. declare that C. is so entitled.

(*e.*) The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her, may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime.

(*f.*) A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.

(*g.*) A. is in possession of certain property. B., alleging that he is the owner of the property, requires A. to deliver it to him. A. may obtain a declaration of his right to hold the property.

(*h.*) A. bequeaths property to B. for his life, with remainder to B.'s wife and her children, if any, by B.; but if B. die without any wife or childern, to C. B. has a putative wife, D., and children, but C. denies that B. and D. were ever lawfully married. D. and her children may, in B.'s lifetime, institute a suit against C. and obtain therein a declaration that they are truly the wife and children of B.

This section is substituted for s. 15 of Act VIII of 1859, now repealed, which ran as follows:—"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby; and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief."

That section was copied from the 50th section of the 15th and 16th Vict., c. 86, which had been previously introduced in the same words in an Act, to amend the Equity Procedure of the Supreme Courts at the Presidency-towns, Act VI of 1864, s. 29.

The construction of the 15th section of Act VIII of 1859 gave rise to a great amount of litigation in India. It was, however, ultimately decided by the Judicial Committee that the section must be construed as the English Act had been construed (*a*); but recognizing the distinction arising from circumstances peculiar to the constitution of the Courts in India, some of which have exclusive jurisdiction in matters of revenue, and where it has been in consequence decided that a declaration of right may be made when it is the foundation of relief to be got somewhere (*b*). A number of the cases decided on the construction of this section was collected and compared with the English decisions before the first two of the cases last quoted decided by the Judicial Committee were reported in India. It is unnecessary to refer to them now, the questions having been thus settled. These cases arose upon suits brought by the reversioners to come after a Hindoo widow enjoying a Hindoo widow's estate, to set aside her alienations; suits to set aside adoptions; suits under the Mitakshara law brought by the son to set aside alienations made to his prejudice by the father; suits relating to marriage; to set aside documents, registered or unregistered; for the registration of title; to rectify boundaries; to declare a right to a settlement; suits regarding butwarrahs; suits regarding rent; suits to set aside purchases or claims in civil suits; suits after claims to attached property; suits to get rid of orders of Criminal Courts in dealing with nuisances; suits to set aside orders for possession; suits to declare rights to enhanced rents; suits relating to slander of title, or as they were termed, to remove clouds on the title; suits regarding the flow of water, rights of way, &c.,—all of which had been made the subject of suits, the object of which had been to obtain declaratory decrees (*c*).

This present section (42) goes further than the English Act, and contemplates apparently a declaration where no relief could be asked for. Should this be the view taken on the construction of the section, it would probably be on the grounds stated by the High Court in Madras, which put a similar extended construction upon the 15th section of Act VIII of 1859 (*d*). The illustrations

(*a*) Fletcher *v.* Rogers, 10 Hare. Apx. 1, xiii; Garlick *v* Lawson, *ib.*, xiv; Greenwood *v.* Sutherland, *ib*, xii; Jackson *v.* Turnley, 1 Drew, 617; S. C., 22 L J, N. S., Ch., 949; Fyfe *v.* Arbuthnot, 1 DeGex and Jones, 406; Norman *v.* Johnson, 6 Jurist, N S., 905; Langdale *v.* Briggs, 26 L. J., N. S, 42; Rooke *v.* Lord Kensington, 2 K & J., 760; S. C., 25 L. J See also Hitchcock *v.* Ledgwick, 1 Eq. Law Abr., 234; Bull *v.* Pritchard, 1 Russ., 213, and 5 Hare, 507; Thelluson *v.* Woodford, 4 Vesey, 227; Wright *v.* Atkyns, 17 *ib*, 255; Ferrand *v.* Wilson, 4 Hare, 344; Grove *v.* Bastard, 2 Phillips, 619; Gosling *v.* Gosling, 1 Johns, 265; Webb *v.* Byng. 8 DeGex, M. & G., 633; Bristow *v.* Whitmore, 28 L. J., N. S., Ch, 801; Jennes *v.* Jennes, L R., 1 Eq., 361; Trustees of Birkenhead Docks *v.* Laird, 4 DeGex, M. & G., 732; Marsh *v.* Keith, 1 Drewry and Smale, 349; Hope *v.* Hope, 4 DeGex, M. & G., 323; Saville *v* Bruce, *ib.*, 557; Bogg *v.* Midland Railway Co., 36 L. J., N. S., Ch., 440; Brandon *v.* Braddon, 2 DeGex and Smale, 305; *Ex parte* Cooper, *ib.*, 112; *In re* Walker's Trusts, 16 Jurist, 1151; Lynn *v* Beaver, T. & R., 70; Sharshaw *v.* Gibbs, 18 Jur., 330; S. C., Kay, 333; Byaur *v.* Byaur, 19 Beavan, 58; Watson *v.* Marshall, 17 *ib.*, 365; Walker *v.* Drury, *ib.*, 482; Wright *v.* King, 18 *ib.*, 461; Burt *v.* Sturt, 1 W. R., 145; Bell *v* Lade, 10 *ib.*, 38

(*b*) Rajah Nilmoney Singh *v.* Kally Churn Bhattacharjee, L. R. 2 I. A., 83; Kathama Natchier *v.* Dorasinga Tever, *ib*, 139; Citing Sadut Ali Khan *v.* Khajah Abdul Gunny, 11 B. L. R., 203 (P. C.)

(*c*) Broughton on Declaratory Decrees: Messrs. Thacker, Spink, & Co., Calcutta, 1875.

(*d*) Rassonada Rayar *v.* Sitharama Pillai, 2 Mad. H. C. Rep., 171, Scotland, C. J., and Holloway, J.; Káliappa Kalldan *v.* Vayapuri Kalldan, *ib*, 442, Frere and Holloway, JJ.; Karyan *v.* Peria Sidden, 6 *ib.*, 307, Scotland and Innes, JJ; Sirimuttu Muttu *v.* Dorasinga Tévar, *ib.*, 310, Scotland, C. J., and Holloway, J.

to this section point to this more extended application, while the proviso to the section itself has a tendency to the contrary.

Effect of declaration.

43. A declaration made under this chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

Illustration.

A., a Hindu, in a suit to which B., his alleged wife, and her mother, are defendants, seeks a declaration that his marriage was duly solemnized and an order for the restitution of his conjugal rights. The Court makes the declaration and order. C., claiming that B. is his wife, then sues A. for the recovery of B. The declaration made in the former suit is not binding upon C.

CHAPTER VII.

OF THE APPOINTMENT OF RECEIVERS.

Appointment of Receivers discretionary.

44. The appointment of a Receiver pending a suit is a matter resting in the discretion of the Court.

Reference to Code of Civil Procedure.

The mode and effect of his appointment, and his rights, powers, duties, and liabilities, are regulated by the Code of Civil Procedure.

See chap. xxxvi of the Code of Civil Procedure.

CHAPTER VIII.

OF THE ENFORCEMENT OF PUBLIC DUTIES.

Power to order public servants and others to do certain specific acts.

45. Any of the High Courts of Judicature at Fort William, Madras, and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature: provided—

(*a*) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act;

(*b*) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character or on such corporation in its corporate character;

(*c*) that in the opinion of the High Court such doing or forbearing is consonant to right and justice;

(*d*) that the applicant has no other specific and adequate legal remedy; and

(*e*) that the remedy given by the order applied for will be complete.

Exemptions from such power.

Nothing in this section shall be deemed to authorize any High Court—

(*f*) to make any order binding on the Secretary of State for India in Council, on the Governor General in Council, on the Governor of

Madras in Council, on the Governor of Bombay in Council, or on the Lieutenant-Governor of Bengal;

(*g*) to make any order on any other servant of the Crown as such, merely to enforce the satisfaction of a claim upon the Crown; or

(*h*) to make any order which is otherwise expressly excluded by any law for the time being in force.

Application how made.

46. Every application under section 45 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof; and the High Court may, in its discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made.

Procedure thereon.

Order in alternative.

If, in the last case, the person, Court or corporation complained of shows no sufficient cause, the High Court may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the High Court fixes in this behalf.

Peremptory order.

47. If the person, Court or corporation to whom or to which such order is directed makes no answer, or makes an insufficient or a false answer, the High Court may then issue a peremptory order to do or forbear the act absolutely.

Execution of, and appeal from, orders.

48. Every order under this chapter shall be executed, and may be appealed from, as if it were a decree made in the exercise of the ordinary original civil jurisdiction of the High Court.

Costs.

49. The costs of all applications and orders under this chapter shall be in the discretion of the High Court.

Bar to issue of *mandamus*.

50. Neither the High Court nor any Judge thereof shall hereafter issue any writ of *mandamus*.

Power to frame rules.

51. Each of the said High Courts shall, as soon as conveniently may be, frame rules to regulate the procedure under this chapter; and until such rules are framed, the practice of such Court as to applications for and grants of writs of *mandamus* shall apply, so far as may be practicable, to applications and orders under this chapter.

PART III.

OF PREVENTIVE RELIEF.

CHAPTER IX.

OF INJUNCTIONS GENERALLY.

Preventive relief how granted.

52. Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

53. Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.

Temporary injunctions.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

Perpetual injunctions.

With regard to temporary injunctions, see chap. xxxv of the Code of Civil Procedure.

CHAPTER X.

OF PERPETUAL INJUNCTIONS.

54. Subject to the other provisions contained in, or referred to by, this chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

Perpetual injunctions when granted.

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act.

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases (namely):—

(*a*) where the defendant is trustee of the property for the plaintiff;

(*b*) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(*c*) where the invasion is such that pecuniary compensation would not afford adequate relief;

(*d*) where it is probable that pecuniary compensation cannot be got for the invasion;

(*e*) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

EXPLANATION.—For the purpose of this section a trademark is property.

Illustrations.

(*a*.) A. lets certain land to B., and B. contracts not to dig sand or gravel thereout. A. may sue for an injunction to restrain B. from digging in violation of his contract.

(*b*.) A., a trustee, threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach.

(*c*.) The Directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.

(*d*.) The Directors of a fire and life insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them.

(*e*.) A., an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting in the assets.

(*f*.) A., a trustee for B., is about to make an imprudent sale of a small part of the trust-property. B. may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.

(*g.*) A. makes a settlement (not founded on marriage or other valuable consideration) of an estate on B. and his children. A. then contracts to sell the estate to C. B. or any of his children may sue for an injunction to restrain the sale.

(*h.*) In the course of A.'s employment as a vakil, certain papers belonging to his client, B., came into his possession. A. threatens to make these papers public, or to communicate their contents to a stranger. B. may sue for an injunction to restrain A. from so doing.

(*i.*) A. is B.'s medical adviser. He demands money of B. which B. declines to pay. A. then threatens to make known the effect of B.'s communications to him as a patient. This is contrary to A.'s duty, and B. may sue for an injunction to restrain him from so doing.

See Illustration (c) to the next section and a late case (*a*), where it was held that an injunction could not be granted to restrain the publication of a libel (*b*).

(*j.*) A., the owner of two adjoining houses, lets one to B and afterwards lets the other to C. A. and C. begin to make such alterations in the house let to C. as will prevent the comfortable enjoyment of the house let to B. B. may sue for an injunction to restrain them from so doing.

(*k.*) A. lets certain arable lands to B for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B. threatens to sow the lands with seed injurious thereto and requiring many years to eradicate. A. may sue for an injunction to restrain B. from sowing the lands in contravention of his implied contract to use them in a husbandlike manner.

(*l.*) A., B., and C. are partners, the partnership being determinable at will. A. threatens to do an act tending to the destruction of the partnership-property. B. and C. may, without seeking a dissolution of the partnership, sue for an injunction to restrain A. from doing the act.

(*m.*) A., a Hindu widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir-expectant may sue for an injunction to restrain her.

(*n.*) A., B, and C. are members of an undivided Hindu family. A. cuts timbers growing on the family-property, and threatens to destroy part of the family-house and to sell some of the family utensils. B. and C. may sue for an injunction to restrain him.

(*o.*) A., the owner of certain houses in Calcutta, becomes insolvent. B. buys them from the Official Assignee and enters into possession. A. persists in trespassing on and damaging the houses, and B. is thereby compelled, at considerable expense, to employ men to protect the possession. B. may sue for an injunction to restrain further acts of trespass.

(*p.*) The inhabitants of a village claim a right of way over A.'s land In a suit against several of them, A. obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A. for obstructing his alleged right of way over the land. A. may sue for an injunction to restrain them.

(*q.*) A., in an administration-suit to which a creditor, B., is not a party, obtains a decree for the administration of C.'s assets. B. proceeds against C.'s estate for his debt. A. may sue for an injunction to restrain B.

(*r.*) A. and B. are in possession of contiguous lands and of the mines underneath them. A. works his mine so as to extend under B.'s mine and threatens to remove certain pillars which help to support B.'s mine. B. may sue for an injunction to restrain him from so doing.

(*s.*) A. rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, B. B. may sue for an injunction restraining A. from making the noise.

(*t*) A. pollutes the air with smoke so as to interfere materially with the physical comfort of B. and C. who carry on business in a neighbouring house. B. and C. may sue for an injunction to restrain the pollution.

(*a*) Shepherd *v.* The Trustee of the Port of Bombay, I. L. R., 1 Bom., 132, Green, J.

(*b*) See also Prudential Life Assurance Company *v.* Knott, L. R., 3 Ch. Ap., 142.

(*u.*) A. infringes B.'s patent. If the Court is satisfied that the patent is valid and has been infringed, B. may obtain an injunction to restrain the infringement.

(*v.*) A. pirates B.'s copyright. B. may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.

(*w.*) A. improperly uses the trademark of B. B. may obtain an injunction to restrain the user, provided that B.'s use of the trademark is honest

It is immaterial whether A. uses B.'s mark with dishonest or fraudulent intention or *bonâ fide* (*a*).

(*x.*) A., a tradesman, holds out B. as his partner against the wish and without the authority of B. B. may sue for an injunction to restrain A. from so doing.

(*y.*) A., a very eminent man, writes letters on family-topics to B. After the death of A. and B., C., who is B.'s residuary legatee, proposes to make money by publishing A.'s letters D., who is A.'s executor, has a property in the letters, and may sue for an injunction to restrain C. from publishing them.

(*z.*) A. carries on a manufactory and B. is his assistant. In the course of his business, A. imparts to B. a secret process of value. B. afterwards demands money of A., threatening, in case of refusal, to disclose the process to C., a rival manufacturer. A. may sue for an injunction to restrain B. from disclosing the process.

Mandatory injunctions.

55. When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may, in its discretion, grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

Illustrations.

(*a.*) A., by new buildings, obstructs lights to the access and use of which B. has acquired a right under the Indian Limitation Act, Part iv. B. may obtain an injunction, not only to restrain A. from going on with the buildings, but also to pull down so much of them as obstructs B.'s lights.

(*b.*) A. builds a house with eaves projecting over B.'s land. B. may sue for an injunction to pull down so much of the eaves as so project.

(*c.*) In the case put as illustration (*i*) to section 54, the Court may also order all written communications made by B. as patient, to A. as medical adviser, to be destroyed.

(*d.*) In the case put as illustration (*y*) to section 54, the Court may also order A.'s letters to be destroyed.

(*e.*) A. threatens to publish statements concerning B. which would be punishable under chapter xxi of the Indian Penal Code. The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B.'s property.

(*f.*) A., being B.'s medical adviser, threatens to publish B.'s written communications with him, showing that B. has led an immoral life. B. may obtain an injunction to restrain the publication.

(*g.*) In the cases put as illustrations (*v*) and (*w*) to section 54, and as illustrations (*e*) and (*f*) to this section, the Court may also order the copies produced by piracy, and the trademarks, statements, and communications therein respectively mentioned, to be given up or destroyed.

Injunction when refused.

56. An injunction cannot be granted—

(*a*) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(*b*) to stay proceedings in a Court not subordinate to that from which the injunction is sought;

(*a*) Graham *v.* Ker, Dods, 3 B. L. R., Apx., 4, Phear, J.

(*c*) to restrain persons from applying to any legislative body;

(*d*) to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a Foreign Government;

(*e*) to stay proceedings in any criminal matter;

(*f*) to prevent the breach of a contract the performance of which would not be specifically enforced;

(*g*) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(*h*) to prevent a continuing breach in which the applicant has acquiesced;

(*i*) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;

(*j*) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court;

(*k*) where the applicant has no personal interest in the matter.

Illustrations.

(*a*.) A. seeks an injunction to restrain his partner, B., from receiving the partnership-debts and effects. It appears that A. had improperly possessed himself of the books of the firm and refused B. access to them. The Court will refuse the injunction.

(*b*.) A. manufactures and sells crucibles, designating them as "patent plumbago crucibles," though, in fact, they have never been patented. B. pirates the designation. A. cannot obtain an injunction to restrain the piracy.

(*c*.) A. sells an article called "Mexican Balm," stating that it is compounded of diverse rare essences, and has sovereign medicinal qualities. B. commences to sell a similar article to which he gives a name and description such as to lead people into the belief that they are buying A.'s Mexican Balm. A. sues B. for an injunction to restrain the sale B. shows that A.'s Mexican Balm consists of nothing but scented hog's lard. A.'s use of his description is not an honest one, and he cannot obtain an injunction.

The limit imposed by this section, clauses (a) and (b), on the power to grant injunctions to stay judicial proceedings appear to be adopted from the rule applied in the Courts of the United States (*a*); and which is stated to be founded upon "peculiar grounds of Municipal and Constitutional Law, "the respective Courts being entirely competent to administer full relief in "the suits pending therein." It is opposed to the general principle upon which the jurisdiction of the Courts of Equity was founded,—namely that "a writ of "injunction is in no sense a prohibition to the Courts in the exercise of its "jurisdiction: it is not addressed to those Courts. It does not even affect to "interfere with them. The process, when its object is to restrain proceedings "....., is directed only to the parties. It neither assumes any superiority over "the Court in which those proceedings are had, nor denies its jurisdiction. "It is granted solely on the sole ground that from certain equitable circum-"stances, of which the Court of Equity granting the process has cognizance, it "is against conscience that the party inhibited should proceed in the cause" (*b*), the Court acting *in personam* even to the extent of staying proceedings in a suit in a foreign country where the parties are within its jurisdiction (*c*).

Injunctions to perform negative agreement.

57. Notwithstanding section 56, clause (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance

(*a*) See Story's Equity Jurisprudence, § 900.
(*b*) *Ibid*, § 875.
(*c*) *Ibid*, § 899.

that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him.

Illustrations.

(*a.*) A. contracts to sell to B. for Rs. 1,000 the good-will of a certain business unconnected with business-premises, and further agrees not to carry on that business in Calcutta. B. pays A. the Rs. 1,000, but A. carries on the business in Calcutta. The Court cannot compel A. to send his customers to B., but B. may obtain an injunction restraining A. from carrying on the business in Calcutta.

(*b.*) A. contracts to sell to B. the good-will of a business. A. then sets up a similar business close by B.'s shop, and solicits his old customers to deal with him. This is contrary to his implied contract, and B. may obtain an injunction to restrain A. from soliciting the customers, and from doing any act whereby their good-will may be withdrawn from B.

(*c.*) A. contracts with B. to sing for twelve months at B.'s theatre and not to sing in public elsewhere. B. cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A. from singing at any other place of public entertainment.

(*d.*) B. contracts with A. that he will serve him faithfully for twelve months as a clerk. A. is not entitled to a decree for specific performance of his contract; but he is entitled to an injunction restraining B. from serving a rival-house as clerk.

(*e.*) A. contracts with B. that, in consideration of Rs. 1,000 to be paid to him by B. on a day fixed, he will not set up a certain business within a specified distance. B. fails to pay the money. A. cannot be restrained from carrying on the business within the specified distance.

SCHEDULE.

(See Section 2.)

ACTS OF THE GOVERNOR GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
VIII of 1859 ...	Civil Procedure ...	Sections 15 and 192.
XIV of 1859 ...	Limitation ..	Section 15.
XXIII of 1861 ..	Civil Procedure ...	Section 26.
IX of 1872 ...	Contract ...	In section 28, the second clause of exception 1.

THE COURT FEES ACT, 1870.

(ACT No. VII OF 1870.)

As amended by Acts XX of 1870, XV of 1872, and XIII of 1875.

(*Received the assent of the Governor General on the* 11*th March*, 1870.)

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called "The Court Fees Act, 1870:"

Extent of Act.

It extends to the whole of British India;

Commencement of Act.

And it shall come into force on the first day of April, 1870.

Repeal of enactments.

2. On and after that day, the enactments mentioned in the first part of the third schedule hereto annexed shall be wholly repealed, and the enactments mentioned in the second part of the same schedule shall be repealed to the extent specified therein.*

CHAPTER II.

FEES IN THE HIGH COURTS AND IN THE COURTS OF SMALL CAUSES AT THE PRESIDENCY-TOWNS.

Levy of fees in High Courts on their original sides.

3. The fees payable for the time being to the clerks and officers (other than the sheriffs and attorneys) of the High Courts established by Letters Patent, by virtue of the power conferred by Statute twenty-fourth and twenty-fifth of Victoria, chapter one hundred and four, section fifteen,

or chargeable in each of such Courts under No. eleven of the first, and Nos. seven, twelve, fourteen, sixteen, twenty, and twenty-one of the second, schedule to this Act annexed;

Levy of fees in Presidency Small Cause Courts.

and the fees for the time being chargeable in the Courts of Small Causes at the Presidency-towns and their several offices;

shall be collected in manner hereinafter appearing.

Fees on documents filed, &c., in High Courts in their extraordinary jurisdiction.

4. No document of any of the kinds specified in the first or second schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction;

* In the schedule, the col. "Extent of repeal" is omitted.—*Ed.*

or in the exercise of its extraordinary original criminal jurisdiction;

In their appellate jurisdiction.

or in the exercise of its jurisdiction as regards appeals from the judgment of two or more Judges of the said Court, or of a Division Court;

or in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence;

As Courts of reference and revision.

or in the exercise of its jurisdiction as a Court of reference or revision;

unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

Procedure in case of difference as to necessity or amount of fee.

5. When any difference arises between the officer whose duty it is to see that any fee is paid under this chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the taxing-officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf.

When any such difference arises in any of the said Courts of Small Causes, the question shall be referred to the Clerk of the Court, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the First Judge of such Court.

The Chief Justice shall declare who shall be taxing-officer within the meaning of the first paragraph of this section.

CHAPTER III.

FEES IN OTHER COURTS AND IN PUBLIC OFFICES.

Fees on documents filed, &c., in Mofussil Courts or in public offices.

6. Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

Computation of fees payable in certain suits.

7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:—

for money:

i. In suits for money (including suits for damages or compensation, or arrears of maintenance, of annuities or of other sums payable periodically) — according to the amount claimed:

for maintenance and annuities:

ii. In suits for maintenance and annuities or other sums payable periodically—according to the value of the subject matter of the suit, and such value shall be deemed to be ten times the amount claimed to be payable for one year:

iii. In suits for moveable property other than money, where the subject-matter has a market-value — according to such value at the date of presenting the plaint:

for other moveable property having a market-value:

iv. In suits—

for moveable property of no market-value:

(a) for moveable property where the subject-matter has no market-value, as for instance, in the case of documents relating to title,

to enforce a right to share in joint family property:

(b) to enforce the right to share in any property on the ground that it is joint family property,

for a declaratory decree and consequential relief.

(c) to obtain a declaratory decree or order, where consequential relief is prayed,

for an injunction:

(d) to obtain an injunction,

for easements:

(e) for a right to some benefit (not herein otherwise provided for) to arise out of land, and

for accounts.

(f) for accounts—

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

In all such suits the plaintiff shall state the amount at which he values the relief sought, and the provisions of the Code of Civil Procedure, section thirty-one, shall apply as if, for the word 'claim,' the words 'relief sought,' were substituted.

In s. 54 (b) of the new, which corresponds with s 31 of the old, Code, this alteration is made. It was considered that these words "relief sought," whatever might be their meaning in this section, did not necessarily comprehend the same thing as the value of the matter in issue (a).

It was questioned whether the concluding passage in cl. iv is too express to limit the power of the Judge, and leaves him the right to revise the valuation of the suit. But assuming this to be so, it would generally not be advisable that the Judge should enhance the value on the reception of the plaint (a).

for possession of land, houses, and gardens:

v. In suits for the possession of land, houses and gardens—according to the value of the subject-matter; and such value shall be deemed to be—

where the subject-matter is land, and—

(a) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government,

or forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue,

and such revenue is permanently settled

ten times the revenue so payable:

(b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate, and is recorded as aforesaid;

and such revenue is settled, but not permanently—

five times the revenue so payable:

(c) where the land pays no such revenue, or has been partially

(a) Ajnas Kooer v. Musst Luteefa. 18 Suth. W. R., 21, Markby, J See also Monohar Ganesh v. Báwá Rám Charan Dass I L R., 2 Bom, 219, Westropp, C. J, and Melvill, J.

exempted from such payment, or is charged with any fixed payment in lieu of such revenue,

and nett profits have arisen from the land during the year next before the date of presenting the plaint—

fifteen times such nett profits:

but where no such nett profits have arisen therefrom—the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood:

(*d*) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as above mentioned—the market-value of the land:

Proviso as to Bombay Presidency.

Provided that, in the territories subject to the Governor of Bombay in Council, the value of the land shall be deemed to be—

(1) where the land is held on settlement for a period not exceeding thirty years, and pays the full assessment to Government—a sum equal to five times the survey-assessment;

(2) where the land is held on a permanent settlement, or on a settlement for any period exceeding thirty years, and pays the full assessment to Government—a sum equal to ten times the survey-assessment; and

(3) where the whole or any part of the annual survey-assessment is remitted—a sum computed under paragraph (1) or paragraph (2) of this proviso, as the case may be, in addition to ten times the assessment, or the portion of assessment, so remitted:

Explanation.—The word 'estate,' as used in this paragraph, means any land subject to the payment of revenue, for which the proprietor or a farmer or ryot shall have executed a separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue.

for houses and gardens:

(*e*) Where the subject-matter is a house or garden—according to the market-value of the house or garden:

to enforce a right of pre-emption.

vi. In suits to enforce a right of pre-emption—according to the value (computed in accordance with paragraph v of this section) of the land, house or garden in respect of which the right is claimed:

for interest of assignee of land-revenue.

vii. In suits for the interest of an assignee of land-revenue—fifteen times his nett profits as such for the year next before the date of presenting the plaint:

to set aside an attachment:

viii. In suits to set aside an attachment of land or of an interest in land or revenue—according to the amount for which the land or interest was attached:

The meaning of this clause is, that a person suing to set aside an attachment on land shall in no case be called upon to pay a higher fee than he would have to pay if he were suing for possession of the land (*a*).

Provided that, where such amount exceeds the value of the land or interest, the amount of fee shall be computed as if the suit were for the possession of such land or interest:

(*a*) Collector of Thana *v.* Dadabhai, I. L. R.. 1 Bom., 352, Melvill and Kemball, JJ.

to redeem:

ix. In suits against a mortgagee for the recovery of the property mortgaged,

to foreclose:

and in suits by a mortgagee to foreclose the mortgage,

or, where the mortgage is made by conditional sale, to have the sale declared absolute—

according to the principal money expressed to be secured by the instrument of mortgage:

for specific performance:

x. In suits for specific performance—

(*a*) of a contract of sale—according to the amount of the consideration:

(*b*) of a contract of mortgage—according to the amount agreed to be secured:

(*c*) of a contract of lease—according to the aggregate amount of the fine or premium (if any) and of the rent agreed to be paid during the first year of the term:

(*d*) of an award—according to the amount or value of the property in dispute:

Between landlord and tenant.

xi. In the following suits between landlord and tenant:—

(*a*) for the delivery by a tenant of the counterpart of a lease,

(*b*) to enhance the rent of a tenant having a right of occupancy,

(*c*) for the delivery by a landlord of a lease,

(*d*) to contest a notice of ejectment,

(*e*) to recover the occupancy of land from which a tenant has been illegally ejected by the landlord, and

(*f*) for abatement of rent—

according to the amount of the rent of the land to which the suit refers, payable for the year next before the date of presenting the plaint.

The proper valuation in the case of an amended plaint is that ascertained at the date of the amendment, and not at the date of the original filing of the plaint (*a*).

Fee on memorandum of appeal against order relating to compensation.

8. The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes, shall be computed according to the difference between the amount awarded and the amount claimed by the appellant.

Power to ascertain nett profits or market-value.

9. If the Court sees reason to think that the annual nett profits or the market-value of any such land, house or garden as is mentioned in section seven, paragraphs five and six, have or has been wrongly estimated, the Court may, for the purpose of computing the fee payable in any suit therein mentioned, issue a commission to any proper person directing him to make such local or other investigation as may be necessary, and to report thereon to the Court.

Procedure where nett profits or market-value wrongly estimated.

10. i. If in the result of any such investigation the Court finds that the nett profits or market-value have or has been wrongly estimated, the Court, if the estimation has been excessive, may in its

(*a*) Moro Vishvanáth v. Ganesh Vithal, 10 Bom. H. C. Rep., 444, West and Nánábhai Haridás, JJ.

discretion refund the excess paid as such fee: but if the estimation has been insufficient, the Court shall require the plaintiff to pay so much additional fee as would have been payable had the said market-value or nett profits been rightly estimated.

ii. In such case the suit shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed:

iii. Section one hundred and eighty of the Code of Civil Procedure shall be construed as if the words 'the market-value of any property or' were inserted after the word 'ascertaining,' and as if the words 'or annual nett profits' were inserted after the word 'damages.'

Procedure in suits for mesne profits or account when amount decreed exceeds amount claimed.

11. In suits for mesne profits or for immoveable property and mesne profits, or for an account, if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer.

Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed.

Decision of questions as to valuation.

12. i. Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal, shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit:

ii. But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided, to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of section ten, paragraph ii, shall apply.

See s. 28, *post*, which provides for the re-stamping of a document offered in evidence and which by mistake has been improperly stamped; and see also the note to s. 541 of the Code of Civil Procedure, *ante*, p. 624. The mode of computing the value of the subject-matter of a suit as provided by this Act was intended to be applicable only to determining the amount of Court fees to be paid, but not to other purposes, *e. g.*, to the question of the jurisdiction of the Court (*a*).

It has been held that this section makes the decision of the Court *on the question of valuation* final, but it does not prohibit an appeal in any other res-

(*a*) Nanhoon Singh *v.* Tofanee Singh 12 B. L. R., 113, Phear and Ainslie, JJ.; Jubraj Singh *v.* Inderjeet Mahton, *ib.*, 115 note; S. C., 18 Suth. W. R., 109, Couch, C. J., and Ainslie, J.; Baí Máhkor *v.* Bulakhi Chaku, I. L. R., 1 Bom., 538, Kemball and Nánábhái Haridás, JJ.; Kálubin Bhiwaji *v.* Vishram Mawaji, *ib.*, 543, Gibbs and Pinhey, JJ; Ahoylla Bai Debia *v.* Shama Churn Bose, 1 Cal., 473, Kemp and Morris, JJ

pect; thus it does not prevent a Court of Appeal from determining, whether or not consequential relief is sought, in a suit so that it may determine under what class of cases the suit falls for the purpose of the Court Fees Act (*a*); nor does it prevent a party from appealing to the High Court, and urging that the Court of first instance was wrong as to the particular schedule of fees by which the case was governed (*b*); but where no question of valuation for the purpose of determining the amount of institution-fee payable on a suit has been raised either in the Court of first instance or in the grounds of appeal, it has been held that the Appellate Court is not competent to raise a question of the correctness of the stamp, as for instance where the suit has been wrongly classed, and even although the stamp was insufficient (*c*).

It was held on the other hand in Bombay that the first clause of this section was repugnant to the 31st and 36th sections of Act VIII of 1859, which gave an appeal from an order rejecting a plaint because it was insufficiently stamped (*d*). Those sections of Act VIII of 1859 are not expressly repealed by this Act. The new Code re-enacts them (*e*), and where the relief sought is *properly valued*, but the plaint is insufficiently stamped, and the plaintiff declines to increase the stamp, and his plaint is on that ground rejected, he can appeal, but the question of valuation is still left for the final decision of the Court in which the plaint is filed.

Refund of fee paid on memorandum of appeal.

13. If an appeal or plaint, which has been rejected by the lower Court on any of the grounds mentioned in the Code of Civil Procedure, is ordered to be received, or if a suit is remanded in appeal, on any of the grounds mentioned in section three hundred and fifty-one of the same Code, for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorizing him to receive back from the Collector the full amount of fee paid on the memorandum of appeal.

Section 351 of the Code of Civil Procedure (Act VIII of 1859) here mentioned, corresponds with s. 562 of the present Code (Act X of 1877).

Provided that, if, in the case of a remand in appeal, the order of remand shall not cover the whole of the subject-matter of the suit, the certificate so granted shall not authorize the appellant to receive back more than so much fee as would have been originally payable on the part or parts of such subject-matter in respect whereof the suit has been remanded.

Refund of fee on application for review of judgment.

14. Where an application for a review of judgment is presented on or after the ninetieth day from the date of the decree, the Court, unless the delay was caused by the applicant's laches, may, in its discretion, grant him a certificate authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before such day.

Refund where Court reverses or modifies its former decision on ground of mistake.

15. Where an application for a review of judgment is admitted, and where, on the re-hearing, the Court reverses or modifies its former decision on the ground of mistake in law or fact, the applicant shall be entitled to a certificate from the Court authoriz-

(*a*) Chunia *v.* Ramdial, I. L. R., 1 All., 360, Pearson and Turner, JJ.

(*b*) Gunga Monee Chowdhrain *v.* Gopal Chunder Roy, 19 Suth W. R., 214, Mitter and Birch, JJ.; see also The Collector of Sylhet *v.* Kali Kumar Dutt, 7 B. L R, F. B. 667, see p 669.

(*c*) Kala Chand Sen *v.* Anund Kristo Bose, 22 Suth. W R., 433, L. S. Jackson and McDonell, JJ.

(*d*) Nárâyan Mádhavráo *v.* The Collector of Thanna, I L. R, 2 Bom, 145, Westropp, C J.; Manohor Ganesh *v.* Báwá Rámcharandás, I L. R., 2 Bom., 219, Westropp C. J, and Melvill, J.

(*e*) See ss. 51 (*b*) and 588 (*o*).

ing him to receive back from the Collector so much of the fee paid on the application* as exceeds the fee payable on any other application to such Court under the second schedule to this Act, number one, clause (b) or clause (d).

But nothing in the former part of this section shall entitle the applicant to such certificate where the reversal or modification is due, wholly or in part, to fresh evidence which might have been produced at the original hearing."

Where the case does not fall within the above three sections, and the applicant has paid too high a stamp duty, or thinks that he has done so, his proper course is to apply to the Government for a refund; the Court can give him no relief, unless it is expressly authorized to do so (*a*).

Additional fee where respondent takes objection to unappealed part of decree.

16. When any appeal is presented to a Civil Court, not against the whole of a decision, but only against so much thereof as relates to a portion of the subject-matter of the suit, and on the hearing of such appeal, the respondent takes, under section three hundred and forty-eight of the Code of Civil Procedure, an objection to any part of the said decision other than the part appealed against, the Court shall not hear such objection until the respondent shall have paid the additional fee which would have been payable had the appeal comprised the part of the decision so objected to.

Where a Court decreed property in shares to members of a family, and one appealed, claiming a larger share, the stamp should be calculated on the value of the excess he claims, supposing him to be content with the decree so far as it has given him a share,—*i e.*, on the value of the relief he seeks (*b*).

A pauper respondent is not entitled to present objections at the trial of an appeal without payment of stamp duty (*c*).

Multifarious suits.

17. Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act.

Nothing in the former part of this section shall be deemed to affect the power conferred by the Code of Civil Procedure, section nine.

Written examinations of complainants.

18. When the first or only examination of a person who complains of the offence of wrongful confinement, or of wrongful restraint, or of any offence other than an offence for which police officers may arrest without a warrant, and who has not already presented a petition on which a fee has been levied under this Act, is reduced to writing under the provisions of the Code of Criminal Procedure, the complainant shall pay a fee of eight annas, unless the Court thinks fit to remit such payment.

Exemption of certain documents.

19. Nothing contained in this Act shall render the following documents chargeable with any fee:—

i. Power-of-attorney to institute or defend a suit when executed

* By Act XX of 1870, s. 1, the word "application" is substituted for "plaint or memorandum of appeal."

(*a*) Moulvie Syud Zoynood-deen, petitioner, 11 B. L. R., 370, Markby and Birch, JJ.

(*b*) Moro Vishvanáth *v.* Ganesh Vithal, 10 Bom. H. C. Rep., 444, West and Nánábhai Haridás, JJ.

(*c*) Babajihari *v.* Rajaram Ballal, I. L. R., 1 Bom., 75, West, J.

by an officer, warrant-officer, non-commissioned officer or private of Her Majesty's army not in civil employment.

ii. Declarations mentioned in section one hundred and eighteen and section one hundred and sixty-four of the Code of Civil Procedure.

iii. Written statements called for by the Court after the first hearing of a suit.

iv. Plaint presented to a Military Court of Requests and petition for execution of a decree of such Court.

v. Plaints in suits tried by Village Munsifs in the Presidency of Fort St. George.

vi. Plaints and processes in suits before District Panchayats in the same Presidency.

vii. Plaints in suits before Collectors under Madras Regulation XII of 1816.

viii. Probate of a will, letters of administration, and certificate mentioned in the first schedule to this Act annexed, No. twelve, where the amount or value of the property in respect of which the probate or letters or certificate shall be granted does not exceed one thousand rupees.

ix. Application or petition to a Collector or other officer making a settlement of land-revenue, or to a Board of Revenue, or a Commissioner of Revenue, relating to matters connected with the assessment of land, or the ascertainment of rights thereto or interests therein, if presented previous to the final confirmation of such settlement.

x. Application relating to a supply for irrigation of water belonging to Government.

xi. Application for leave to extend cultivation, or to relinquish land, when presented to an officer of land-revenue by a person holding, under direct engagement with Government, land of which the revenue is settled, but not permanently.

xii. Application for service of notice of relinquishment of land or of enhancement of rent.

xiii. Written authority to an agent to distrain.

xiv. First application (other than a petition containing a criminal charge or information) for the summons of a witness or other person to attend either to give evidence or to produce a document, or in respect of the production or filing of an exhibit not being an affidavit made for the immediate purpose of being produced in Court.

xv. Bail-bonds in criminal cases, recognizances to prosecute or give evidence, and recognizances for personal appearance or otherwise.

xvi. Petition, application, charge, or information respecting any offence, when presented, made or laid to or before a Police officer, or to or before the Heads of Villages or the Village Police in the territories respectively subject to the Governors in Council of Madras and Bombay.

xvii. Petition by a prisoner, or other person in duress or under restraint of any Court or its officers.

xviii. Complaint of a public servant (as defined in the Indian Penal Code), a municipal officer, or an officer or servant of a Railway Company.

xix. Application for permission to cut timber in Government forests, or otherwise relating to such forests.

xx. Application for the payment of money due by Government to the applicant.

xxi. Petition of appeal against the chaukidari assessment under Act No. XX of 1856, or against any municipal tax.

xxii. Applications for compensation under any law for the time being in force relating to the acquisition of property for public purposes.

xxiii. Petitions presented to the Special Commissioner appointed under Bengal Act No. II of 1869 (*to ascertain, regulate, and record certain tenures in Chota Nagpore*).

xxiv.* Petitions under the Indian Christian Marriage Act, 1872, sections forty-five and forty-eight.

CHAPTER III A.†

PROBATES, LETTERS OF ADMINISTRATION, AND CERTIFICATES OF ADMINISTRATION.

Relief where too high a Court-fee has been paid.

19A. Where any person on applying for the probate of a will or letters of administration has estimated the property of the deceased to be of greater value than the same has afterwards proved to be, and has consequently paid too high a Court-fee thereon, if within six months after the true value of the property has been ascertained, such person produces the probate or letters to the Chief Controlling Revenue Authority of the Province in which the probate or letters has or have been granted,

and delivers to such Authority a particular inventory and valuation of the property of the deceased, verified by affidavit or affirmation,

and if such Authority is satisfied that a greater fee was paid on the probate or letters than the law required,

the said Authority may—

(*a*) cancel the stamp on the probate or letters, if such stamp has not been already cancelled;

(*b*) substitute another stamp for denoting the Court-fee which should have been paid thereon; and

(*c*) make an allowance for the difference between them as in the case of spoiled stamps, or repay the same in money, at his discretion.

This section enacts what was in substance contained in a notification No. 2025 of the Government of India, Separate Revenue, Stamps, dated 15th August, 1872.

Relief where debts due from a deceased person have been paid out of his estate.

19B. Whenever it is proved to the satisfaction of such Authority that an executor or administrator has paid debts due from the deceased to such an amount as, being deducted out of the amount or value of the estate, reduces the same to a sum which, if it had been the whole gross amount or value of the estate, would have occasioned a less Court-fee to be paid on the probate or letters

* As amended by Act XV of 1872.

† Added, see s. 6 of Act XIII of 1875. For the duty payable, refer to sched. i, cls. 11 & 12, of this Act.

of administration granted in respect of such estate than has been actually paid thereon under this Act,

such Authority may return the difference, provided the same be claimed within three years after the date of such probate or letters.

But when, by reason of any legal proceeding, the debts due from the deceased have not been ascertained and paid, or his effects have not been recovered and made available, and in consequence thereof the executor or administrator is prevented from claiming the return of such difference within the said term of three years, the said Authority may allow such further time for making the claim as may appear to be reasonable under the circumstances.

This section takes the place of a notification, No. 2504, of the Government of India, Separate Revenue, Stamps, dated 18th April, 1873.

Relief in case of several grants.

19C. Whenever such a grant of probate or letters of administration has been or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under the same Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate;

Whenever such a grant has been or is made in respect of any property forming part of an estate, the amount of fees then actually paid under this Act shall be deducted when a like grant is made in respect of property belonging to the same estate, identical with or including the property to which the former grant relates.

Probates declared valid as to trust-property though not covered by Court-fee.

19D. The probate of the will, or the letters of administration of the effects, of any person deceased heretofore or hereafter granted, shall be deemed valid and available by his executors or administrators for recovering, transferring, or assigning any moveable or immoveable property whereof or whereto the deceased was possessed or entitled, either wholly or partially as a trustee, notwithstanding the amount or value of such property is not included in the amount or value of the estate in respect of which a Court-fee was paid on such probate or letters of administration.

This section takes the place of a notification, No 2135 of the Government of India, Separate Revenue, Stamps, dated 22nd March, 1872.

When the grant is made in respect of property which is subject to a mortgage, the value of the property for the purpose of estimating the *ad valorem* duty payable under this Act is the value of that with which the representative has to deal,—*i. e.*, the value of the entire property less the amount of the encumbrance(*a*).

Where one brother, a Hindu, died leaving another alive, and each was entitled to a half of certain Government securities jointly with the other, it was held that the stamp duty should only be paid in respect of the half belonging to the deceased brother, although the whole of the securities had been transferred to and stood in the name of the deceased brother alone; and that the other half was trust property upon which no stamp fee was payable upon a grant of administration which was made in favor of the surviving brother (*b*). But where in a suit for a division of a joint estate having terminated in a settlement, the terms of which were embodied in a decree, the receivers who had been appointed *pendente lite* endorsed and transferred certain securities and shares to one of the

(*a*) In the goods of Innes, 8 B. L. R., Apx., 44, Norman, offg C. J.

(*b*) Goods of Brindabun Ghose, B. L. R., Apx., 39, Couch, C. J.

parties, D. pursuant to the decree; and the Bank of Bengal. Account Department, and the companies concerned having refused to recognise the transfer, D. applied for letters of administration in respect of the securities and shares in question, claiming exemption from the duty prescribed by sched. i. cl. 2, on the ground that she ought not to have been required to obtain such letters, her right having been declared by a decree of the Court, it was held, that the prescribed duty must be paid, and that there was no ground for exemption from it (*a*). Where A., by deed gave funds to trustees for B. for life, and after her death to such uses as B. should by will appoint, and B. made an appointment, it was held that duty was not payable (*b*).

Provision for case where too low a Court-fee has been paid on probates, &c.

19E. Where any person on applying for probate or letters of administration has estimated the estate of the deceased to be of less value than the same has afterwards proved to be, and has in consequence paid too low a Court-fee thereon, the Chief Controlling Revenue Authority of the Province in which the probate or letters has or have been granted, may, on the value of the estate of the deceased being verified by affidavit or affirmation, cause the the probate or letters of administration to be duly stamped on payment of the full Court-fee which ought to have been originally paid thereon in respect of such value and of the further penalty, if the probate or letters is or are produced within one year from the date of the grant, of five times, or if it or they is or are produced after one year from such date, of twenty times, such proper Court-fee, without any deduction of the Court-fee originally paid on such probate or letters:

Provided that, if the application be made within six months after the ascertainment of the true value of the estate and the discovery that too low a Court-fee was at first paid on the probate or letters, and if the said Authority is satisfied that such fee was paid in consequence of a mistake or of its not being known at the time that some particular part of the estate belonged to the deceased, and without any intention of fraud or to delay the payment of the proper Court-fee, the said Authority may remit the said penalty, and cause the probate or letters to be duly stamped on payment only of the sum wanting to make up the fee which should have been at first paid thereon.

Administrator to give proper security before letters stamped under section 19E.

19F. In case of letters of administration on which too low a Court-fee has been paid at first, the said Authority shall not cause the same to be duly stamped in manner aforesaid until the Administrator has given such security to the Court by which the letters of administration have been granted as ought by law to have been given on the granting thereof in case the full value of the estate of the deceased had been then ascertained.

Executors, &c., not paying full Court-fee on probates, &c., within six months after discovery of underpayment.

19G. Where too low a Court-fee has been paid on any probate or letters of administration in consequence of any mistake, or of its not being known at the time that some particular part of the estate belonged to the deceased, if any executor or administrator acting under such probate or letters

(*a*) Goods of Sreenath Doss, 20 Suth. W. R., 440, Couch, C J.

(*b*) Goods of George, 6 B. L. R., Apx., 138, Couch, C. J., following Drake *v.* The Attorney General, 10 Cl. & F., 257; see also Goods of Oram, 12 B. L. R., Apx., 21, Couch. C. J.

does not, within six months after the first day of April, 1875, or after the discovery of the mistake or of any effects not known at the time to have belonged to the deceased, apply to the said Authority and pay what is wanting to make up the Court-fee which ought to have been paid at first on such probate or letters, he shall forfeit the sum of one thousand rupees, and also a further sum at the rate of ten rupees per cent. on the amount of the sum wanting to make up the proper Court-fee.

Sections 19A to 19G applied to certificates under Acts XL of 1858 and XX of 1864.

19H. The provisions of sections 19A to 19G (both inclusive) shall, *mutatis mutandis*, apply to certificates granted under Act No. XL of 1858 *(for making better provision for the care of the persons and property of Minors in the Presidency of Fort William in Bengal)* or Act No. XX of 1864 (*for making better provision for the care of the persons and property of Minors in the Presidency of Bombay*) and to the holders of such certificates.

CHAPTER IV.

Process Fees.

Rules as to costs of processes.

20. The High Court shall, as soon as may be, make rules as to the following matters:—

i. the fees chargeable for serving and executing processes issued by such Court in its appellate jurisdiction, and by the other Civil and Revenue Courts established within the local limits of such jurisdiction:

ii. the fees chargeable for serving and executing processes issued by the Criminal Courts established within such limits in the case of offences other than offences for which Police officers may arrest without a warrant; and

iii. the remuneration of the peons and all other persons employed by leave of a Court in the service or execution of processes.

The High Court may, from time to time, alter and add to the rules so made.

Confirmation and publication of rules.

All such rules, alterations and additions shall, after being confirmed by the Local Government, and sanctioned by the Governor General of India in Council, be published in the local official Gazette, and shall thereupon have the force of law.

Until such rules shall be so made and published, the fees now leviable for serving and executing processes shall continue to be levied, and shall be deemed to be fees leviable under this Act.

Tables of process-fees.

21. A Table in the English and Vernacular languages, showing the fees chargeable for such service and execution, shall be exposed to view in a conspicuous part of each Court.

Number of peons in District and subordinate Courts.

22. Subject to rules to be made by the High Court and approved by the Local Government and the Governor General of India in Council,

every District Judge and every Magistrate of a District shall fix, and may from time to time alter, the number of peons necessary to

be employed for the service and execution of processes issued out of his Court and each of the Courts subordinate thereto.

Number of peons in Mofussil Small Cause Courts.

and for the purposes of this section, every Court of Small Causes established under Act No. XI of 1865 *(to consolidate and amend the law relating to Courts of Small Causes beyond the local limits of the ordinary original civil jurisdictions of the High Courts of Judicature)* shall be deemed to be subordinate to the Court of the District Judge.

Number of peons in Revenue Courts.

23. Subject to rules to be framed by the Chief Controlling Revenue Authority and approved by the Local Government and the Governor General of India in Council, every officer performing the functions of a Collector of a District shall fix, and may from time to time alter, the number of peons necessary to be employed for the service and execution of processes issued out of his Court or the Courts subordinate to him.

Process served under this chapter to be held process served under Civil Procedure Code.

24. Every process served or executed under this chapter shall be held to be a process within the meaning of section one hundred and eighty-eight of the Code of Civil Procedure, and of section two of Act No. XXIII of 1861 *to amend Act VIII of* 1859.

CHAPTER V.

OF THE MODE OF LEVYING FEES.

Collection of fees by stamps.

25. All fees referred to in section three or chargeable under this Act shall be collected by stamps.

Stamps to be impressed or adhesive.

26. The stamps used to denote any fee chargeable under this Act shall be impressed, or adhesive, or partly impressed and partly adhesive, as the Governor General of India in Council may, by notification in the *Gazette of India*, from time to time direct.

Rules for supply, number, renewal and keeping accounts of stamps.

27. The Local Government may, from time to time, make rules for regulating—

(*a*) the supply of stamps to be used under this Act,

(*b*) the number of stamps to be used for denoting any fee chargeable under this Act,

(*c*) the renewal of damaged or spoiled stamps, and

(*d*) the keeping accounts of all stamps used under this Act:

Provided that, in the case of stamps used under section three in a High Court, such rules shall be made with the concurrence of the Chief Justice of such Court.

All such rules shall be published in the local official Gazette, and shall thereupon have the force of law.

Stamping documents inadvertently received.

28. No document which ought to bear a stamp under this Act shall be of any validity, unless and until it is properly stamped.

But if any such document is through mistake or indavertence received, filed or used in any Court or office without being properly stamped, the presiding Judge or the head of the office, as the case

may be, or, in the case of a High Court, any Judge of such Court, may, if he thinks fit, order that such document be stamped as he may direct; and on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance.

Amended document.

29. Where any such document is amended in order merely to correct a mistake and to make it conform to the original intention of the parties, it shall not be necessary to impose a fresh stamp.

Cancellation of stamp.

30. No document requiring a stamp under this Act shall be filed or acted upon in any proceeding in any Court or office until the stamp has been cancelled.

Such officer as the Court or the head of the office may from time to time appoint shall, on receiving any such document, forthwith effect such cancellation by punching out the figure-head so as to leave the amount designated on the stamp untouched, and the part removed by punching shall be burnt or otherwise destroyed.

The word "application," when used in this Act, means of course only a written application. If an application is made without writing, no fee is payable under this Act (*a*).

CHAPTER VI.

MISCELLANEOUS.

Repayment of fees paid on application to Criminal Courts.

31. i. Whenever an application or petition containing a complaint or charge of an offence, other than an offence for which Police officers may arrest without warrant, is presented to a Criminal Court, the Court, if it convict the accused person, shall, in addition to the penalty imposed upon him, order him to repay to the complainant the fee paid on such application or petition.

ii. In the case mentioned in section eighteen, the Court, if it convict the accused person, shall, in addition to the penalty imposed upon him, order him to repay to the complainant the fee, if any, paid by the latter for the examination.

iii. When the complainant has paid fees for serving processes in either of the cases mentioned in the first and second paragraphs of this section, the Court, if it convict the accused person, shall, in addition to the penalty imposed upon him, order him to repay such fees to the complainant.

iv. All fees ordered to be repaid under this section may be recovered as if they were fines imposed by the Court.

An order to repay a fee under this section is an integral part of the section, and the fee should be treated as a fine imposed by the Court, and may be retained in deposit pending an appeal, where an appeal lies (*b*).

Amendments of Act VIII of 1859, sections 306, 309, 371, 373.

32. The Code of Civil Procedure, sections three hundred and eight and three hundred and nine, shall be read as if, for the words 'stamp-duty' and 'stamps,' the words and figures 'fees chargeable under the Court

(*a*) Tetley *v.* Administrator-General of Bengal, 2 H. C. Rep. N. W. P., 418, Turner and Turnbull, JJ.

(*b*) Mad. H. C. Rulings, 5 M. H. C. Rep., xxviii.

Fees Act, 1870,' were substituted; section three hundred and seventy-one of the same Code shall be read as if, for the words 'a stamp of the value,' the words 'the payment of the fee,' were substituted; and section three hundred and seventy-three of the same Code shall be read as if, for the words 'on a stamp paper of the value,' the words 'and shall be chargeable with the fee,' were substituted; and as if, for the words 'for the stamps,' the words 'the fees,' were substituted.

And the Indian Income Tax Act, section twenty, shall be read as if, for the words 'the value of the said stamp,' the words, 'the fee on the petition,' were substituted.

Admission in criminal cases of documents for which proper fee has not been paid.

33. Whenever the filing or exhibition in a Criminal Court of a document in respect of which the proper fee has not been paid is, in the opinion of the presiding Judge, necessary to prevent a failure of justice, nothing contained in section four or section six shall be deemed to prohibit such filing or exhibition.

Rules for sale of stamps.

34. In the General Stamp Act, 1869, section forty-eight shall be read as if, for the words and figures 'Act No. XXVI of 1867 (*to amend the law relating to Stamp Duties*)' the words and figures 'The Court Fees Act, 1870,' were substituted.

Power to reduce or remit fees.

35. The Governor General of India in Council may, from time to time, by notification in the *Gazette of India*, reduce or remit, in the whole or in any part of British India, all or any of the fees mentioned in the first and second schedules to this Act annexed,

and may in like manner cancel or vary such order.

Saving of fees to certain officers of High Courts.

36. Nothing in chapters II and V of this Act applies to the commission payable to the Accountant-General of the High Court at Fort William, or to the fees which any officer of a High Court is allowed to receive in addition to a fixed salary.

SCHEDULE I.

Ad valorem Fees.

	Proper fee.
1. Plaint or memorandum of appeal (not otherwise provided for in this Act), presented to any Civil or Revenue Court, except those mentioned in section three(*a*):—	
When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
When such amount or value exceeds five rupees, —for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Ditto.
When such amount or value exceeds one hundred rupees,—for every ten rupees, or part thereof, in excess of one hundred rupees, up to one thousand rupees.	Twelve annas.
When such amount or value exceeds one thousand rupees,—for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Five rupees.

(*a*) To ascertain the proper fee leviable on the institution of a suit, see the Table annexed to this schedule.

	Proper fee.
When such amount or value exceeds five thousand rupees,—for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Ten rupees.
When such amount or value exceeds ten thousand rupees,—for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Fifteen rupees.
When such amount or value exceeds twenty thousand rupees,—for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.	Twenty rupees.
When such amount or value exceeds thirty thousand rupees,—for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.	Ditto.
When such amount or value exceeds fifty thousand rupees,—for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.	Twenty-five rupees.
Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be three thousand rupees.	
2. Plaint in a suit for possession under Act No. XIV of 1859 (*to provide for the limitation of suits*), section fifteen.	A fee of one-half the amount prescribed in the foregoing scale.
The words "or memorandum of appeal" are omitted by s. 1, Act XX of 1870.	
3. Petition under the Indian Registration Act, section fifty-three.	Ditto.
4. Application for review of judgment, if presented on or after the ninetieth day from the date of the decree.	The fee leviable on the plaint or memorandum of appeal.
5. Application for review of judgment if presented before the ninetieth day from the date of the decree.	One-half of the fee leviable on the plaint or memorandum of appeal.
An application for a new trial in a Small Cause Court under s. 21 of Act XI of 1869, is not an application for a review, but falls under sched. ii, art. 1 (*a*).	
6. Copy or translation of a judgment or order not being, or having the force of, a decree:—	
When such judgment or order is passed by any Civil Court other than a High Court, or by the presiding officer of any Revenue Court or office, or by any other Judicial or Executive Authority—	
(*a*.)—If the amount or value of the subject-matter is fifty or less than fifty rupees.	Four annas.
(*b*.)—If such amount or value exceeds fifty rupees.	Eight annas.
When such judgment or order is passed by a High Court.	One rupee.
7. Copy of a decree or order having the force of a decree:—	
When such decree or order is made by any Civil Court other than a High Court, or by any Revenue Court—	
(*a*.)—If the amount or value of the subject-matter of the suit wherein such decree or order is made is fifty or less than fifty rupees.	Eight annas.

(*a*) Chotalal Jamnádás *v.* Bulákidás Tetha, 7 Bom. H. C. Rep., A. J., 109, Gibbs and Melvill, JJ.

	Proper fee.
(*b*.)—If such amount or value exceeds fifty rupees.	One rupee.
When such decree or order is made by a High Court.	Four rupees.

Notes of judgments furnished to parties under the rules of practice (Madras) for the guidance of Small Cause Courts, are copies of decrees, and require a stamp under this article (*a*).

8. Copy of any document liable to stamp-duty under the General Stamp Act, 1869, when left by any party to a suit or proceeding in place of the original withdrawn :—

(*a*.)—When the stamp-duty chargeable on the original does not exceed eight annas.	The amount of the duty chargeable on the original.
(*b*.)—In any other case ...	Eight annas.

9. Copy of any revenue or judicial proceeding or order not otherwise provided for by this Act, or copy of any account, statement, report or the like, taken out of any Civil or Criminal or Revenue Court or office, or from the office of any chief officer charged with the executive administration of a Division :—

For every three hundred and sixty words, or fraction of three hundred and sixty words.	Ditto.

10. Certificate of administration granted under Act No. XL of 1858 *(for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal)*, or under Act No. XX of 1864 *(for making better provision for the care of the persons and property of minors in the Presidency of Bombay)* :—

If the amount or value of the property in respect to which such certificate is granted does not exceed five hundred rupees.	Five rupees.
If such amount or value exceeds five hundred rupees, but not one thousand rupees.	Ten rupees.
And for every one thousand rupees, or part thereof, in excess of one thousand rupees.	Five rupees.

11. Probate of a will or letters of administration with or without will annexed :—

If the amount or value of the property in respect of which the probate or letters or certificate shall be granted exceeds one thousand rupees.	Two per centum on such amount or value.

In cases in which the value of property in respect of which a certificate of heirship (and a probate or letters of administration stand on the same footing) is sought exceeds Rs. 1,000, the stamp duty should be calculated on the whole amount, and not on the excess over the Rs. 1,000, but the exceeding Rs. 1,000 is the condition of liability (*b*). The value means the market value, and this applies to an annuity, although for the purpose of a *suit*, the annuity is, under s. 7, to be calculated at ten times the yearly payment (*c*); if the property is mortgaged, the amount for which it is mortgaged should be deducted; if it is mortgaged for its full value, nothing is payable (*d*). Where *ad valorem* duty has been paid on a portion of the property under letters of administration which were valid, but have been revoked, such *ad valorem* duty is not payable a second time on grant of new letters of administration. The second letters of administration should recite the former grant and the fact of the payment of stamp duty thereon, and credit should be taken for the amount already paid on the former letters (*e*). But the

(*a*) Mad. H. C. Rulings. 6 M. H. C. Rep., xxiv.

(*b*) Mad. H. C. Rulings, 6 M. H. C. Rep., xiv.

(*c*) Goods of Ramchandra Lakshmanji, I. L. R., 1 Bom., 118, Westropp, C. J.

(*d*) Goods of Maclean, 6 H. C. Rep., N. W. P., 214, Pearson and Turner, JJ; Goods of Innes, 8 B L R., Apx., 43, Norman, Offg. C. J.

(*e*) *Ibid.*

Proper fee.

payment of the 10-rupee fee imposed by the Indian Succession Act, and which alone was payable before this Court Fees Act was passed, is not equivalent to the payment of an *ad valorem* fee, and the full duty is payable (*a*). Where the full *ad valorem* duty has been paid, and it is necessary to obtain a fresh grant, as for instance, when a freshly discovered document has to be proved, no fresh fee is payable (*b*). The property being in India, partnership property is not exempt from stamp duty on the probate, on the ground that, by an arrangement among the partners, the valuation of the property of a deceased partner was to be struck on his death and payable, and in this instance paid, in Liverpool. This, notwithstanding that the English executor had paid duty in respect of the same property in England (*c*). The payment in England had apparently been wrongly made (*d*), and a refund could be asked for under 55 Geo. III, c. 186, s. 40.

12. Certificate granted under Act No. XXVII of 1860 *(for facilitating the collection of debts on successions, and for the security of parties paying debts to the representatives of deceased persons)*, or under Bombay Regulation VIII of 1827 *(to provide for the formal recognition of heirs, executors, and administrators, and for the appointment of Administrators and Managers of property by the Courts)*.

If the amount or value of the property in respect of which the probate or letters or certificate shall be granted exceeds one thousand rupees. — Two per centum on such amount or value.

NOTE.—The person to whom any such certificate is granted, or his representative, shall, after the expiration of twelve months from the date of such certificate, and thereafter whenever the Court granting such certificate requires him so to do, file a statement on oath of all monies recovered or realized by him under such certificate.

If the monies so recovered or realized exceed the amount of debts or other property as sworn to by the person to whom the certificate is granted, the Court may cancel the same and order such person to take out a fresh certificate and pay the fee prescribed by this schedule for such excess.

In default of filing such statement within the time allowed, the Court may cancel the certificate.

(*a*) Goods of Chalmer, 6 B. L. R., Apx., 137, Couch, C. J.

(*b*) Goods of Morson, 6 B. L. R., Apx., 139 Norman, J.

(*c*) Goods of Gladstone, I. L. R., 1 Cal. 168, Garth, C. J., and Pontifex, J.

(*d*) Attorney-General *v.* Bonwens, 4 M. and W., 171.

Table of Rates of ad valorem Fees leviable on the institution of Suits.

When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee			When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.		
Rs.	Rs.	Rs.	A.	P.	Rs.	Rs.	Rs.	As.	P.
...	5	0	6	0	350	360	27	0	0
5	10	0	12	0	360	370	27	12	0
10	15	1	2	0	370	380	28	8	0
15	20	1	8	0	380	390	29	4	0
20	25	1	14	0	390	400	30	0	0
25	30	2	4	0	400	410	30	12	0
30	35	2	10	0	410	420	31	8	0
35	40	3	0	0	420	430	32	4	0
40	45	3	6	0	430	440	33	0	0
45	50	3	12	0	440	450	33	12	0
50	55	4	2	0	450	460	34	8	0
55	60	4	8	0	460	470	35	4	0
60	65	4	14	0	470	480	36	0	0
65	70	5	4	0	480	490	36	12	0
70	75	5	10	0	490	500	37	8	0
75	80	6	0	0	500	510	38	4	0
80	85	6	6	0	510	520	39	0	0
85	90	6	12	0	520	530	39	12	0
90	95	7	2	0	530	540	40	8	0
95	100	7	8	0	540	550	41	4	0
100	110	8	4	0	550	560	42	0	0
110	120	9	0	0	560	570	42	12	0
120	130	9	12	0	570	580	43	8	0
130	140	10	8	0	580	590	44	4	0
140	150	11	4	0	590	600	45	0	0
150	160	12	0	0	600	610	45	12	0
160	170	12	12	0	610	620	46	8	0
170	180	13	8	0	620	630	47	4	0
180	190	14	4	0	930	640	48	0	0
190	200	15	0	0	640	650	48	12	0
200	210	15	12	0	650	660	49	8	0
210	220	16	8	0	660	670	50	4	0
220	230	17	4	0	670	680	51	0	0
230	240	18	0	0	680	690	51	12	0
240	250	18	12	0	690	700	52	8	0
250	260	19	8	0	700	710	53	4	0
260	270	20	4	0	710	720	54	0	0
270	280	21	0	0	720	730	54	12	0
280	290	21	12	0	730	740	55	8	0
290	300	22	8	0	740	750	56	4	0
300	310	23	4	0	750	760	57	0	0
310	320	24	0	0	760	770	57	12	0
320	330	24	12	0	770	780	58	8	0
330	340	25	8	0	780	790	59	4	0
340	350	26	4	0	790	800	60	0	0

Table of Rates of ad valorem Fees leviable, &c.—(Continued.)

When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.			When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.		
Rs.	Rs.	Rs.	A.	P.	Rs.	Rs.	Rs.	A.	P.
800	810	60	12	0	3,500	3,600	205	0	0
810	820	61	8	0	3,600	3,700	210	0	0
820	830	62	4	0	3,700	3,800	215	0	0
830	840	63	0	0	3,800	3,900	220	0	0
840	850	63	12	0	3,900	4,000	225	0	0
850	860	64	8	0	4,000	4,100	230	0	0
860	870	65	4	0	4,100	4,200	235	0	0
870	880	66	0	0	4,200	4,300	240	0	0
880	890	66	12	0	4,300	4,400	245	0	0
890	900	67	8	0	4,400	4,500	250	0	0
900	910	68	4	0	4,500	4,600	255	0	0
910	920	69	0	0	4,600	4,700	260	0	0
920	930	69	12	0	4,700	4,800	265	0	0
930	940	70	8	0	4,800	4,900	270	0	0
940	950	71	4	0	4,900	5,000	275	0	0
950	960	72	0	0	5,000	5,250	285	0	0
960	970	72	12	0	5,250	5,500	295	0	0
970	980	73	8	0	5,500	5,750	305	0	0
980	990	74	4	0	5,750	6,000	315	0	0
990	1,000	75	0	0	6,000	6,250	325	0	0
1,000	1,100	80	0	0	6,250	6,500	335	0	0
1,100	1,200	85	0	0	6,500	6,750	345	0	0
1,200	1,300	90	0	0	6,750	7,000	355	0	0
1,300	1,400	95	0	0	7,000	7,250	365	0	0
1,400	1,500	100	0	0	7,250	7,500	375	0	0
1,500	1,600	105	0	0	7,500	7,750	385	0	0
1,600	1,700	110	0	0	7,750	8,000	395	0	0
1,700	1,800	115	0	0	8,000	8,250	405	0	0
1,800	1,900	120	0	0	8,250	8,500	415	0	0
1,900	2,000	125	0	0	3,500	8,750	425	0	0
2,000	2,100	130	0	0	8,750	9,000	435	0	0
2,100	2,200	135	0	0	9,000	9,250	445	0	0
2,200	2,300	140	0	0	9,250	9,500	455	0	0
2,300	2,400	145	0	0	9,500	9,750	465	0	0
2,400	2,500	150	0	0	9,750	10,000	475	0	0
2,500	2,600	155	0	0	10,000	10,500	490	0	0
2,600	2,700	160	0	0	10,500	11,000	505	0	0
2,700	2,800	165	0	0	11,000	11,500	520	0	0
2,800	2,900	170	0	0	11,500	12,000	535	0	0
2,900	3,000	175	0	0	12,000	12,500	550	0	0
3,000	3,100	180	0	0	12,000	13,000	565	0	0
3,100	3,200	185	0	0	13,000	13,500	580	0	0
3,200	3,300	190	0	0	13,500	14,000	595	0	0
3,300	3,400	195	0	0	14,000	14,500	610	0	0
3,400	3,500	200	0	0	14,500	15,000	625	0	0

Table of Rates of ad valorem Fees leviable, &c.—(Continued.)

When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.			When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.		
Rs.	Rs.	Rs.	A.	P.	Rs.	Rs.	Rs.	A.	P.
15,000	15,500	640	0	0	1,25,000	1,30,000	1,575	0	0
15,500	16,000	655	0	0	1,30,000	1,35,000	1,600	0	0
16,000	16,500	670	0	0	1,35,000	1,40,000	1,625	0	0
16,500	17,000	685	0	0	1,40,000	1,45,000	1,650	0	0
17,000	17,500	700	0	0	1,45,000	1,50,000	1,675	0	0
17,500	18,000	715	0	0	1,50,000	1,55,000	1,700	0	0
18,000	18,500	730	0	0	1,55,000	1,60,000	1,725	0	0
18,500	19,000	745	0	0	1,60,000	1,65,000	1,750	0	0
19,000	19,500	760	0	0	1,65,000	1,70,000	1,775	0	0
19,500	20,000	775	0	0	1,70,000	1,75,000	1,800	0	0
20,000	21,000	795	0	0	1,75,000	1,80,000	1,825	0	0
21,000	22,000	815	0	0	1,80,000	1,85,000	1,850	0	0
22,000	23 000	835	0	0	1,85,000	1,90,000	1,875	0	0
23,000	24 000	855	0	0	1,90,000	1,95,000	1,900	0	0
24,000	25,000	875	0	0	1,95,000	2,00,000	1,925	0	0
25,000	26,000	895	0	0	2,00,000	2,05,000	1,950	0	0
26,000	27,000	915	0	0	2,05,000	2,10,000	1,975	0	0
27,000	28,000	935	0	0	2,10,000	2,15,000	2,000	0	0
28,000	29,000	955	0	0	2,15,000	2,20,000	2,025	0	0
29,000	30,000	975	0	0	2,20,000	2,25,000	2,050	0	0
30,000	32,000	995	0	0	2,25,000	2,30,000	2,075	0	0
32,000	34,000	1,015	0	0	2,30,000	2,35,000	2,100	0	0
34,000	36,000	1,035	0	0	2,35,000	2,40,000	2,125	0	0
36,000	38,000	1,055	0	0	2,40,000	2,45,000	2,150	0	0
38,000	40,000	1,075	0	0	2,45,000	2,50,000	2,175	0	0
40,000	42,000	1,095	0	0	2,50,000	2,55,000	2,200	0	0
42,000	44,000	1,115	0	0	2,55,000	2,60,000	2,225	0	0
44,000	46,000	1,135	0	0	2,60,000	2,65,000	2,250	0	0
46,000	48,000	1,155	0	0	2,65,000	2,70,000	2,275	0	0
48,000	50,000	1,175	0	0	2,70,000	2,75,000	2,300	0	0
50,000	55,000	1,200	0	0	2,75,000	2,80,000	2,325	0	0
55,000	60,000	1,225	0	0	2,80,000	2,85,000	2,350	0	0
60,000	65,000	1,250	0	0	2,85,000	2,90,000	2,375	0	0
65,000	70,000	1,275	0	0	2,90,000	2,95,000	2,400	0	0
70,000	75,000	1,300	0	0	2,95,000	3,00,000	2,425	0	0
75,000	80,000	1,325	0	0	3,00,000	3,05,000	2,450	0	0
80,000	85,000	1,350	0	0	3,05,000	3,10,000	2,475	0	0
85,000	90,000	1,375	0	0	3,10,000	3,15,000	2,500	0	0
90,000	95,000	1,400	0	0	3,15,000	3,20,000	2,525	0	0
95,000	1,00,000	1,425	0	0	3,20,000	3,25,000	2,550	0	0
1,00,000	1,05,000	1,450	0	0	3,25,000	3,30,000	2,575	0	0
1,05,000	1,10,000	1,475	0	0	3,30,000	3,35,000	2,600	0	0
1,10,000	1,15,000	1,500	0	0	3,35,000	3,40,000	2,625	0	0
1,15,000	1,20,000	1,525	0	0	3,40,000	3,45,000	2,650	0	0
1,20,000	1,25,000	1,550	0	0	3,45,000	3,50,000	2,675	0	0

Table of Rates of ad valorem Fees leviable, &c.—(Concluded.)

When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.			When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.		
Rs.	Rs.	Rs.	A.	P.	Rs.	Rs.	Rs.	A.	P.
3,50,000	3,55,000	2,700	0	0	3,85,000	3,90,000	2,875	0	0
3,55,000	3,60,000	2,725	0	0	3,90,000	3,95,000	2,900	0	0
3,60,000	3,65,000	2,750	0	0	3,95,000	4,00,000	2,925	0	0
3,65,000	3,70,000	2,775	0	0	4,00,000	4,05,000	2,950	0	0
3,70,000	3,75,000	2,800	0	0	4,05,000	4,10,000	2,975	0	0
3,75,000	3,80,000	2,825	0	0	4,10,000	...	3,000	0	0
3,80,000	3,85,000	2,850	0	0					

SCHEDULE II.

Fixed Fees.

1. Application or Petition—	Proper fee.
(*a*)—When presented to any officer of the Customs or Excise Department or to any Magistrate by any person having dealings with the Government, and when the subject-matter of such application relates exclusively to those dealings;	
or when presented to any officer of land-revenue by any person holding temporarily-settled land under direct engagement with Government, and when the subject-matter of the application or petition relates exclusively to such engagement;	
or when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy or improvement;	
or when presented to any Civil Court other than a principal Civil Court of original jurisdiction, or to any Cantonment Magistrate sitting as a Court of Civil Judicature under Act No. III of 1859, or to any Court of Small Causes constituted under Act No. XI of 1865, or under Act No. XVI of 1868, section twenty, or to a Collector or other officer of revenue in relation to any suit or case in which the amount or value of the subject-matter is less than fifty rupees;	One anna.
or when presented to any Civil, Criminal or Revenue Court, or to any Board or executive officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court, Board or officer, or of any other document on record in such Court or Office ...	

(*b*)—When containing a complaint or charge of any offence other than an offence for which Police officers may, under the Criminal Procedure Code, arrest without warrant, and presented to any Criminal Court; or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any revenue officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity, and not otherwise provided for by this Act; or to deposit in Court revenue or rent; or for determination by a Court of the amount of compensation to be paid by a landlord to his tenant ...	Proper fee. Eight annas.
(*c*)—When presented to a Chief Commissioner or other chief controlling revenue or executive authority, or to a Commissioner of Revenue or Circuit, or to any chief officer charged with the executive administration of a Division and not otherwise provided for by this Act ...	One rupee.
(*d*)—When presented to a High Court ...	Two rupees.

An application for a new trial under s. 21 of Act XI of 1865 is distinct from an application for a review of judgment, and a one-anna stamp is sufficient under this article (*a*).

The plaintiff's attorney sent to the officer of the Court some khatta-books containing accounts for several years, to have various portions translated by the Court translator. In such cases the translator is required to sign each portion translated by him, after adding the words "translated by me this day of ," and when the books are used in evidence, each translated portion is spoken to separately and marked and charged for as a separate exhibit. It was held, that this was a correct practice, and that the separate portion ought not to be treated as forming one document for the purpose of the stamp-fee, or for the purpose of fee payable for the translation (*b*).

2. Application for leave to sue as a pauper ...	Eight annas.
3. Application for leave to appeal as a pauper—	
(*a*)—When presented to a District Court ...	One rupee.
(*b*)—When presented to a Commissioner or a High Court ...	Two rupees.
4. Plaint or Memorandum of Appeal in a suit to obtain possession under Act No. XVI of 1838, or Bombay Act No. V of 1864 (*to give Mamlutdars' Courts jurisdiction in certain cases to maintain existing possession, or to restore possession to any party dispossessed otherwise than by course of law*) ...	Eight annas.
5.—Plaint or Memorandum of Appeal in a suit to establish or disprove a right of occupancy ...	
6.—Bail-bond or other instrument of obligation not otherwise provided for by this Act, when given by the direction of any Court or executive authority ...	
7. Undertaking under section forty-nine of the Indian Divorce Act ...	
8. Petition of objection to assessment under the Indian Income Tax Act ...	
9. Petition of appeal under the Indian Income Tax Act, section twenty-one ...	One rupee.

(*a*) Chotálál Jamnádás *v.* Bulákidás Jethá, 7 Bom. H. C. Rep., A. J., 109, Gibbs and Melvill, JJ.

(*b*) Brajanath Dhar *v.* Bhabo Mohun Dhar, 6 B. L. R., Apx., 137, Couch, C. J.

	Proper fee.
10. Mukhtarnama or Wakalatnama—	
When presented for the conduct of any one case—	
(*a*)—to any Civil or Criminal Court other than a High Court, or to any Revenue Court, or to any Collector or Magistrate, or other executive officer, except such as are mentioned in clauses (*b*) and (*c*) of this Number ...	Eight annas.
(*b*)—to a Commissioner of Revenue, Circuit or Customs, or to any officer charged with the executive administration of a Division, not being the chief revenue or executive authority ...	One rupee.
(*c*)—to a High Court, Chief Commissioner, Board of Revenue, or other chief controlling revenue or executive authority ...	Two rupees.
11. Memorandum of Appeal when the Appeal is not from an order rejecting a plaint or from a decree or an order having the force of a decree, and is presented—	
(*a*)—to any Civil Court other than a High Court, or to any Revenue Court or executive officer other than the High Court or chief controlling revenue or executive authority ...	Eight annas.
(*b*)—to a High Court or Chief Commissioner, or other chief controlling executive or revenue authority	Two rupees.

An application to a High Court to set aside an order of a District Court, reversing an order of a Court of first instance directing an award made without the intervention of a Court, to be filed, should be made on a stamp of two rupees under this article (*a*).

12. Caveat ...	Five rupees.
13. Application under Act No. X of 1859, section twenty-six, or Bengal Act No. VI of 1862, section nine, or Bengal Act No. VIII of 1869, section thirty-seven ...	
14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1866 ...	
15. Plaint or Memorandum of Appeal in a suit to obtain possession of a wife ...	
16. Administration-bond ...	Eight rupees.
17. Plaint or Memorandum of Appeal in each of the following suits:—	
i. to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court:	Ten rupees.
ii. to alter or cancel any entry in a register of the names of proprietors of revenue-paying estates:	
iii. to obtain a declaratory decree where no consequential relief is prayed:	
iv. to set aside an award:	
v. to set aside an adoption:	
vi. every other suit where it is not possible to estimate at a money-value the subject-matter in dispute, and which is not otherwise provided for by this Act ...	

Where a suit was brought as a declaratory suit, but in the opinion of the Court it should have been an ordinary suit, and on a stamp calculated *ad valorem*, Holloway, J., refused to allow the plaintiff to put on an additional stamp, considering that such suits were often instituted in order to evade the stamp laws (*b*).

(*a*) Lakshman Shivaji *v.* Rama Esu, 8 Bom. H. C. Rep., A. J., 17, Lloyd, J.
(*b*) Chokalinga Pershana Naicker *v.* Achiyar, I. L. R., 1 Mad., 45, Kindersley, J., concurring.

Proper fee.

A plaint for confirmation of possession and for setting aside a forged and invalid will, does not come under these provisions; but must be stamped according to the value of the subject-matter of the suit (*a*).

A suit to remove a Mutawalli, and asking that the plaintiff may be appointed to the office and receive the profits of the wakf, must bear an *ad valorem* stamp; the fixed stamp under sched. ii, art. 17, cl. iii, is not sufficient (*b*).

A Hindu claiming to have a right to redeem a mortgage in due course of time, being entitled in reversion after persons having only a partial interest, and who had mortgaged the whole property as their own, seeks a declaratory decree only and a 10-rupee stamp is sufficient for him to put upon the plaint (*c*).

A plaintiff seeking to set aside a solenamah, and thereby aiming at the possession of immoveable property, will not be allowed to bring his suit on a stamp of Rs. 10, and to frame it as if it were to set aside an adoption (*d*).

In a suit to set aside an adoption, the plaint had a stamp affixed to it of the value of Rs. 10. The suit was dismissed with costs amounting to Rs. 12. The plaintiff then filed a memorandum of appeal in the High Court with an affidavit, in which the value of the property was described as being above Rs. 5,000. It was held, that unless the appellant paid into Court the proper amount of vakeel's fees assessed upon the true valuation of the suit, the appeal could not be allowed to proceed (*e*).

18. Application under section three hundred and twenty-six of the Code of Civil Procedure ...	10 rupees.
19. Agreement under section three hundred and twenty-eight of the same Code ...	
20. Every Petition under the Indian Divorce Act, except petitions under section forty-four of the same Act, and every Memorandum of Appeal under section fifty-five of the same Act ...	Twenty rupees.
21. Plaint or Memorandum of Appeal under the Parsi Marriage and Divorce Act, 1865 ...	

(*a*) Joy Narain Giree *v.* Grish Chunder Mytee, 22 Suth. W. R., 458, Couch, C. J., and Amslie, J., following Takoordeen Tewarry *v.* Nawab Syud Ali Hossein Khan, 21 W. R, 34 (P. C.)

(*b*) Delroos Banoo Begum *v.* Nawab Syud Ashgur Ally Khan, 15 B. L. R., 167, Glover and Mitter, JJ.

(*c*) Musst. Imaman *v.* Lalta Baksh, 7 H. C. Rep., N. W. P., 343, Pearson and Oldfield, JJ.

(*d*) Bama Soonduree Dossee *v.* Soorjo Coomar Roy, 22 Suth. W. R., 338, L. S. Jackson and McDonell, JJ.

(*e*) Bama Soonduree Dossee *v.* Soorjo Coomar Roy, 22 Suth. W. R., 338, L. S. Jackson, and McDonell, JJ. See also Manohur Ganesh *v.* Báwá Ram Charan Das, I. L. R., 2 Bom., 219, Westropp, C. J., and Melvill, J. (a suit for an account); Ramdooall Singh *v.* Gopal Kristo Singh, 16 Suth. W. R., 156, E. Jackson and Mookerjee, JJ.; and Lutchmeeput Singh *v.* Nund Coomar Goopto, 22 Suth. W. R., 338, Kemp and Amslie, JJ.

SCHEDULE III.

Enactments repealed.

PART I.—*Acts wholly repealed.*

Act XVII of 1848.
Act X of 1862.
Act XI of 1863.
Act XVIII of 1865.
Act XV of 1868.
Bengal Act V of 1863.

PART II.—*Acts and Regulations partly repealed.*

Act V of 1852.
Act XXXIII of 1852.
Act VIII of 1859.
Act X of 1859.
Act XXIII of 1861.
Act XX of 1862.
Act I of 1863.
Act XX of 1863.
Act XXI of 1863.
Act XXXII of 1863.
Act X of 1865.
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Act XV of 1865.
Act XX of 1866.
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Act XXVIII of 1868.
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Act IX of 1869.
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Ditto Act VIII of 1869.
Mad. Reg. III of 1802.
Ditto IV of 1816.
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